



Sailing the High C's:

Contracts, Communication, Coordination

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Introduction

“Smooth seas never made a skilled sailor.”

For design firms in Colorado, most projects make it to port just fine, while others spring leaks. Why? Nobody goes into a project expecting a claim, but when disputes arise there are usually ways to calm the storm, either by riding the waves or building bridges over troubled waters. Lessons learned by designers consistently refer back to the **“High C’s.” Contracts, Communication, Coordination.**

We will offer guidance on how to navigate through the choppy waters of projects and claims, doing great work while keeping a lookout for risk.



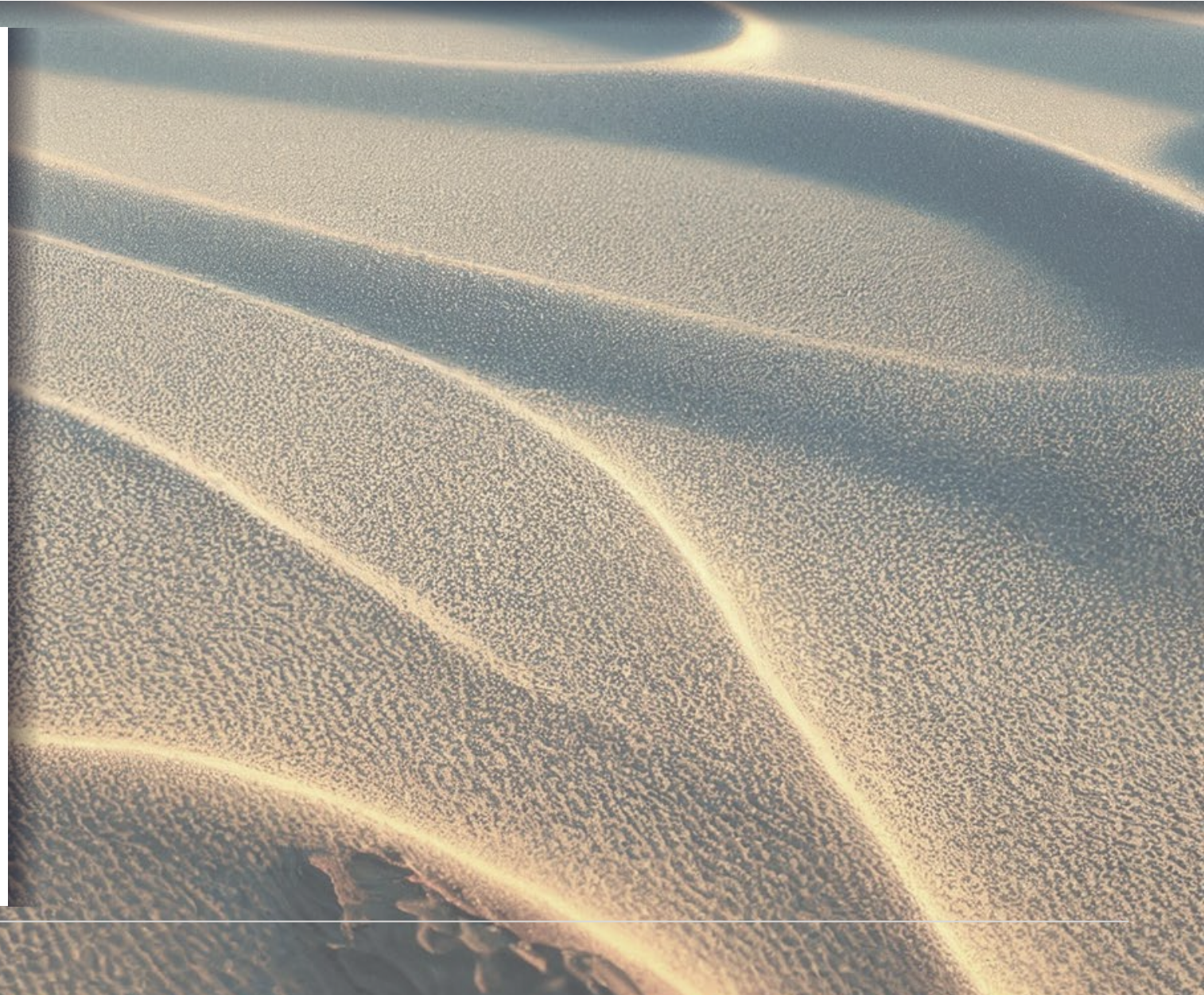
Learning Objectives ...

- **Before:** what to embrace, or avoid, *before* the project
- **During:** doing good work, while minimizing risk, *during* the project
- **After:** shutting things down, without worrying, *after* the project
- **Contracts**
- **Communication**
- **Coordination**
- **Trends in:** 1) design-build, 2) value engineering, 3) C/A services, 4) engineered products



Before the Project

- **Getting the work**
 - Marketing
 - Go/no-go decisions
- **Setting up *the project* for success**
- **Setting up *your firm* up for smooth sailing**
 - Risk management basics
 - Spotting & addressing trouble in advance
- **Case studies**
 - Situations *before* the project, leading to claims afterwards



During the Project

- **Competence**

- Working in your wheelhouse
- Providing good advice, consulting and design
- Successfully navigating design
- Ensuring services meet, exceed the standard of care
- Providing expertise, staffing, experience & quality assurance

- **Compliance**

- At a *minimum*, following the contract, codes, laws and AHJ mandates

- **Scope**

- Providing all the services you agreed to, *but not more*

During the Project

- **Advice and decisions**
 - Helping the owner, and yourself, during construction
- **Communication**
 - Importance, and how to do it better
- **Coordination**
 - Everything, everywhere, all at once!
 - Applies to parties, contracts, information, issues & disputes
- **Case studies**
 - What worked and what didn't?

After the Project



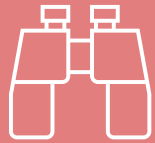
- **Closing out the project**
- **What risks remain *after* substantial completion?**
- **What duties remain after you're done and everyone's paid?**
 - Obligations to communicate & keep records are ongoing
 - Warranties and certifications may expand your exposure

After the Project



- **Statutes of limitation and repose**
 - Are you ever truly in the clear?
- **Trends in claims & lawsuits**
 - What if you get a claim?
 - What to expect in defending a lawsuit

Risk Management Fundamentals



Avoiding risk

Client evaluation
Project selection



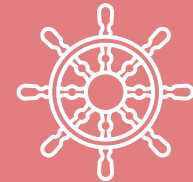
Transferring risk

Contracts
Insurance



Retaining risk

In your control
Things for which you're
responsible



Controlling risk

Your work
Things you can manage,
or monitor

Risk Management Fundamentals

- **Firm success is a product of...**

- ① Risk management; plus,
- ② Practice management; plus,
- ③ Project management

- **All three legs of the stool are not only important, *but necessary***

- Risk management is holistic, philosophical, cultural & firmwide
 - Practice management is 24/7/365
 - Project management weighs each project's unique risk v. reward factors at the beginning, and also relies on successful execution
-

Before: Asking the Right Questions

What is the project delivery method?

