

CLARIFYING WIDESPREAD MISUNDERSTANDINGS ABOUT CONSTRUCTION LAWS AND PROCEDURES



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About the Presenters



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What's on Tap?

- **Construction Process Overview**
- **The Delivery Methods for Construction Projects**
- **Overview of Construction Laws**
- **Common Misperceptions**
- **The Do's and Don'ts**



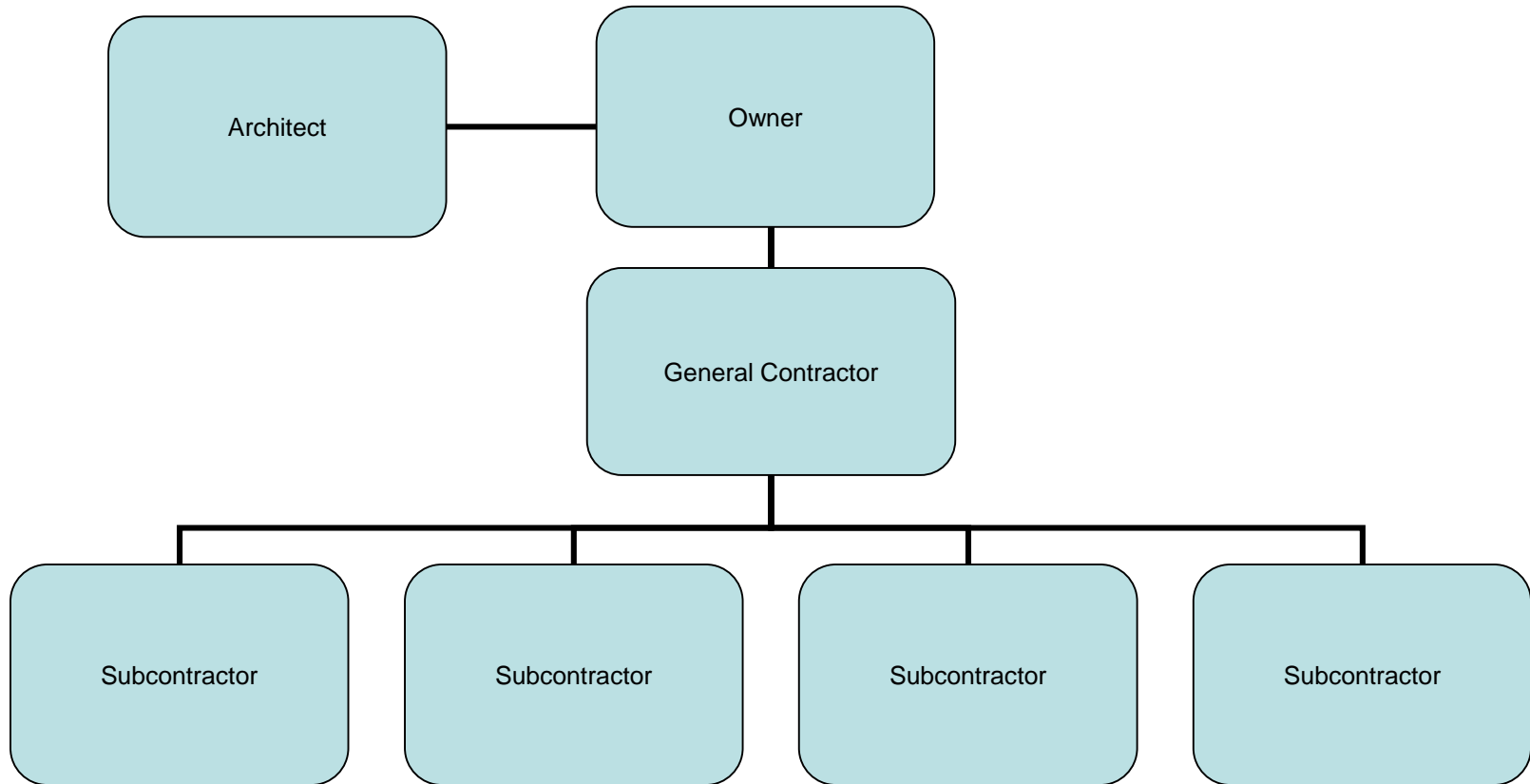
This document is comprised of general information relative to the subject matters discussed herein. It is not intended to give legal advice and does not establish any attorney-client relationship. School Districts facing specific issues should seek the assistance of an experienced attorney.

