

ATKINSON, ANDELSON, LOYA, RUUD & ROMO



ALTERNATE CONSTRUCTION PROJECT DELIVERY METHODS

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AGENDA

- Design-Bid-Build – PCC § 20651
- Lease-Leaseback – Ed. Code § 81335
- Construction Manager – Gov. Code §§ 4526 & 4529.5
 - Construction Manager Agency
 - Construction Manager Multiple Prime
 - Construction Manager At-Risk
- Design-Build – Ed. Code § 81700 et seq.
- Local Vendor Preference Policies

THE HEART OF PUBLIC CONTRACTING

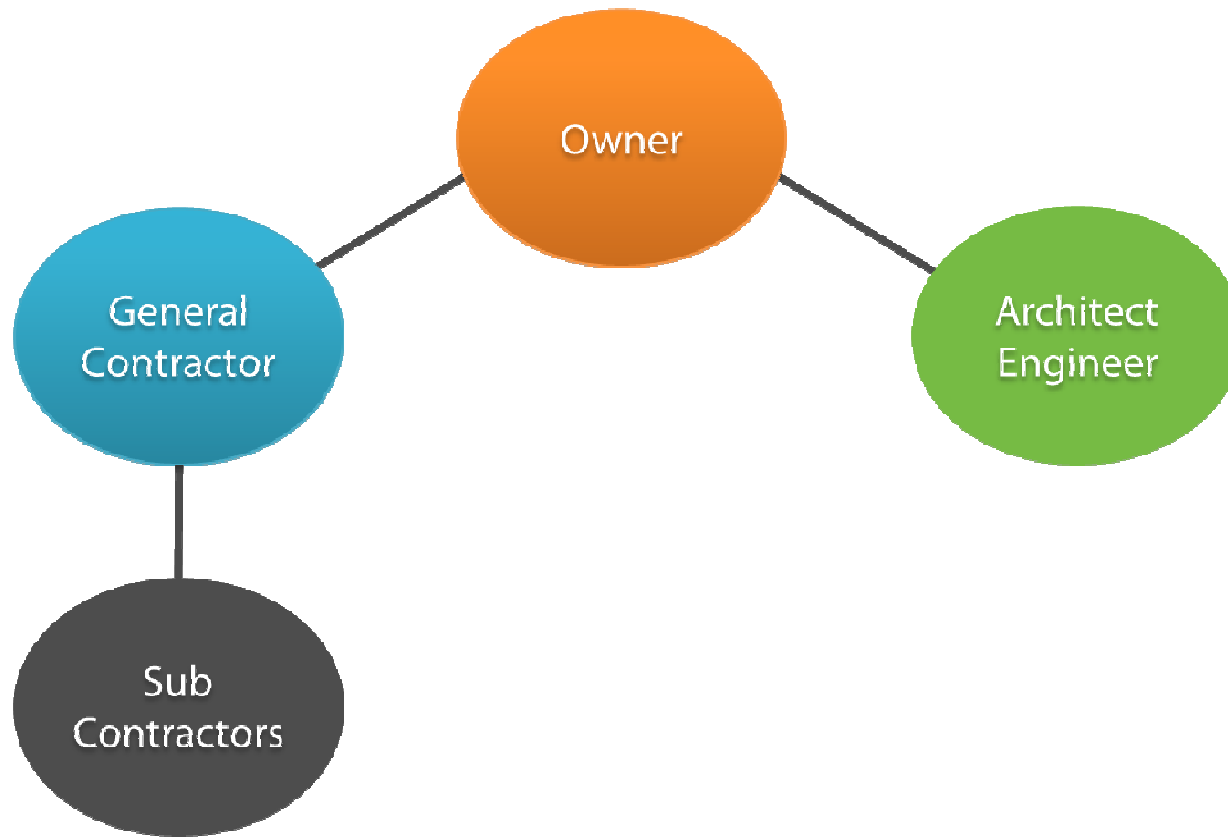
- California Public Contract Code § 100
- Protect the public from misuse of public funds
- Provide all qualified builders a fair opportunity to compete
- Stimulate competition in a fiscally-sound manner
- Eliminate favoritism, fraud, and corruption

DESIGN-BID-BUILD

- Public Contract Code § 20651(b)
- For Public Projects – Public Contract Code § 22002
- The governing board shall let:
 - To the lowest responsible bidder
 - Who shall give security as the board requires in cash, cashier's or certified check payable to the district, or a bond executed by an admitted surety insurer, made payable to the community college district
- Any contract involving an expenditure of fifteen thousand dollars (\$15,000) or more

DESIGN-BID-BUILD

Traditional Design-Bid-Build



A QUICK NOTE ON THE UNIFORM PUBLIC CONSTRUCTION COST ACCOUNTING ACT...