Some are riskier than others

Design

Too ambitious, innovative?

Schedule

Realistic, or aggressive?

Budget

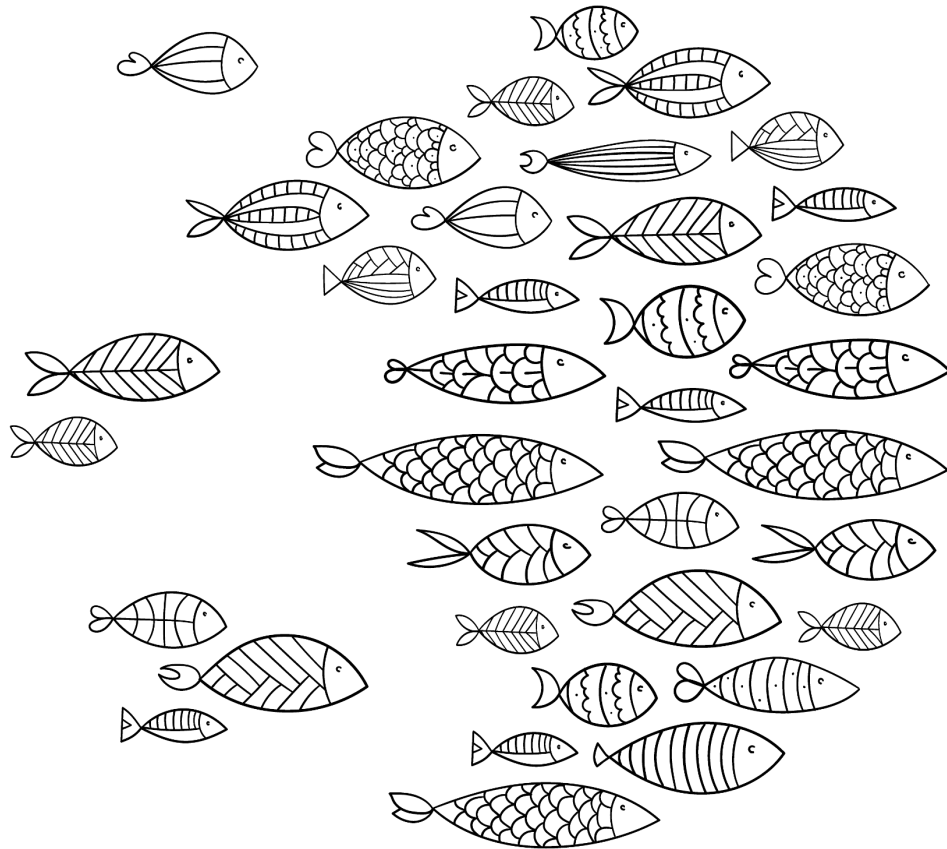
Bids too low or too high?

Ability to staff will affect motivation

Products and systems

Who's specified this before, who's recommending?