The Construction Players

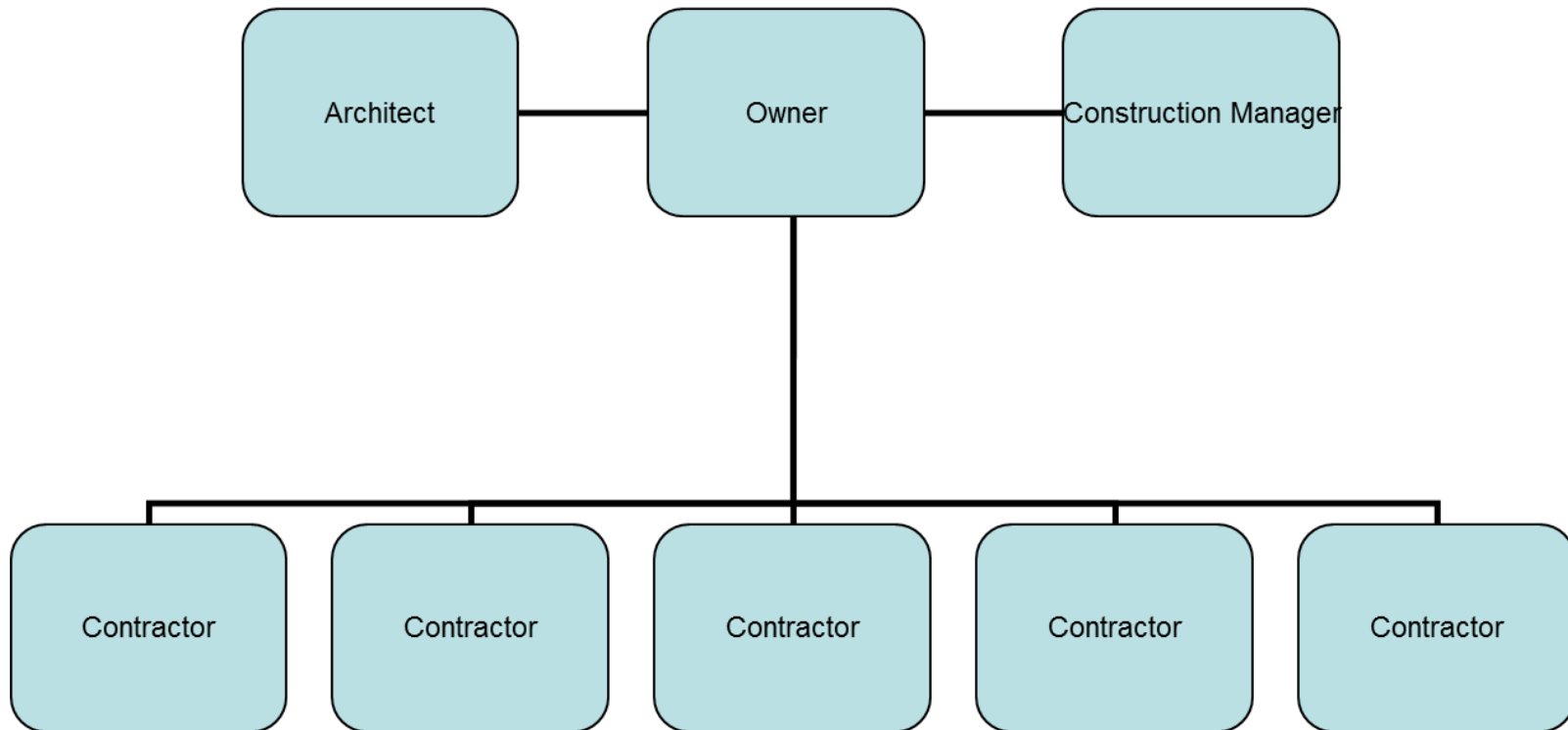
- **There are various “players” that may be involved in a Construction Project.**
 - The Owner (*i.e.*, the School District)
 - The Architect
 - The Construction Manager
 - The Owner’s Representative
 - The Technology Designer
 - The General Contractor
 - The Contractor
 - The Sub-Contractor
 - The Surety

