

Strafford

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*Presenting a live 90-minute webinar with interactive Q&A*

# Construction Management Agreements: Key Provisions, Common Areas of Dispute, and Minimizing Performance Risks

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MONDAY, JUNE 17, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

David A. Blake, Partner, **Seyfarth Shaw**, Washington, D.C.

Lisa F. Glahn, Partner, **Foley & Lardner**, Boston

Mark House, Director of Strategic Projects, **The Beck Group**, Tampa, Fla.

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# **STRAFFORD WEBINARS**

June 17, 2019

**David Blake,**  
Partner  
Seyfarth Shaw

**Lisa Glahn,**  
Partner  
Foley & Lardner

**Mark House,**  
Director of Strategic  
Projects  
The Beck Group

## **CONSTRUCTION MANAGEMENT AGREEMENTS: UNDERSTANDING KEY PROVISIONS, NAVIGATING COMMON AREAS OF DISPUTE & MINIMIZING PERFORMANCE RISKS**

# INTRODUCTION AND AGENDA

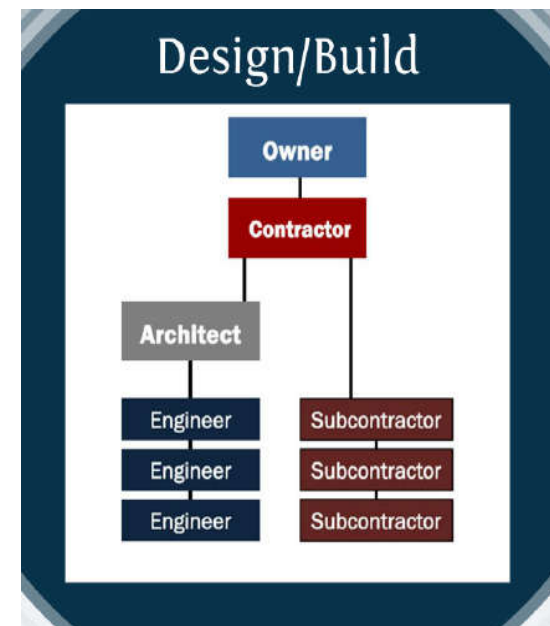
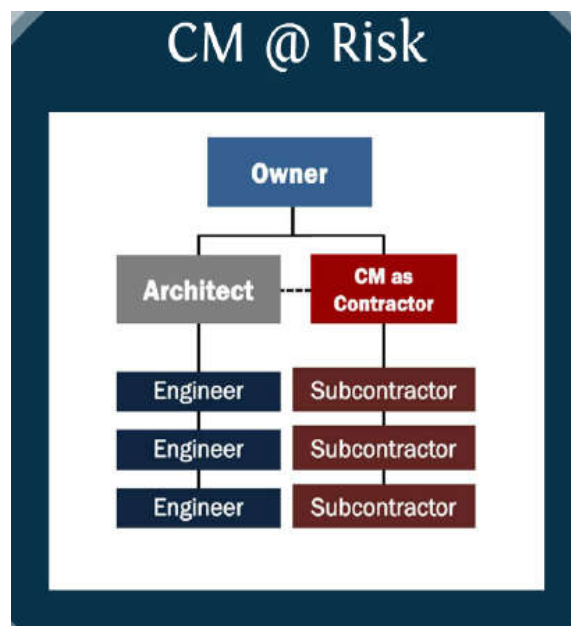
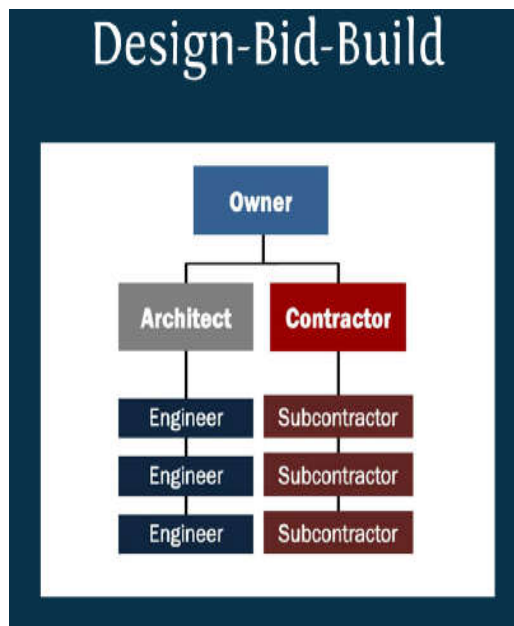
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- UNDERSTANDING THE CM @ RISK MODEL
- RECOGNIZING KEY ISSUES
- IDENTIFYING AND MODIFYING KEY TERMS AND PROVISIONS
- EMPLOYING BEST PRACTICES FOR CONTRACT ADMINISTRATION

