The Infrastructure Trifecta: Integrating the Owner, Designer and Municipal Counsel for Precision Project Delivery

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86th IMLA Annual Conference
Minneapolis, Minnesota

The Infrastructure Trifecta: Leading the Charge – Shaping the Deal

- OWNER –
  - Direction, Finance, objectives, accountability
- DESIGN PROFESSIONAL
  - Conceptual, Schematic, Preliminary and Final (not DB) Design
  - Project Administration/Oversight
- Legal Counsel – *Because the process is document driven*
  - Procurement
    - Invitation for bids/Requests for Proposals
  - Finance
    - Bond/Bond Counsel
  - Contracting
    - Professional Service Agreements
    - Construction Contracts

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The Infrastructure Trifecta: Leading the Charge – Shaping the Deal

Traditional Traps and Treachery

- Designer lead/administered project: no legal oversight
- Documents selected by A/E – Bowed to by Owner – Signed by Counsel
  - Unmodified standard form contracts used
  - Limited to library subscribed to by (A/E)
- Public Owners unaware of alternative project delivery models
- Non-legal practitioners dispensing legal advice

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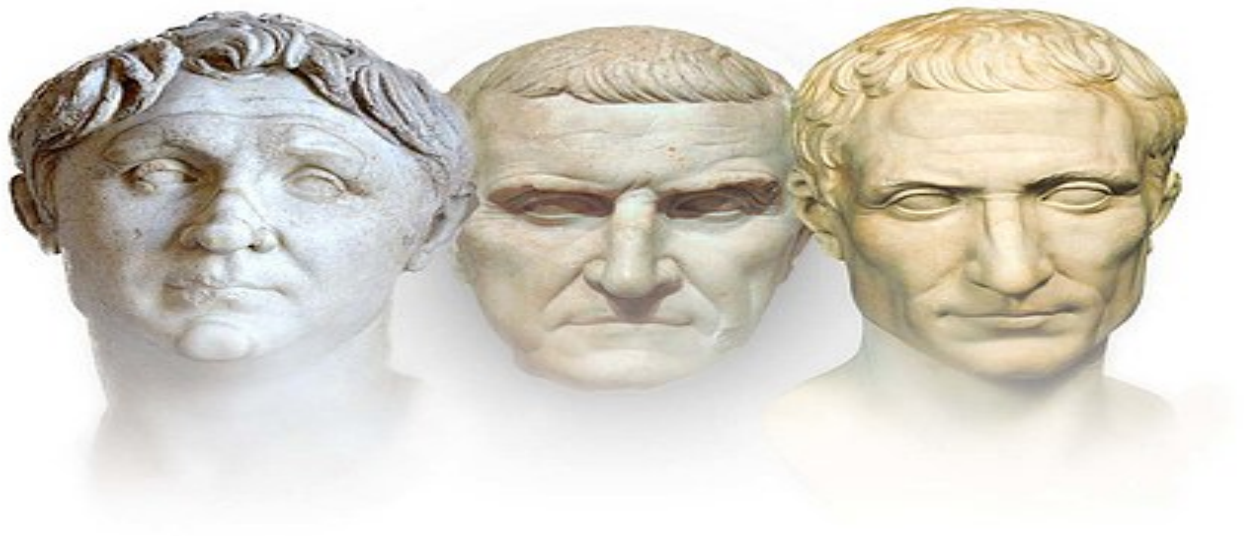

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The Infrastructure Trifecta: Leading the Charge – Shaping the Deal



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The Infrastructure Trifecta: Leading the Charge – Shaping the Deal

- Project Team
- Leadership
- Cooperation
- Collaboration
- Coordination
- Control
  - The triumvirate doesn't work any more
  - Clearly Defined Chains of Command
- Roles and responsibilities (often defined in contract documents, modify)



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Expanded Team Members – Successful Infrastructure Projects

- Owner
- Owner's Project Manager (optional – Factors to consider)
- Design Professional (A/E)
- General Contractor
- Construction Manager at Risk
- Design-Builder

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- Key Decision Points
- Project Delivery Method
  - Traditional Design – bid – build
  - Design- Build Variations
  - Construction Manager at Risk
- Project Team Selection
  - Internal
  - External



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- Contract Document Selection
  - Standard Forms
    - AIA – Vertical Construction
    - EJDC – Horizontal Construction
    - Consensus Docs (A/E) alternatives to the other two
    - DBIA – For Design Build
  - Modified Standard Form
    - IMLA
  - Municipal and State Model Documents