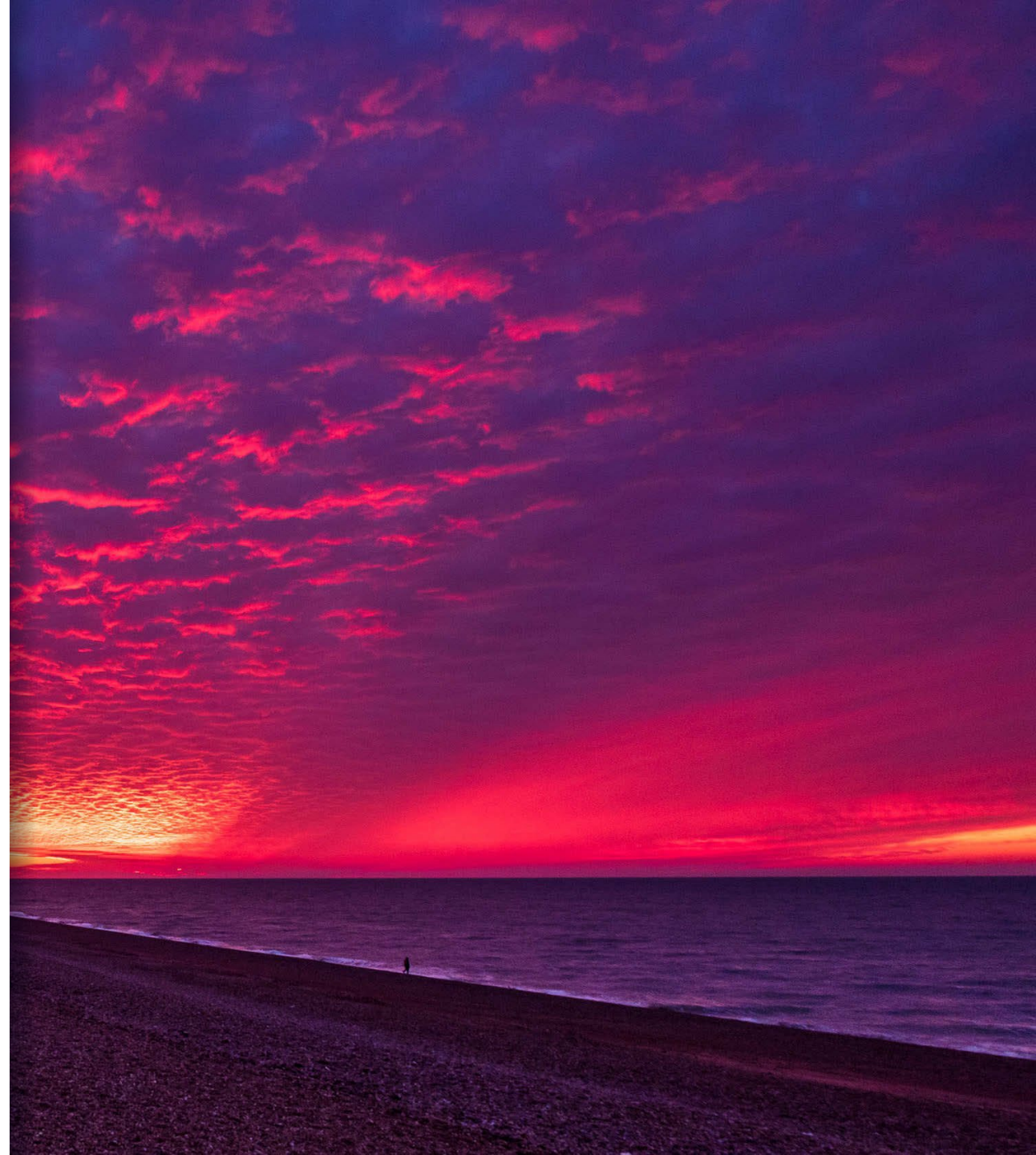
Before: Getting the Band Together



- **Establishing a go/no-go process**
 - Evaluating the owner, team and project
 - Final risk/reward analysis
- **Vetting the overall project team**
- **Assembling the design team**
 - Internal
 - External
 - Designating leads for life of project
 - Confirming scopes & understandings
 - Aligning the chain-of-command
- **Sharing goals**
- **Setting up consistency in communications (for everyone)**

Red Flags ...

- **Shotgun marriage?**
 - Teammates dictated, not chosen
 - **Shotgun contract?**
 - Contracts do not contain a “functional program” (set up to fail)
 - Terms are one-sided
 - Fee is not fair, commensurate
 - Provisions seem onerous, or might unfold unfairly
 - E.g., time of the essence, liquidated damages?
 - No time, or opportunity, to negotiate
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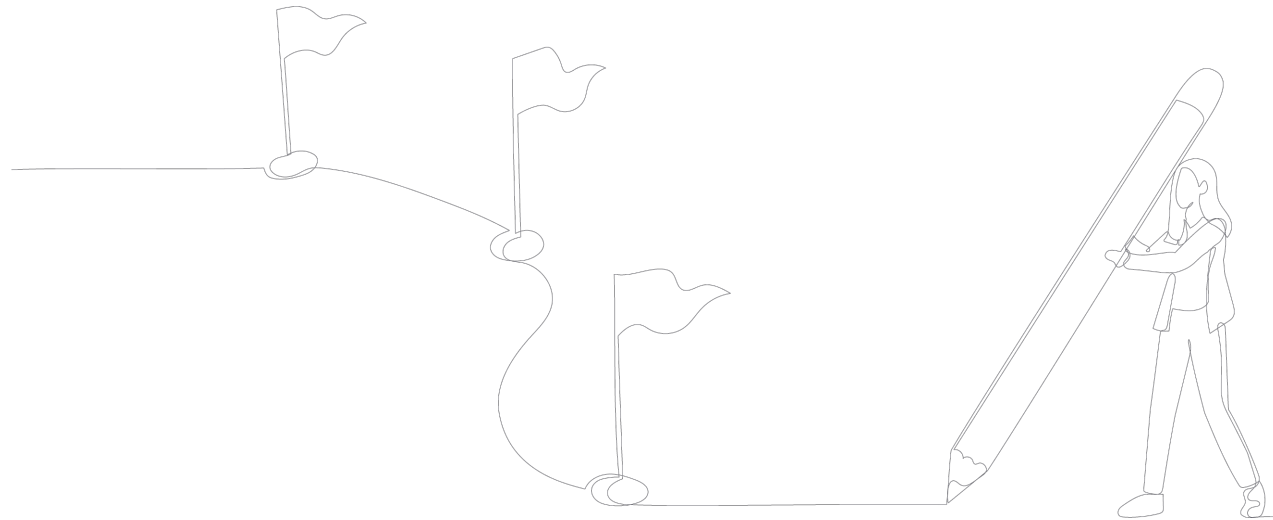


...Red Flags

- **Delays**
 - Funding
 - Getting started (and getting paid)
 - Permits
 - Fast-tracking pros and cons – how to protect yourself?
 - Scheduling and the critical path
 - **Claims and lawsuits**
 - Nobody wants to consider the worst case, but forethought can help
 - How will communications look in court?
 - What if concerns are not documented, both internally and externally?
 - Why preserve evidence?
-

Before and During: Managing Owner Expectations...

- **Confirming the desired end result – in advance?**
 - Clarify or restate goals, in writing, using unambiguous language
 - Perform due diligence, such as on finances and your “partners”
- **Tell them what you’re going to do**
 - Then, do it
 - Then, tell them how you did it



Before and During: Managing Owner Expectations...

- **Be honest**
 - Frank discussions about feasibility or technical concerns
 - Disclose limitations on your services
 - Identify errors in real time
 - Consider dispute resolution to keep things on track
- **Establish communication standards**
 - Designate a point of contact for all entities
 - Specify times and methods of communicating



Most Problems Can Be Minimized by ...



To avoid over/under design issues and budget busts



With a forward-looking approach



Stressing the importance of internal preparation



Properly maintained *written* communications are critical

During a Project: Problems Brewing?

The work:

Lack of leadership

Rushed, disorganized contractors, no sequencing and coordination

High turnover

Substituted construction methods

Extensive value engineering of materials and products

Changed site conditions

Blown deadlines, schedule

During: Problems Brewing?

The work:

Excessive change orders, RFIs

Questionable means-and-methods

Unsafe conditions

Unfinished work

Defective work

Never-ending punchlists

Unrealistic pay applications

During: Tone of Communications?

- **Cooperative or dysfunctional?**
 - Unresolved, recurring disputes with ...
 - Owner, GC, other design professionals
 - Suppliers, manufacturers
 - Responsiveness, response times
 - Change requests, RFIs, ASIs, etc.
 - With whom are you working?
 - Why is everything a design issue?
 - Recognizing and addressing toxicity, before it's too late
-





After the Project

- Closing out the project
 - Risks in getting to substantial completion, and after?
 - What duties remain after the project is handed over?
 - Statutes of limitation and repose
 - Warranties, guarantees, certifications
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Throughout: Good Communication, Documentation