# OVERVIEW

# RISK SHIFTING MODELS

- CM @ Risk Approach: contractor involved in design





# FINANCIAL STRUCTURING

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- Pricing approaches & budgeting models
- Guaranteed Maximum Price (GMP)
  - Compensation options for general conditions/requirements
  - Construction contingency uses
  - Claw back provision for contingency fund

# COMMON ISSUES

# PRECONSTRUCTION PHASE: BUDGETING, SCHEDULING, CONSTRUCTABILITY & LOGISTICS

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- Constructability reviews and waiver of related claims
  - Preliminary evaluation of the Owner's program, schedule and construction budget requirements
  - Subcontractor vetting and preliminary estimating
  - Practical approaches to project development and procurement

# COMPENSATION AND PAYMENT

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- Establishment of GMP
  - Savings
  - Excluded Costs
  - Rental Charges
    - Non-conforming work due to negligence
  
- Payment, Withholding and Assessment of Liquidated Damages

# CHANGES AND DELAY

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- Fee holiday on changes
- Aggregate limit on subcontractor markups
- Change Order includes all relief related to the change
- Tiered Liquidated Damages considerations
- Liquidated Damages do not cutoff termination damages
- Anticipated weather days
- Time Impact Analysis required for time extension

# DISPUTE RESOLUTION AND TERMINATION

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- Notice of claims as condition precedent
- Alternative choice of law provisions
- Tiered dispute resolution
  - Expediency

# INSURANCE AND INDEMNIFICATION

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- Insurance provisions removed from AIA A201-2017
  - Standalone exhibit
  - More specifically covers BR and CGL
  - Contains fill boxes for limits
  
- Insurance
  - Retroactive date for PLI
  - Occurrence v. claims made
  - Minimum limits do not limit CM's liability to the owner
  
- Indemnity for 3<sup>rd</sup> party economic loss

# KEY PROVISIONS



# SCOPE OF WORK

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- Clearly delineate expectations as to scope, comprehensiveness and coordination
- Representations as to ability, manpower and coordination
- Clarifications and exclusions
  - Order of Precedence

# CONSTRUCTION MANAGER'S OBLIGATIONS

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- Payment Deliverables
  - Pay Apps
  - Substantial Completion
  - Final Completion / Final Payment
  
- Liens
  - Discharge or removal
  - Waivers
  - Priority and state law

# TIME FOR COMPLETION OF WORK

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- Substantial Completion – delay in obtaining Certificate of Occupancy
- Mutual waiver of consequential damages / liquidated damages
  - Limitations
- Acceleration
- Excusable delay and force majeure

# TIMING OF PAYMENTS

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- Prompt pay laws
- Practical benefits of prompt pay and early release of retainage

# TERMINATION & REMEDIES ON DEFAULT

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- Termination prior to v. after GMP Amendment
- Reprocurement costs and savings – who pays whom
- Improper termination for default converts to termination for convenience
- No anticipated overhead and profit on unperformed work
- Management and control of subs on termination

# ADMINISTRATION OF THE CONTRACT

# INSURANCE AND BONDS

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- Owner may inform surety of claims and problems
- Parent guarantees v. bonds
  - Private industry trending away from bonds

# UNCOVERING AND CORRECTION OF WORK

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- 1 year correction warranty/timely corrections
  - 11 months walk through
- Important to distinguish from contractual warranties and warranties at law



# MISCELLANEOUS PROVISIONS

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- LEED/green damages
- Inability to obtain warranty compliant materials
  - Confidentiality
  - Role of lender

# THANK YOU

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**David A. Blake**

Seyfarth Shaw

[dblake@seyfarth.com](mailto:dblake@seyfarth.com)

**Lisa F. Glahn**

Foley & Lardner

[lglahn@foley.com](mailto:lglahn@foley.com)

**Mark House**

The Beck Group

[markhouse@beckgroup.com](mailto:markhouse@beckgroup.com)

# QUESTIONS