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Forms of Infrastructure Projects

- Public Buildings/Schools
- Renewable Energy
- Bridge and Highway
- Water/Wastewater
    - Treatment
    - Collection/Distribution
    - Storage





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President Biden's American Jobs Plan

Specific Allocations

- $110 Billion for roads, bridges and major infrastructure
- $39 Billion to modernize public transit
- $65 Billion in Broadband Infrastructure
- $25 Billion in Airports
- $7.5 Billion to Zero- and Low-Emission transportation
- $65 Billion to Rebuild Electric Grid
- $21 Billion in Environmental Remediation

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President Biden's American Jobs Plan

Notable Spending on Drinking Water

- $55 Billion investment represents the largest investment in clean drinking water including dedicated funding to replace lead service lines and PFAs.
- $15 Billion for lead pipe replacement

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President Biden's American Jobs Plan



Providing High-Speed Broadband to America

- Goal of reaching 100% high speed broadband coverage in America
- Prioritizes support for broadband networks owned, operated, or affiliated with local governments
- Emphasis on right to unionize and collective bargain

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President Biden's American Jobs Plans

Building and Improving Affordable Housing

- $40B in funding to improve the infrastructure of public housing
- High-speed internet connectivity to Federally Assisted Housing
- Transit Supportive Communities
- Changes Property Disposition for Affordable Housing

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Municipal Counsel Role in Infrastructure Success

- Regulatory and Legislative Compliance
  - Bond Conditions
  - Special Purpose Projects
- Procurement Vehicle Guidance
  - Traditional Design-Bid-Build
  - Alternative Project Delivery
    - Design-Build
    - CMAR
    - Multiple-Primes –
- Project Labor Agreements

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Municipal Counsel Role in Infrastructure Success

- Procurement Document Development/Compliance
  - Bid Documents/Instructions to Bidders
    - General Conditions of Contract (GCC's)
    - Special Conditions – Applicable to this Project and Your Municipality
  - Performance Bonds & Security
  - Template Contracts Released with Bid Docs
  - Strong/Defensible Evaluative Criteria
    - Minimum Requirements (avoid unqualified/unwelcome low bidder)
    - Comparative Evaluative Criteria (When applicable)

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Municipal Counsel Role in Infrastructure Success

Traps for the Unwary

- Missing a Qualifying Requirement
- Slipping a Filing or Submittal Date
- Using unmodified/Standard Form Contracts (AIA, EJDC)
- Permitting Binding Arbitration of Disputes
- Ineffective Forum Selection Clause or Waiver of Removal
- Warranties from Substantial Completion / Final Acceptance
- Limitation of Liability Clauses that are not on/after
- Procurement Docs not Accompanied by Final Contract

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Municipal Counsel Role in Infrastructure Success

Now What do I do? Municipal Counsel Next Steps

- Follow/Track Federal Infrastructure Legislation
- Understand your Municipality's Capital Plan
- Outline Allowable Project Delivery Models & be prepared to advise/recommend options by type (vertical/Horizontal/Utility)
  - Design Build/CMAR/Concessions & Tolling
- Begin Dialogue with Bond Counsel – Know what they expect
- Position Yourself as Part of the Project Team
- Develop Checklists and Compliance Matrices