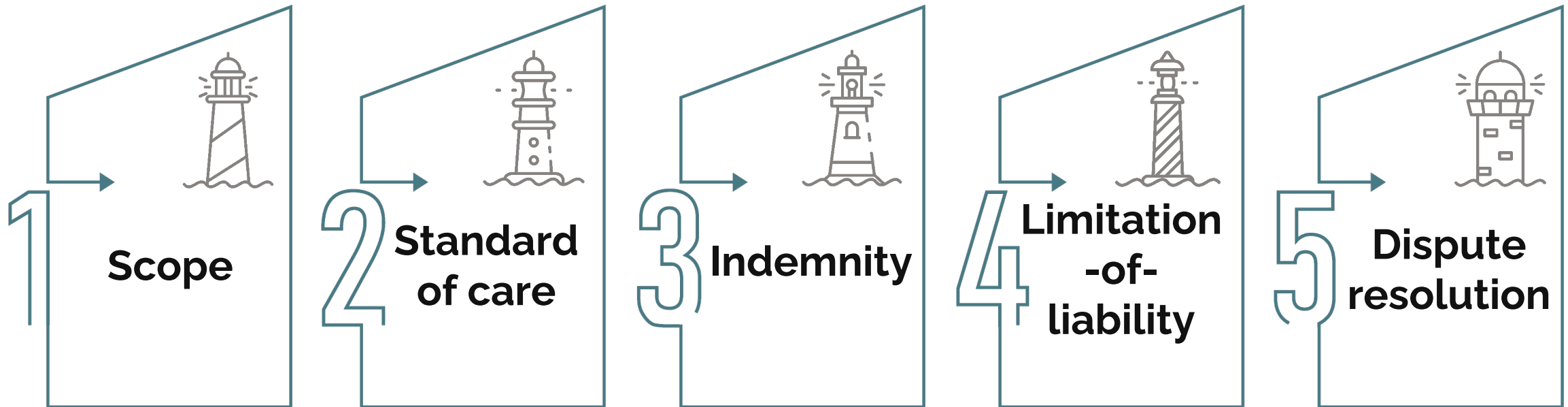
- **Monitor and respond to communications**
 - Be consistent
 - Does silence = acquiescence?
 - Course-of-performance can “rewrite” the contract
 - Establish critical positions in writing
 - **The importance of meeting minutes**
 - Say what's needed
 - Offer chance to review and comment
 - Itemize by criticality
 - Note what's resolved
 - **Promptly document any observed ...**
 - Delays
 - Safety concerns
 - Deviations from design
 - Failures
 - Defects
-

Throughout: Your Contract

- **A written *and signed* contract ... Why?**
 - Confirms both sides' understandings of each other's rights, duties & obligations
 - Fairly allocates risk
 - Helpful provisions won't be forgotten about, or ignored
 - Still, negligence theories, outside the contract, may increase exposure
- **Essentials:**
 - Well-defined, functional program
 - Scope
 - Standard of care
 - Alignment between upstream (prime) & downstream (subconsultant) agreements



Top 5 Contract Provisions



Scope

- **Professional duties you will perform**
- **What duties you are **NOT** responsible for**
 - Tasks, installations, results
- **Whether “Additional Services” are anticipated**
- **Differentiating between advice, design, and construction-phase services could help you if a dispute arises later**



Scope Creep

What is it?

Continuous growth in scope beyond original intent and the contract terms

- **Causes:**

- Inertia
- Course-of-dealings
- Diplomacy (conflict-avoidant behavior)
- Ambiguous contract provisions
- Lack of process for Additional Services

- **To Minimize:**

- *Re-confirm* owner expectations and excluded services
 - *Stick to* scope unless renegotiated in writing
 - *Establish* a cost framework for Add. Services
 - *Share* agreements with rest of design team
-

Also, Nice to Have ...

- Owner's obligations (listed)
 - Statute of limitations accrual
 - Ownership of documents
 - Waiver of consequential damages
 - No responsibility for means-and-methods
 - No responsibility for site safety
-



Nice to Have...

- **Certificate of merit**
 - **No personal liability**
 - Can only go after company or insurance
 - **Force majeure**
 - **Additional Services**
 - If longer schedule, expanded services
 - **Right to suspend, terminate services**
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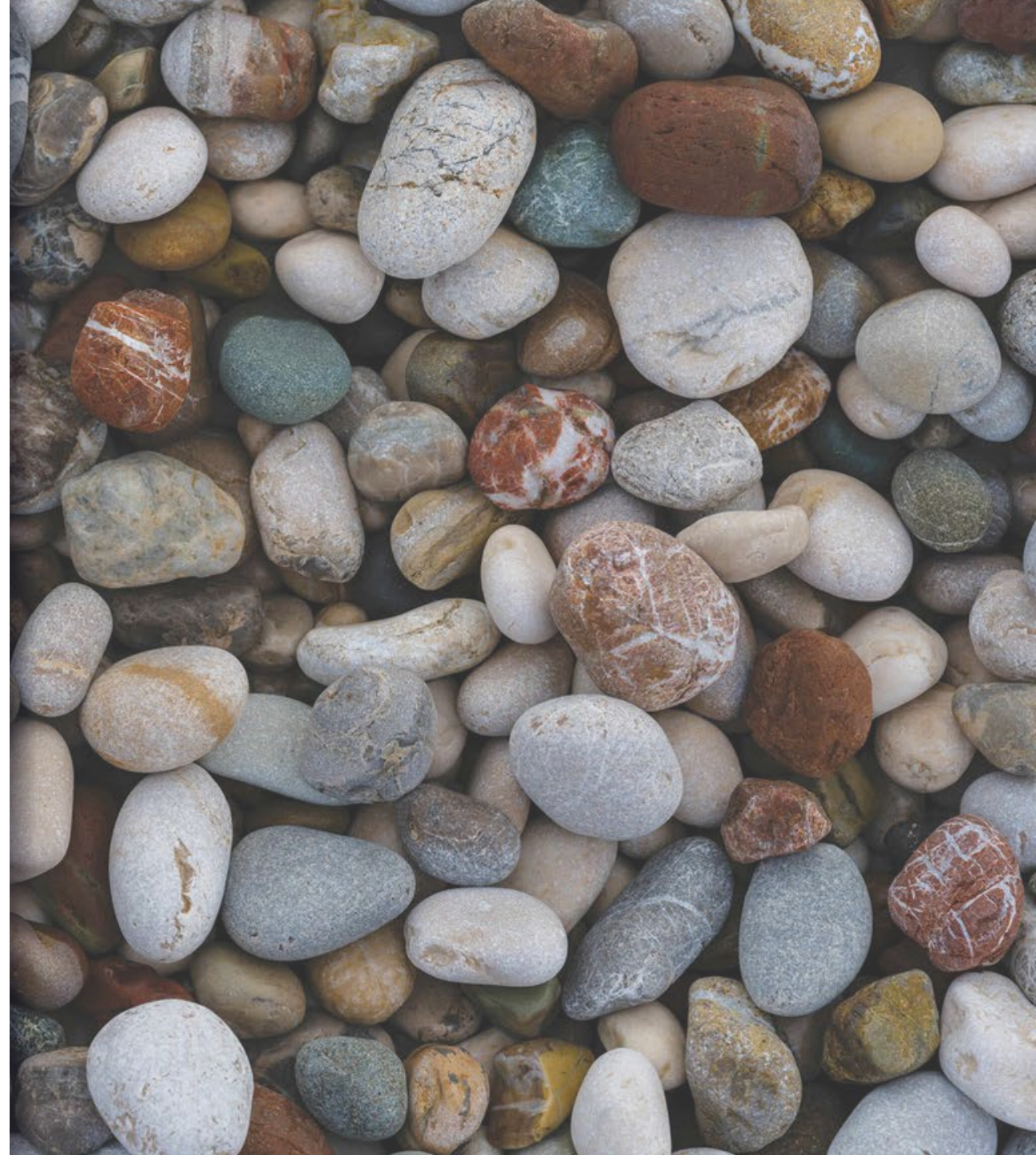
Lots of Litigation Over ...