- Public Contract Code § 22000 et seq.
 - Provides an alternative system of bidding
 - Contract without bidding up to \$45,000
 - Informal bidding for contracts over \$45,000 up to \$175,000
 - Formal bidding procedures for contracts over \$175,000
 - Safe harbor up to \$187,500
 - Follow the Cost Accounting Policies and Procedures Manual of the California Uniform Public Construction Cost Accounting Commission

LEASE-LEASEBACK – EDUCATION CODE § 81335

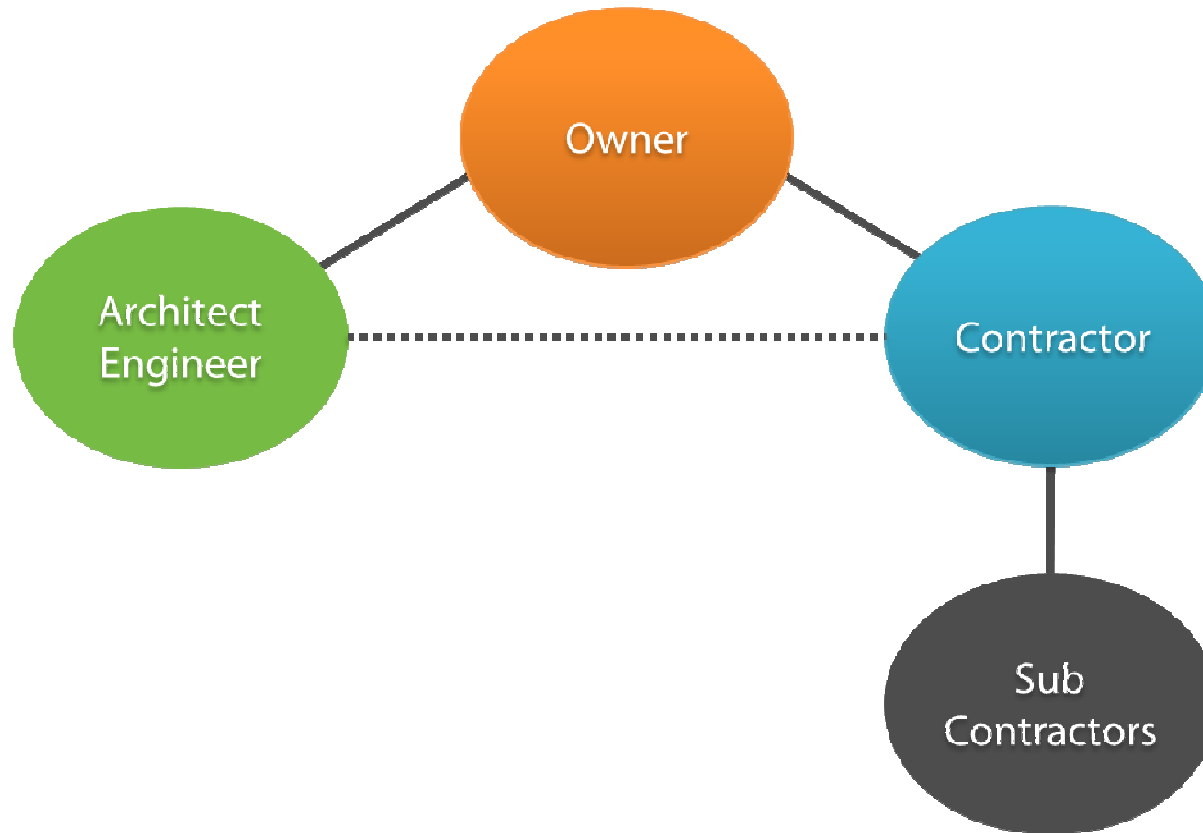
The governing board of a community college district may let, at a minimum rental of one dollar (\$1) a year, to any person, firm, or corporation **any real property that belongs to the district** if the instrument by which such property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, **a building or buildings for the use of the community college district** during the term thereof, and provides that title to that building shall vest in the community college district at the expiration of that term. The instrument may provide for the means or methods by which that title shall vest in the community college district prior to the expiration of that term, and shall contain other terms and conditions as the governing board may deem to be in the best interest of the community college district.