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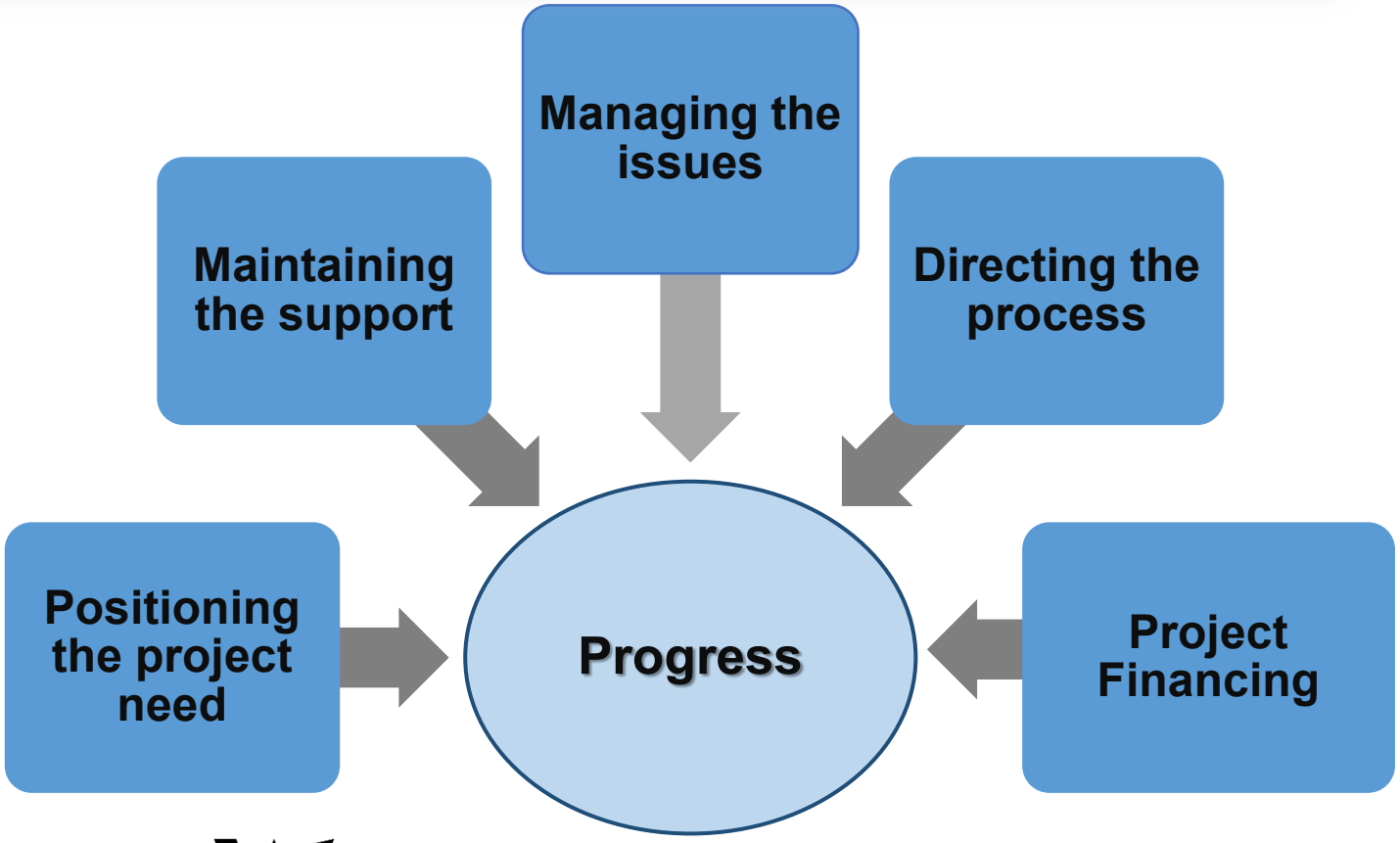
Mechanics of Project Delivery: Framework

Without a Framework, Projects Fail



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Mechanics of Project Delivery: Procurement Fundamentals

Legal Framework	**Identify Project Team**	**Request for Proposals**
Proposal Evaluation	**Contract Negotiations**	**Contract Award**

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Mechanics of Project Delivery: Procurement Fundamentals

- Delivery Method Selection
  - Traditional (Low Bid) or Alternative Delivery (Qualifications Based/P3)
- Type of Project
  - New construction,
  - Expansion, or
  - Upgrade
- Appointment of Technical Team
  - Responsible for all aspects of procurement
- Requests for …
  - Expression of Interest,
  - Qualifications,
  - Proposals, and
  - Qualifications and Proposals
- Proposal evaluations
- Contract award and contract negotiations

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Mechanics of Project Delivery: Mechanics and Logistics

- Project Identification and Selection
  - Needs Analysis
  - Permit Compliance/Service Area Growth
  - Cost Benefit Analysis
  - Alternatives Analysis
- Project Funding Sources – GO/Revenue/
- Project Procurement
  - Request for Proposals – RFP
  - Invitation for Bids - IFB

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Critical Contract Components

- Price
- Performance
- Protection
- Period
- Project Acceptance
- Provisions (inter alia)

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Critical Contract Components : Price

- Lump Sum
- Cost-plus
- Guaranteed Maximum Price
- Unit Price

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Critical Contract Components: Performance

- Design Specifications
- Construction Standards
- Operations Standards
- Performance Guarantees
- Compliance
- Environmental
- Enhanced Standards

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Critical Contract Components: Protection

- Insurance
- Bonds
  - Performance
  - Completion
  - Labor & Materials
- Guarantees
  - Parent
  - Corporate

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Critical Contract Components: Project Acceptance