- **Not all of these “players” will be involved in every construction project. It depends on the delivery method utilized by the Owner.**

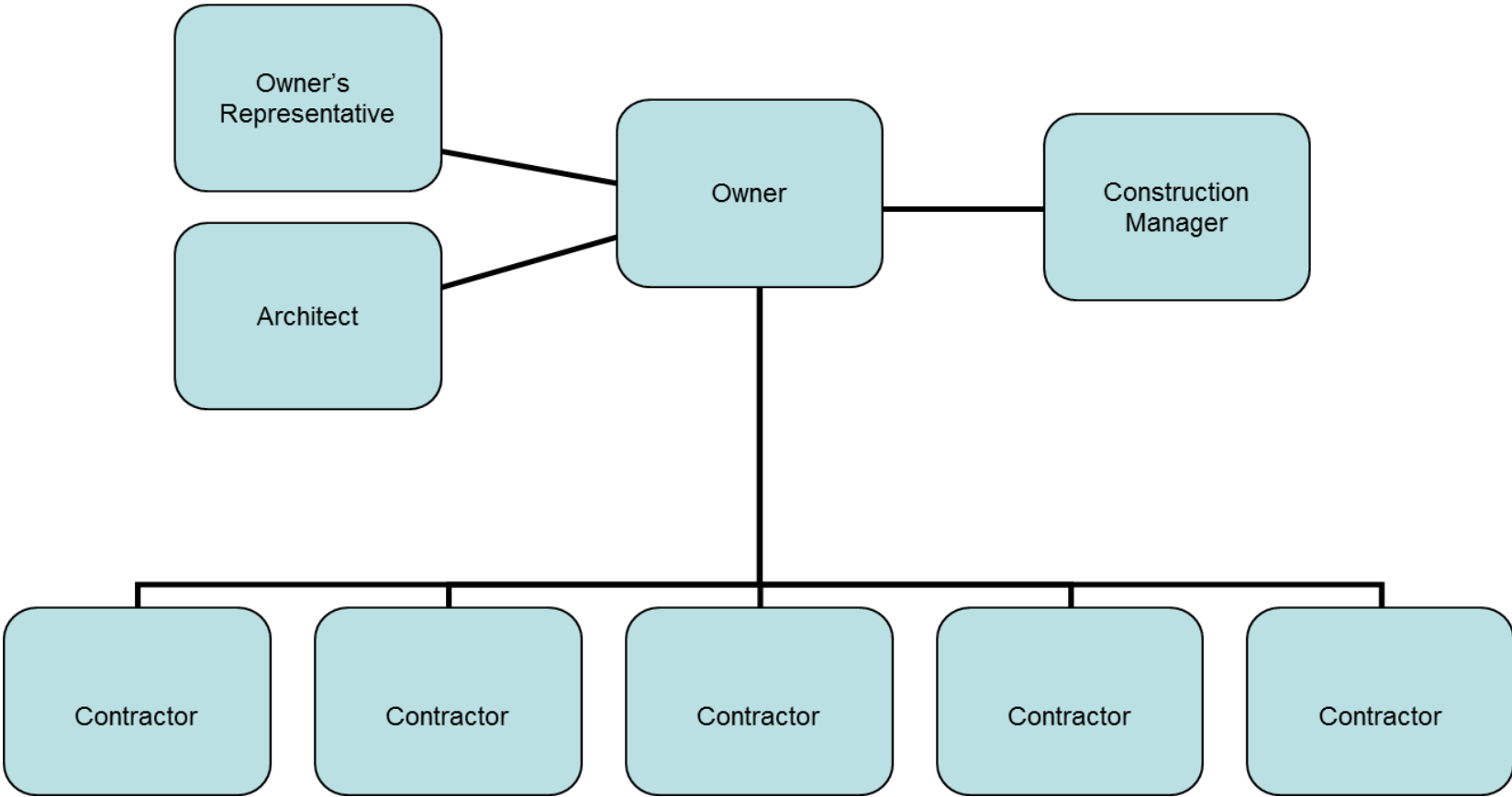
Delivery Method – Owner with General Contractor