- **Coordination** – especially when it's vague
 - **Defense and indemnity**
 - **Differing site conditions**
 - **Product failures**
 - **Copyright**
 - **Construction-phase services**
 - An Achilles heel?
-



Coordinating Agreements

- **Prime agreement**
 - Flow-down provision?
 - Insurance requirements?
 - **Subconsultant agreements**
 - Are the terms consistent with the Prime?
 - Is there joinder?
 - Are there terms that favor one side over the other?
-



Coordinating Agreements

- **Clauses to consider with subconsultants**
 - Joinder
 - Dispute resolution – steps?
 - Venue
 - Choice of law
 - Defense and Indemnity
 - Limitation of liability
 - Attorneys' fees in the event of a claim
-



Special Considerations

Pay-when-
paid,
pay-if-paid

Industry
standard, or
one party's
version?

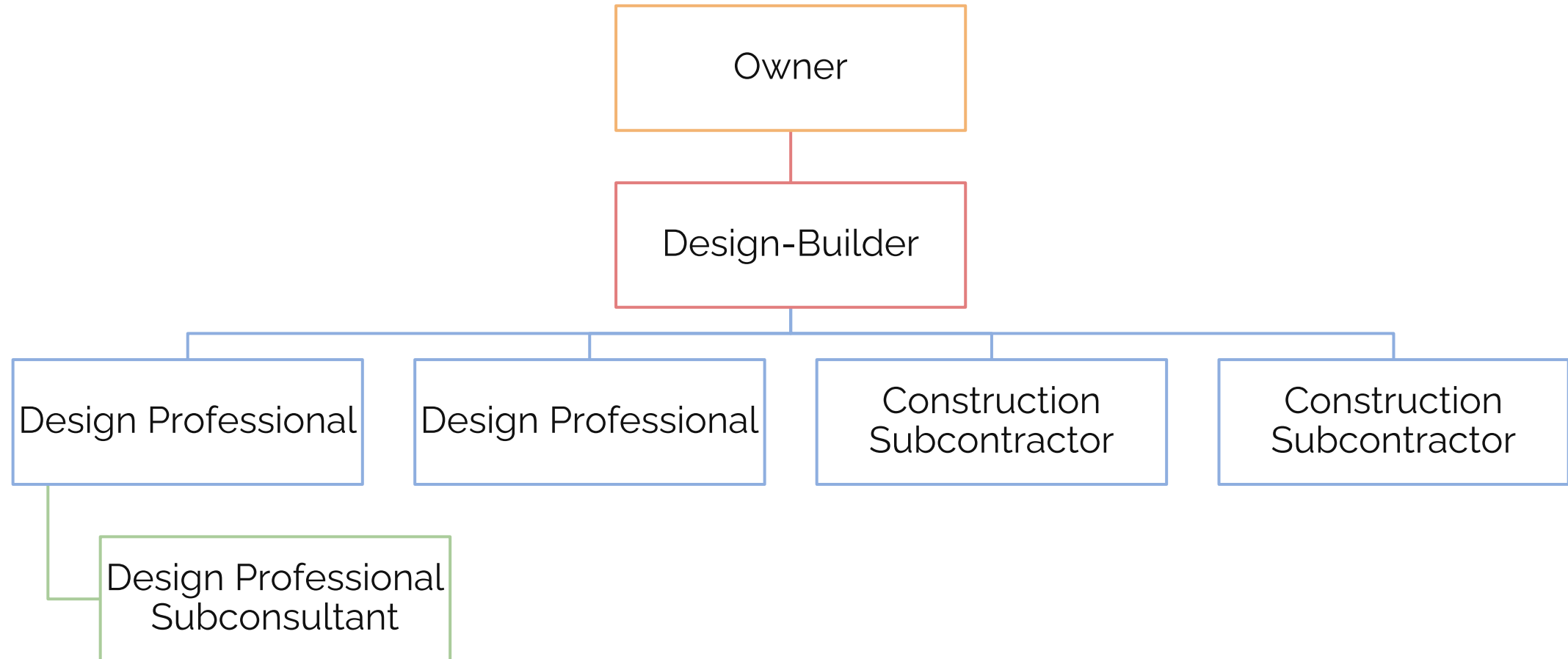
Contract
assignments
– allowed?

Attorneys'
fees-shifting



Design-Build Risks for A&E Firms

Typical Design-Build Structure



Teaming Agreements

- **Proposals which set the stage for professional services agreements**
 - Best opportunity to obtain favorable contract terms
- **Should include:**
 - Scope of pursuit-phase services and compensation
 - Qualifying language regarding reliance on quantity estimates
 - Adequate contingency for design-related issues