- Risk of acceptance on Design-Builder/ General Contractor
- What if the project fails to meet performance standards?
- What if the project fails to meet design requirements, but still functions?
- Guaranteed scheduled acceptance date
- Delay liquidated damages

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Design-Build: Legal Authority

- **Statutory Authority**
  - Independent legal authority to utilize the design-build project delivery model for this type of construction, (vertical, horizontal, utility, transportation, energy)
- **Local Authority**
  - Local charters, articles of incorporation, ordinances or by-laws
  - Determine the extent of the municipal authority's legal right to utilize alternative project delivery models
  - A determination must be made of which local board or executive department has authority for procurement, vendor selection, contract
  - Appropriate local authorities appoint procurement team that will perform the procurement process
- **Sources of Authority**
  - State law, local charters, special legislation, home-rule authority
  - Special legislation to grant a limited authority

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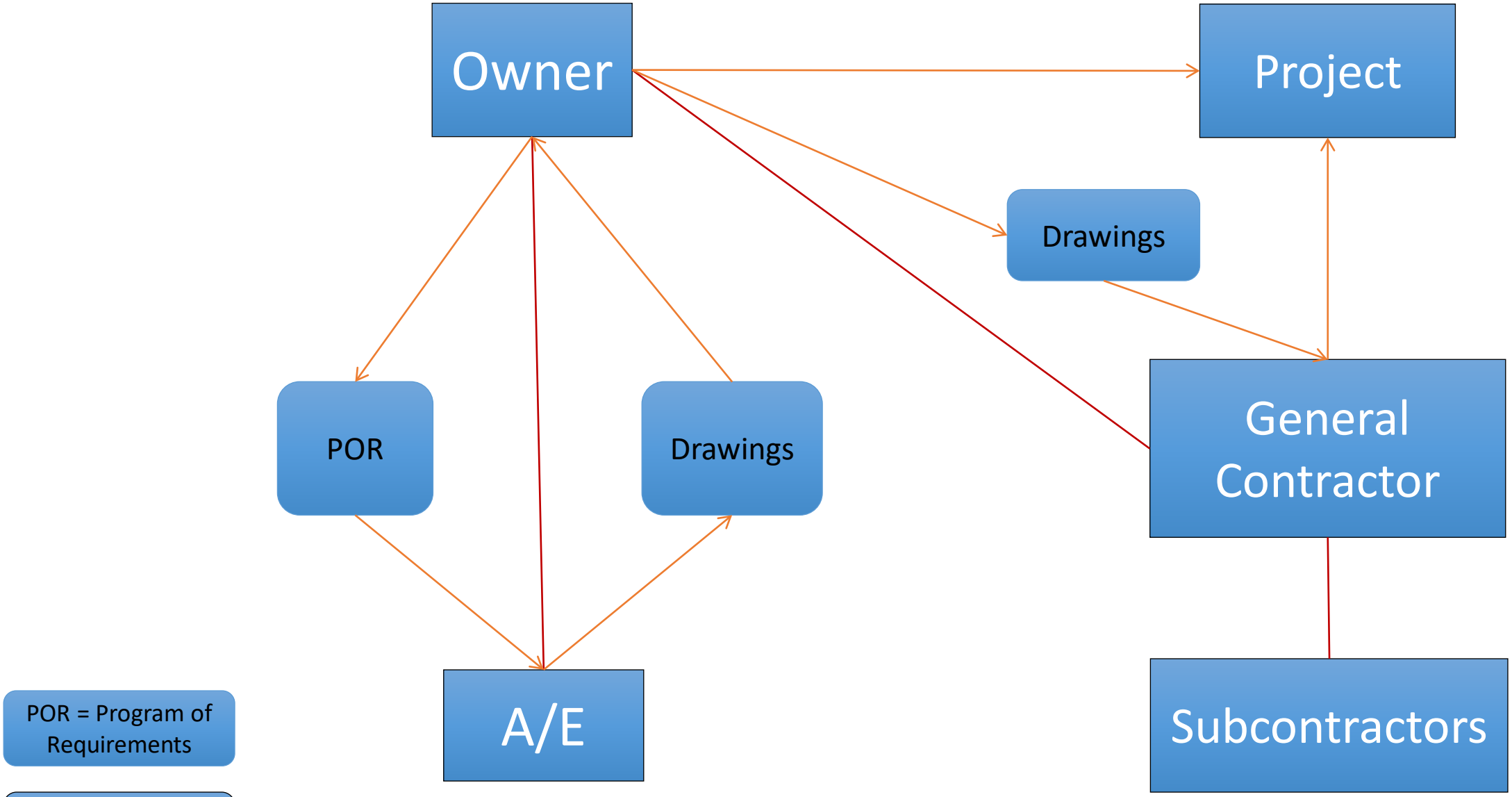