Delivery Method – Owner with Construction Manager



Delivery Method – Owner with CM and Owner’s Representative



Legal Aspects Of Procurement – MCL 380.11a

The Broad Powers under the Revised School Code – MCL 380.11a

- General Powers School Districts
- School districts have express powers, and may exercise those **powers that are implied or incidental to those express powers**, and may also exercise a power incidental or appropriate to the performance of any function related to the operation of the school district **in the interest of public elementary and secondary education within the school district.**
- “Educational Nexus”
- Express Power for Purchasing:
MCL 380.11a(3)(c) – “Acquiring, **constructing**, maintaining, repairing, **renovating**, disposing of, or conveying school property, facilities, equipment, technology, or furnishings.”
- MCL 380.11a(4) – “A general powers school district may enter into agreements or cooperative arrangements with other entities, public or private, or join organizations as part of performing the functions of the school district.”

Legal Aspects Of Procurement – MCL 380.1267

Construction and Repair of School Buildings – MCL 380.1267

- **Before commencing construction of new school building, or addition to or repair or renovation of an existing school building, except in emergency situation, the school district shall obtain competitive bids on all material and labor to complete construction costing **\$23,881** or more.**
- **Specific Requirements for Bidding Procedures:**
 - Advertise once in local **newspaper**
 - Post advertisement on **State website** for at least 2 weeks
 - Advertisement must specify:
 - Date and Time bids are due
 - School district will not accept or consider late bids
 - Date, time and place where bids will be opened and read aloud
 - Each bid shall be accompanied by sworn and notarized familial affidavit
 - Will not accept bid that does not include sworn and notarized familial affidavit
 - A Bid Bond (5% of bid amount) is required
- **Reservation of Rights for 1267(5)(late bids) & 1267(6)(reject all and re-bid)**
- **Michigan-based Business Preference (same requirements as Section 1274)**

Legal Aspects Of Procurement – MCL 380.1274a

Energy Conservation Projects - MCL 380.1274a

- Projects include, but not limited to: building envelope improvements; heating & cooling; equipment upgrades; lighting retrofits; energy management systems; etc.
- May pay with general funds or issue bonds.
- Energy conservation improvements or substance removal or treatment authorized by this section is **subject to the competitive bidding requirements of section 1267.**

NEW Procedures for Posting on State Website (Effective October 27, 2017)

- The **NEW** state website for posting is SAIGMA VSS (www.michigan.gov/sigmavss) (formerly www.buy4michigan.com)
- Posting Procedures
 - School district must create an account MILogin (in addition to SIGMA) to post.
 - Old information will not transfer.
 - Process to obtain “security clearance” and obtain access can take a week or more.
 - School district must post bids (and attachments) itself.
 - May be used for bids other than construction.

Legal Aspects Of Procurement

- ❑ **The Revised School Code – MCL 380.1 et seq.**
 - **MCL 380.1263(3)**
 - Requires that the design or construction of school buildings used for instruction or non-instructional purposes comply with requirements of School Building Construction Act.
- ❑ **School Building Construction Act – MCL 388.851 et seq.**
 - Monetary Threshold for Applicability - \$15,000 (“Total Cost”)
 - All plans and specifications for the construction, renovation, repair or remodeling of a school building must be prepared by an architect or professional engineer licensed in Michigan.
 - Architect, professional engineer or “other person qualified to supervise construction” must supervise the construction of a school building.
 - May NOT dispense of architect or professional engineer after they prepare plans/specifications.
 - Authorized Department of Licensing and Regulatory Affairs (“LARA” – formerly DELEG) to administer Act and Single-State Construction Code Act.
 - Design-Build – Only permitted for energy conservation improvement projects (MCL 380.1274a)

Legal Aspects Of Procurement

- Iran Economic Sanctions Act – MCL 129.311 *et seq.* (Became effective April 1, 2013)
 - An Iran linked business is not eligible to submit a bid on ANY request for proposal with a Public Entity.
 - A Public Entity shall require a person that submits a bid on ANY request for proposal with the public entity to certify that it is not an Iran linked business.
 - If Public Entity determines that certification is false, must give written notice to bidder of such determination and intent to not enter into, or renew, the contract.
 - Bidder has 90 days to demonstrate certification was not false, and if not done, Public Entity may terminate contract and shall report bidder to State Attorney General.
 - Civil penalty against bidder for non-compliance is the greater of \$250,000 or 2 times the amount of contract AND is ineligible to bid on any request for proposal for 3 years from the date of the Public Entity's determination of false certification.
 - "Public Entity" definition includes a school district and an intermediate school district, and implicitly a public school academy.