LEASE-LEASEBACK - EDUCATION CODE § 81330 et seq.

- One or more buildings located or to be located on one or more sites - *New Construction*.
- The remodeling of any building located on a site to be leased pursuant to this article - *Modernization*.
- Onsite and offsite facilities, utilities or improvements which the governing board determines are necessary for the proper operation or function of the school facilities to be leased - *Infrastructure*.
- The permanent improvement of school grounds - *Catch-all*.
- "...includes one or more sites, and also may include any building or buildings located or to be located on a site."
- The District must own the site or hold an option to purchase the site.

LEASE-LEASEBACK

Lease-Leaseback



LEASE-LEASEBACK CHALLENGES

The challenges to Lease-Leaseback agreements have come in two forms:

- Answer to a Validation Complaint
- Reverse Validation Action Complaint

LOS ALAMITOS USD V. HOWARD CONTRACTING, INC., **229 CAL.APP.4TH 1222 (2014)**

- Confirmed that Lease-Leaseback procedures in Education Code section 17406 were exempt from the competitive bidding process, Public Contract Code section 20111
- Confirmed that the competitive bidding exception applies to the entire Lease-Leaseback agreement and not solely to the Site Lease
- Confirmed that Education Code section 17417 does not apply to the Lease-Leaseback procedures in section 17406
- Confirmed that the validation process is not mandatory and nothing would prevent the Lease-Leaseback contractor to begin working while the validation process was pending in court

DAVIS V. FRESNO USD, HARRIS CONSTRUCTION, 237 CAL.APP.4TH 261 (2015)

- Lease-Leaseback must be a “genuine” lease
- Lease-Leaseback must include a financing component
- Lease-Leaseback must provide for the use of the facilities “during the term of the lease”
- Sufficient facts alleged to state a conflict of interest cause of action under Gov. Code 1090 for Harris Construction as a consultant under the preconstruction agreement
- Supreme Court denied petition for review on August 26, 2015

McGEE V. TORRANCE USD, ET AL. 247 CAL.APP.4TH 235 (2016)

- Rejects Davis holding that a Lease-Leaseback must be a “genuine” lease, must include a financing component, or must provide for the use of the facilities “during the term of the lease”
- Sufficient facts alleged to state a conflict of interest cause of action under Gov. Code 1090 for independent contractors
- Rejects standing issue in *San Bernardino County, et al. v. Superior Court*, 239 Cal.App.4th 679 (2015)

NEW LLB LEGISLATION

AB2316 (O'Donnell)

- Requires a competitive process when selecting the Lease-Leaseback contractor under Education Code 17406 and 17407
- Expressly authorizes preconstruction services by the Lease-Leaseback contractor
- Effective for K-12 Lease-Leaseback contracts awarded after January 1, 2017

SB693 (Hueso)

- Skilled and trained workforce
- Applies to K-12 Lease-Leaseback and design build contracts awarded after January 1, 2017