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Design-Build: Design/Construction Responsibility

- Alternative project delivery method
- Contractor responsible for design, construction means and methods, and quality
- Owner may have design review right, but not approval
- Owner often in better position to obtain key permits
- Contractor responsible for construction-related permits and regulatory compliance

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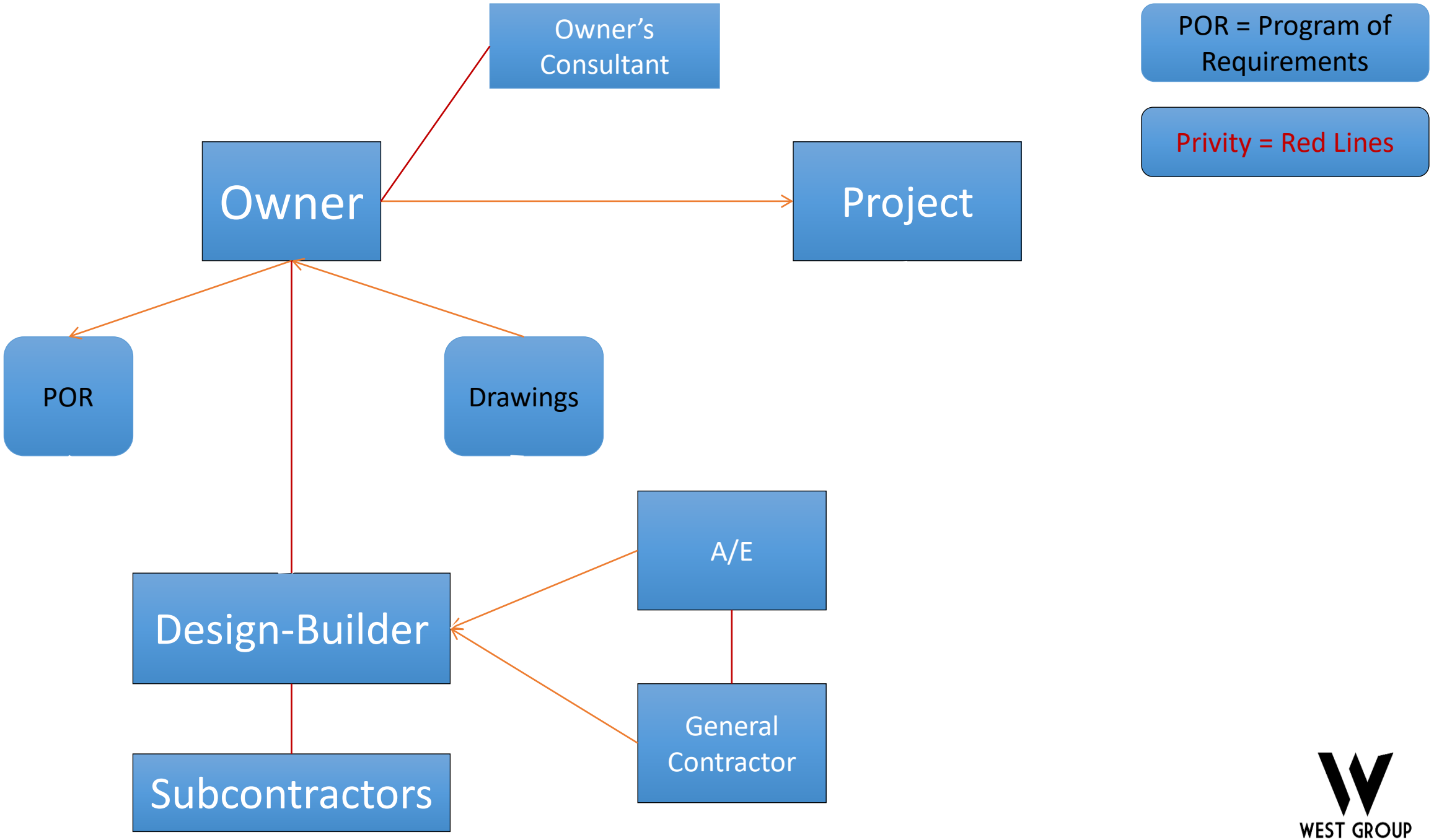