BEST PRACTICE - obtain certification by requiring an affidavit in RFP documents that bidder must complete and include/submit as part of its proposal.

Legal Aspects Of Procurement

- ❑ **Contractor's Bond for Public Buildings and Works Act – MCL 129.201 et seq.**
 - **Monetary Threshold for Applicability - \$50,000 ("Contract Amount")**
 - **Requirement for Performance Bond**
 - **Protects Owner if Contractor does not perform**
 - **Must be at least 25% of Contract Amount**
 - **Requirement of Payment Bond**
 - **Protects materialmen/suppliers and subcontractors against non-payment by contractor since lien on public property is prohibited.**
 - **Must be 25% of Contract Amount**
 - **Surety must be licensed in Michigan**
 - **Be aware of notice requirements if elect to invoke the Bond**

Common Misperceptions of the Law

- ❑ **State Website Posting Requirements for Construction**
 - Has changed from “Buy4Michigan” to “SIGMA VSS & MILogin”
 - Can be lengthy process to obtain login credentials

- ❑ **Length on State Website and in Newspaper**

- ❑ **Due Dates and Late Bids**

- ❑ **Waiver of RFP vs. Legal Requirements**
 - Bid Bond
 - Familial Disclosure Affidavit
 - Iran Linked Business Certification (Affidavit)

- ❑ **Licensed Architects/Engineer required for construction projects over \$15,000 regardless of bidding requirements**

Common Misperceptions of the Law

- ❑ **Emergency Exception under MCL 380.1267**
 - **ONLY** applies to “repairs in emergency situations”
 - **“Emergency”** = failure to repair school building would have detrimental effect on building or on the **health, safety or welfare** of students or occupants of the school building.
- ❑ **No “Sole Source” Exception**
- ❑ **Definition of “School Building” can be broad**
 - MCL 388.851a – “School Building” includes all buildings used for school purposes
 - MCL 125.1502a(1)(f) – “Building” means a combination of materials, whether portable or fixed, forming a structure “bonding a facility or shelter for use or occupancy by persons, animals or property”
 - MCL 125.1502a(1)(z) – “Structure” means that which is built or constructed, an edifice or building of any kind, or piece of work continually built up or composed of parts joined together in some definite manner.

Common Misperceptions of the Law

□ LARA Issues

- **Delegated authority under MCL 380.1263**
- **Approval of Plans**
- **Permits and Licensing**
 - **Minor Repair Exceptions**
 - **Electrical Exceptions (< \$100)**
 - **No Plumbing Exceptions**
- **Certain Use Requires Local Reviews**
 - **Examples that require local review:**
 - **Cell Towers**
 - **Driveways/Access Entries**
 - **Sanitary/Storm Sewer and Water Supply Systems**
 - **Traffic Control**
 - **Wetlands**

Common Misperceptions of the Law

- ❑ **Common Projects often not “viewed” as Construction**
 - **Field Turf Installation**
 - **Demolition of Buildings**
 - **Re-Opening of a Previously Closed Building**

- ❑ **Third-Parties who perform work as part of other services**
 - **Contractors who perform construction as part of other services may still be required to comply with Construction Laws and may require LARA and Local review**
 - **Examples that may require “dual purpose” LARA and Local submittals:**
 - **Cell Tower Installations**
 - **Leasing of Buildings**

Construction Do's and Don'ts

- ❑ **DO hire design and management professionals who special in school construction.**
- ❑ **DON'T have Board approve professional before contract is fully negotiated.**
- ❑ **DO submit prototype Contractor Agreement, along with General and Supplementary Conditions, to School's legal counsel.**
- ❑ **DON'T rely upon legal documents prepared by Architect or Construction Manager.**
- ❑ **DO read and verify all bid, performance and payment bonds.**
- ❑ **DON'T accept form of bond that is less protective than AIA form.**
- ❑ **DO require Architect and CM to take responsibility for requiring adequate insurance for the specific contract in question.**
- ❑ **DON'T rely upon the standard insurance requirements of AIA documents – have your insurance carrier review.**

THANK YOU! Any Questions?



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