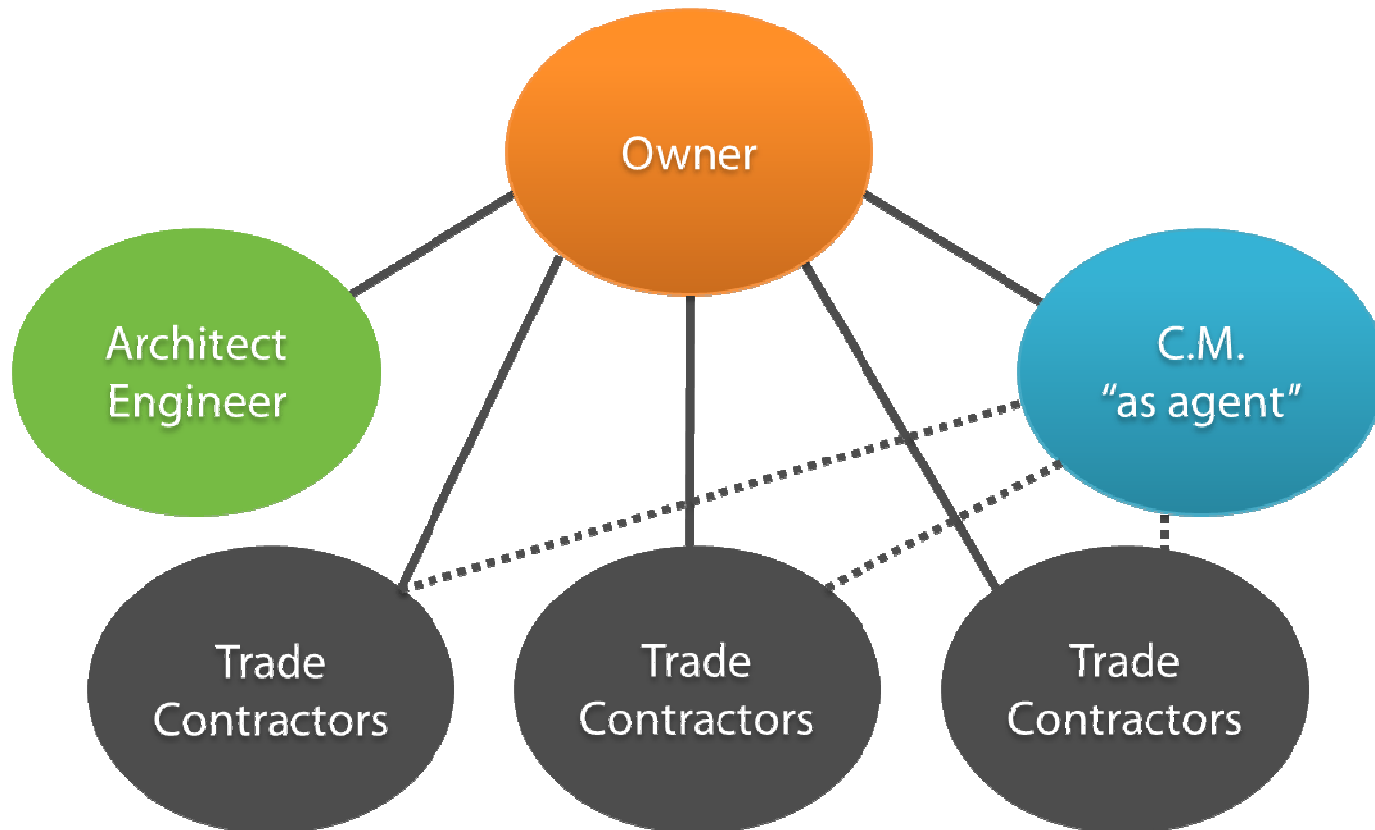
CONSTRUCTION MANAGEMENT

Government Code § 4526

- A “local agency head” may select providers of construction project management services
- Based on demonstrated competence and professional qualifications necessary for the satisfactory performance of the services required
- This should not be used if the services needed are “more of a technical nature and involve little professional judgment and that requiring bids would be in the public interest”

CONSTRUCTION MANAGER

Construction Manager



CONSTRUCTION MANAGEMENT

Agency

- The CM acts as the district's agent to manage a traditional design-bid-build project

Multi-Prime

- The CM acts as the district's agent to manage a group of multiple prime contractors with complimentary scopes of work
 - Both of these models use the CM as a replacement for district personnel who would otherwise oversee prime contractors