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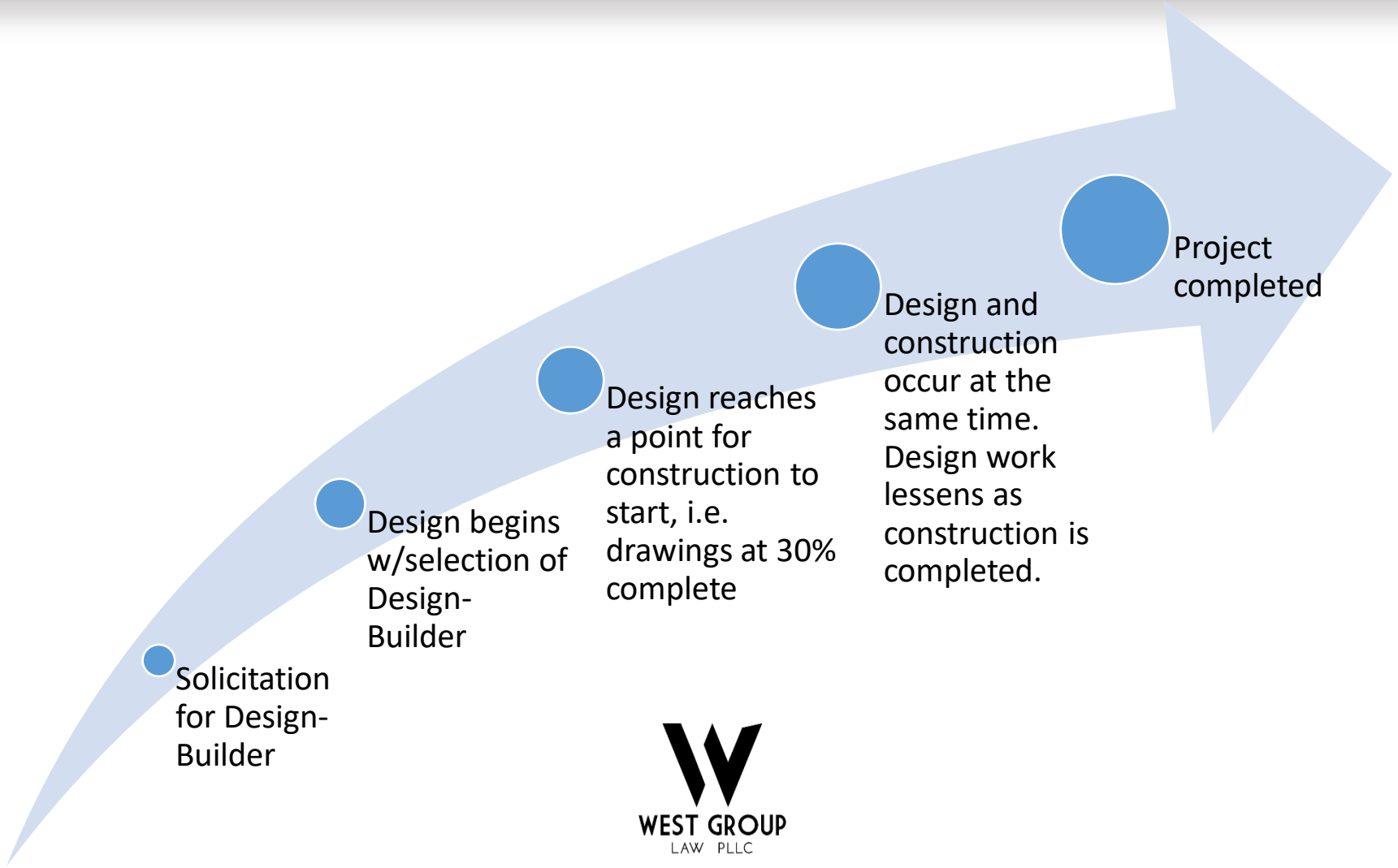
Design-Build: Timeline



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Design-Build: Fundamental Differences

- Performance Based
- Single Source Guarantor
- Kiss Spearing Liability good-bye (But check your jurisdiction!)
- Qualification Based Selection

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Summary

- Define your own triumvirate
  - Leadership Team (owner, OPM, Counsel?)
  - Project Team (Owner, OPM, Counsel, A/E, GC, DB or CMAR)
- Define your project
- Define your project delivery model
  - Traditional low bid
  - Alternative project delivery

Define your transactional structure and Contracts

Control the Players/Control the Process/Control the Outcome

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