Professional Services Agreement

- **Pre-bid is best opportunity for favorable terms because design-builder not yet tied to Prime Agreement**
 - Acceptable:
 - Design professional's standard form
 - Unmodified industry-standard form
 - **Avoid uncertainty:**
 - "Industry-standard" form with the design-builder's allegedly "standard" markups
 - Non-negotiated design-builder's form
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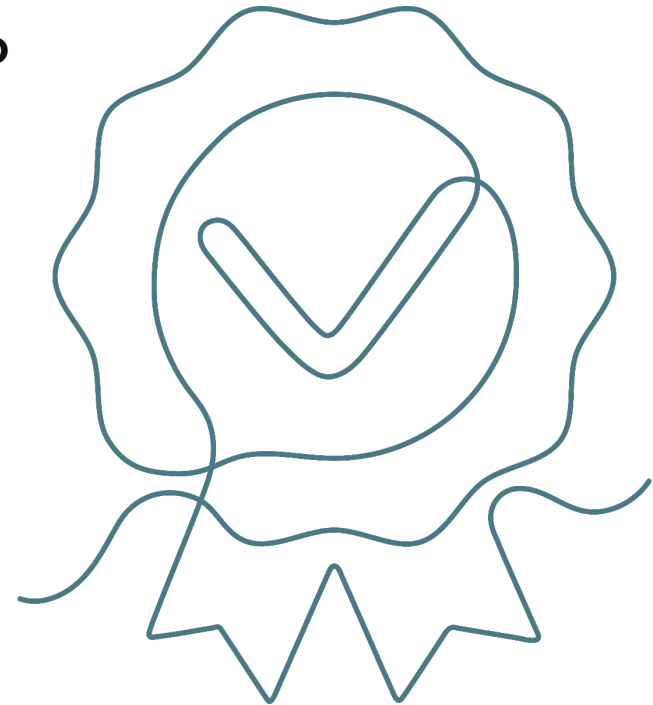
Prime Contract

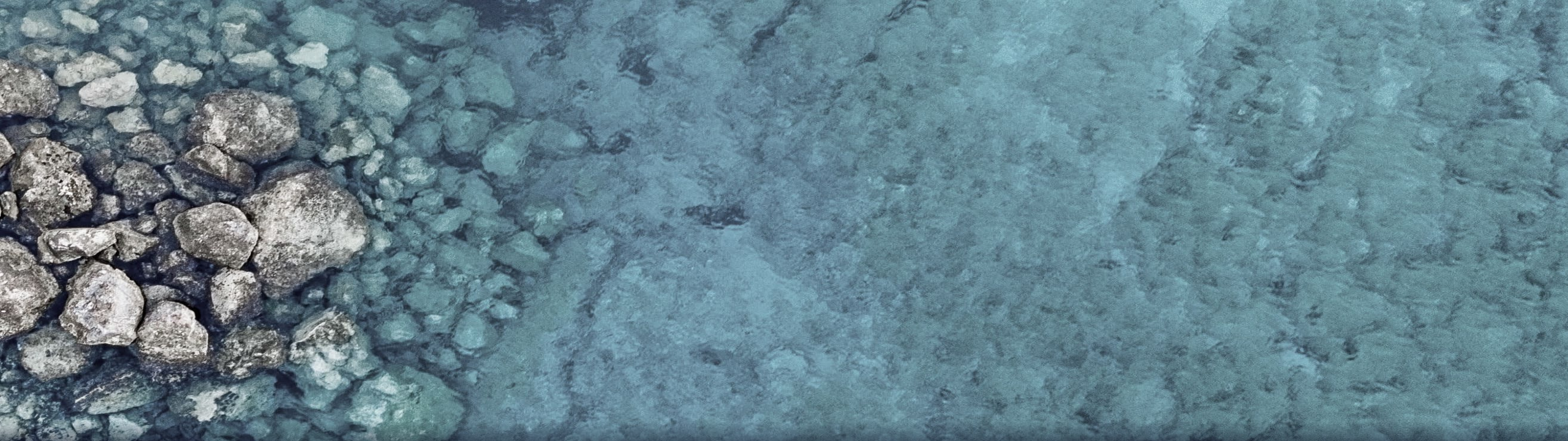


- **Address unacceptable flow-through provisions as early as possible**
 - Provide feedback to design-builder during their negotiations with the owner
 - Identify dealbreakers
 - **Insist that your Professional Services Agreement controls in the event of conflict with Prime**
 - **Be prepared to walk away**
-

Warranties, Guarantees

- **Prime Contract may include warranties from design-builder to owner regarding the end result**
- **Beware of heightened standard of care language**
- **Avoid terms like:**
 - Must comply with all laws (regulations, standards, etc.)
 - Stamp constitutes "verification"
 - Impact of reviewing bid, costs, schedule
 - Constructability of the plans





The Pros and Cons of Value Engineering

Value Engineering

- **Academic Definition:**

- Ratio of function to cost
- Theoretically, lowering cost while maintaining function increases value
- Value engineering is a focused, systematic approach to analyze a service, system, product or facility

- **In short, it is the process of getting more value per dollar spent**

- Improving efficiency, while decreasing cost
 - Can the project be built cheaper, and also maintain or even increase quality?
-

How Do V/E Risks Arise?

- **The Professional Services Agreement**

- Clauses that require redesign for free if budget is exceeded
- “Best”, “Unique”, “Highest”, “Will Perform in Non-negligent manner”

- **Post-Design Plan Submission**

- Examine what is driving the V/E request
- Consider product availability and compatibility
- What research and investigation is required?

- **During Construction**

- Whether the suggested course of action impacts the designer's standard of care
 - Whether the suggested changes expand the designer's scope
-

C/A: What Does It Actually Stand For?

1

**Construction
Administration
services?**

2

**Contract
Administration
services?**

3

**Construction
Contract
Administration
services?**

What is the difference between these?

C/A: Why provide these services?

- Increases likelihood the project will be constructed per design intent
 - Valuable service to the owner
 - Valuable service to the general contractor
 - No riskier than other phases of design services if done properly
-



C/A: Requests for Information (RFIs)

- **Can be “excessive”**
 - Often argued as a basis for claim that design documents were negligently prepared
 - Should be documented in writing or in drawings

Checklist



Establish and enforce clear RFI procedures and forms in general conditions and project manual



Require specificity in RFI forms



Escalate the problem if abuse occurs

C/A: Architect Supplemental Instructions (ASIs)

- Purpose is not to *fundamentally* change the design
 - Does it add scope?
 - Does it add cost?
 - Will it take more time to accomplish?

Checklist



Use ASIs only to supplement, not rewrite, the drawings



Are the changes “substantial?”