CONSTRUCTION MANAGEMENT

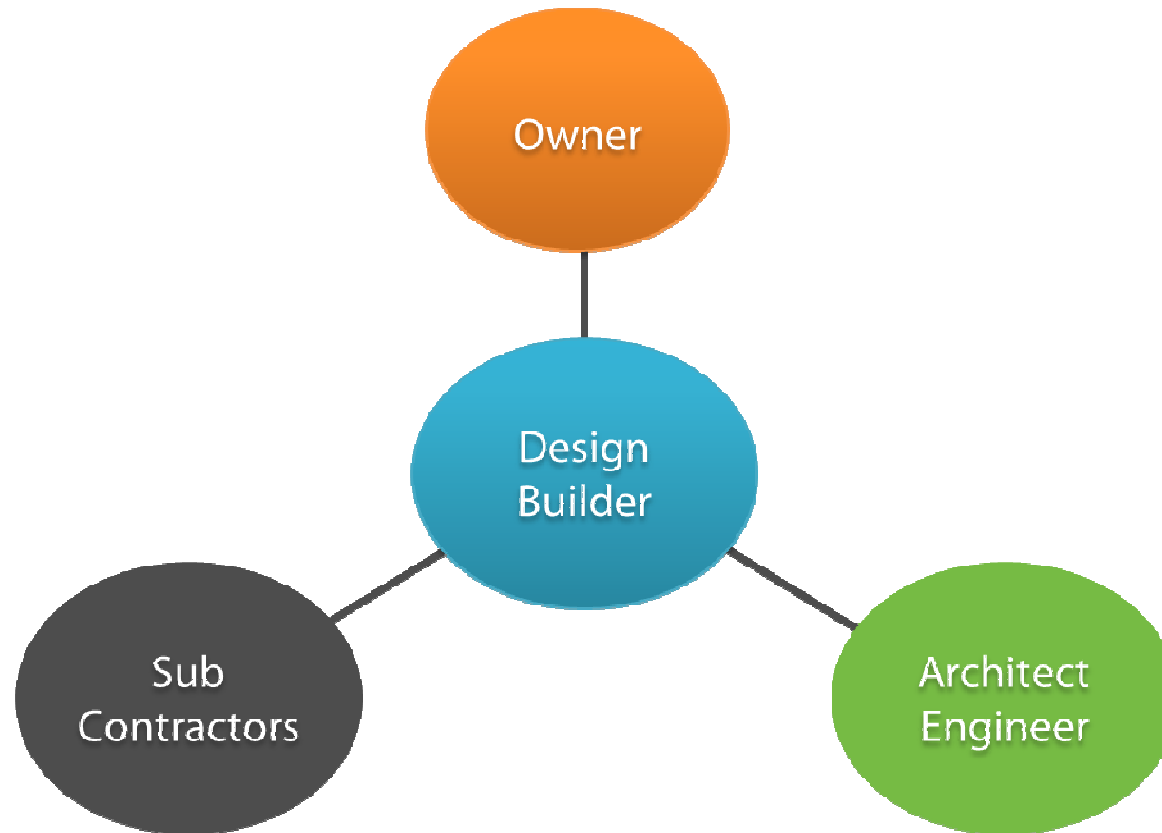
- At-Risk – begin with a multi-prime, then assign the multiple prime contracts to the CM
 - The CM takes on the risk of delivering the project on time (at the scheduled completion date)
 - The CM takes on the risk of delivering the project on budget (a Guaranteed Maximum Price)
- Limitations from *City of Inglewood-Los Angeles Civic Center Authority v. Superior Court* (1972) 7 Cal.3d 861
 - The CM cannot take on the traditional role of a prime contractor
 - The CM should not provide any bonds
 - The CM should not provide any builder's risk insurance
 - The CM is compensated on a fee basis just like an architect

DESIGN-BUILD

- Education Code § 81700 et seq.
 - Design Build – a procurement process in which both the design and construction of a project are procured from a single entity
 - Written finding that use of the design-build method will:
 - Reduce comparable project costs
 - Expedite project completion
 - Provide features not otherwise achievable
 - The design-build method is in the community college district's best interests
 - Allows selection based on “best value” – but must be specified
 - Must use a prequalification procedure established by the Department of Industrial Relations
 - Project must “exceed” \$2,500,000

DESIGN-BUILD

Design-Build



WHY CONSIDER A LOCAL VENDOR CONTRACTING PREFERENCE POLICY?

Many public entities have found that strategies that promote the use of local vendors and service providers help create a sustainable economy and preserve local businesses. The use of local businesses helps retain local dollars within the community and strengthen employment.

WHAT IS A LOCAL VENDOR PREFERENCE POLICY?

- A Local Vendor Preference Policy offers a competitive selection preference to businesses that meet established criteria for a local business enterprise, or a small local business enterprise
- Businesses that are located at a fixed commercial address in the District's market area, which are staffed on a full-time permanent basis are considered to be a local business enterprise

LEGAL CONSIDERATIONS FOR LOCAL VENDOR PREFERENCE POLICIES

A Local Vendor Preference Policy must be carefully drafted to avoid conflict with federal and state law.

- The United States Constitution
 - Commerce Clause
 - Privileges and Immunities Clause
 - Equal Protection Clause

- California Law
 - Public Contract Code § 20651 – Competitive Bidding Statute
 - Public Contract Code § 2002 - Small (Local) Business Preference

FURTHER CONSIDERATIONS – NEXT STEPS

- ❑ Would a Local Vendor Preference Policy provide a public benefit?
 - Does an analysis of the local employment/unemployment statistics, sales tax revenues and local economy support the adoption of a Local Vendor Preference Policy?
- ❑ What would be the scope of the policy?
 - Applicable for procurement using local funds only vs. state and federal funding
 - Local hire/participation on capital projects
 - Local vendor preference
 - How to monitor and measure the results of the policy.
- ❑ Have other community colleges or public entities adopted Local Vendor Preference Policies, and if so, what are the components of those policies?

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THANK YOU FOR ATTENDING

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