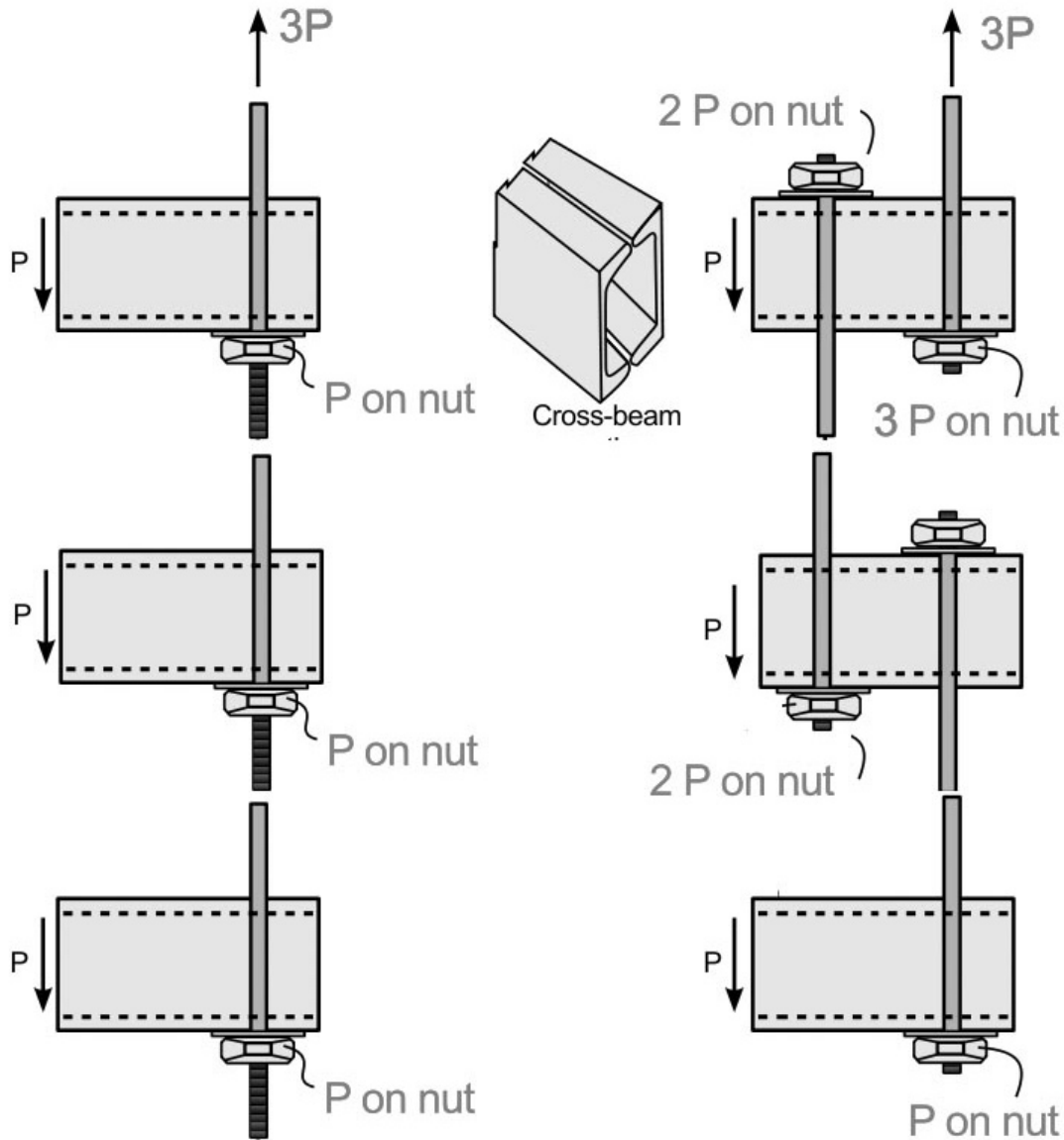
Clarify, explain to affected contractors the purpose behind particular instructions

C/A: Submittals

“Documents and physical samples prepared by the contractor, subcontractor, suppliers or manufacturers that describe in detail how the contractor will construct the work, submitted to the design profession for its review and processing.”

- **Types of Submittals**

- Pre-construction
- Construction submittals (e.g., shop drawings)
- Contract submittals (e.g., test reports)



(a) Original Design

(b) Actual Construction

Submittals – What Can Go Wrong?

- Hyatt Skywalk Bridge Collapse
- Fabricator submitted a change in design through contractor's shop drawing
- Contractor and structural engineer approved shop drawing with design changes
- As result of change, bridge was not structurally sound
- July 17, 1981 collapse
 - 114 fatalities
 - 216 injured

C/A: Certificates

“A written assurance, or official representation, that some act has or has not been done, or some event occurred, or some legal formality has been complied with...a statement in writing signed by the party certifying...”

Sixth Edition of Black's Law Dictionary

- **Types of Certificates**

- Payment
- Substantial completion
- Inspection testing, approval
- Compliance with design

C/A: Certificates



- **Concerns**

- Can call for legal conclusions, or knowledge beyond scope of services
- Can create potential liabilities to third parties (known or unknown) at the time of certification

- **Problematic Contractual Obligation**

- *Upon completion of the Project or such other time as required for the Client's benefit, Design Professional shall provide all certifications necessary for the construction and occupancy of the project.*
-

C/A: Certificates

Checklist:



Limited to and consistent with designer's scope of services



Limited to a specific purpose, recipient *and date*

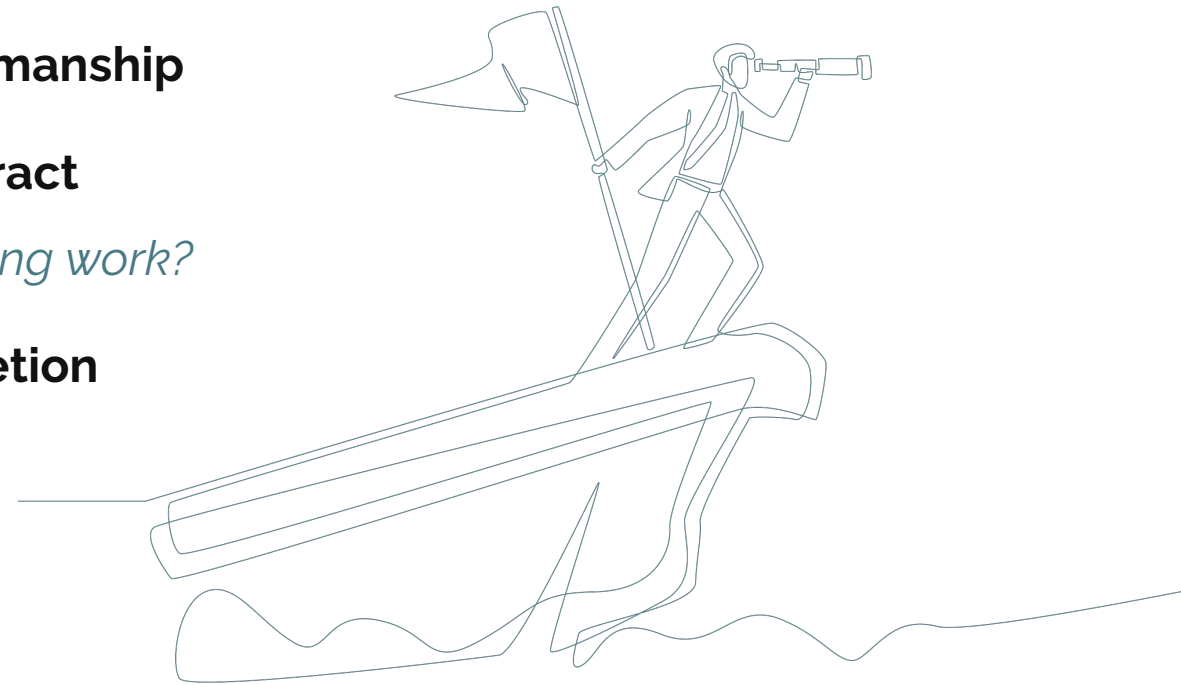


Limited to a statement of:

- Known facts
- Open, apparent conditions
- Based upon information supplied
- Based upon number, frequency of observations
- Qualified as a professional opinion
- No certification of product performance or commissioning

C/A: Observations, Evaluations

- Determining amount of work in place and appropriate payment to contractor
- Confirming acceptable material quality and workmanship
- Rejecting work that does not conform to the contract
 - *But, what if owner wants to **accept** non-conforming work?*
- Determining dates of substantial and final completion



C/A: Site Safety

- **If you see and recognize an unsafe condition...**
 - Report your observation to the entity in control and responsible for site (usually the general contractor)
- Include in the field observation report the issue and to whom it was reported
- If serious and persistent ... elevate concerns to owner
- Duty to public: if you see something, do you have to say something?



C/A: Change Orders

Checklist:



Follow contractual procedures for change requests and changes



Who has authority to approve changes?

- To be reviewed and approved by:
 - Owner
 - Contractor
 - Design Professional



Specifying Engineered Products

Engineered Products

- “Green products” and the problem of unintended consequences
 - Modular, pre-fabricated components
 - Where is the line between innovative versus unproven?
 - How can product failures implicate a designer’s standard of care?
-



Engineered Products

- **Incorporating products into plans**
 - **Describing products in specifications**
 - **Reviewing, handling samples, shop drawings and submittals**
 - **Might some products require a stamp?**
 - Impact on your standard of care
 - What does your stamp mean in this context?
-

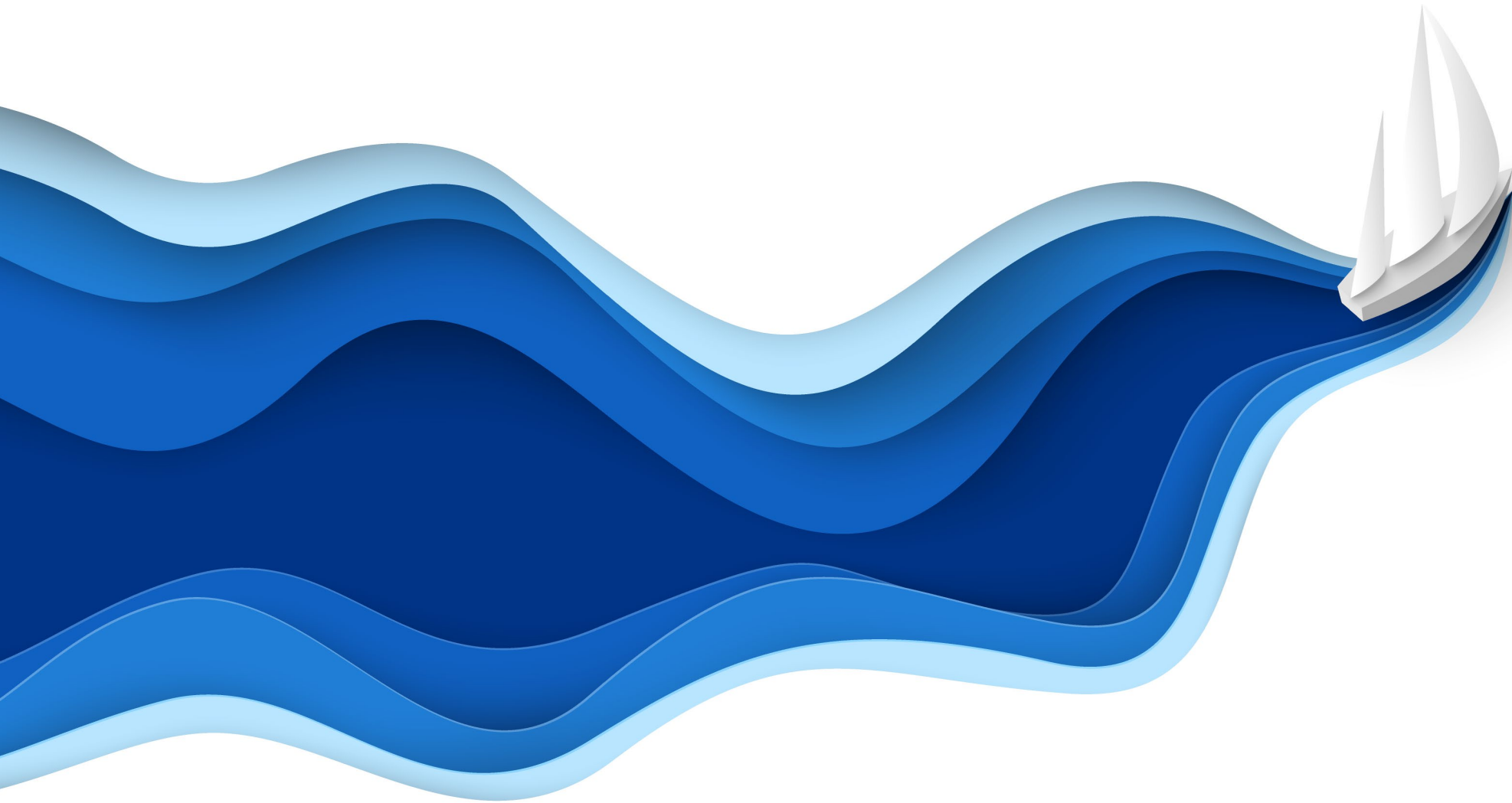


Claims, Relationships



- **First Steps? Notification to carriers and acknowledgements**
- **Attorney-client communications and privileges**
- **Communication within the design team**
- **Communication outside the design team**
- **Project status?**

Q&A?



Thank You!



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