

COGENCE Alliance

Owners+Architects+Engineers+Contractors

Inspire. Educate. Unite.

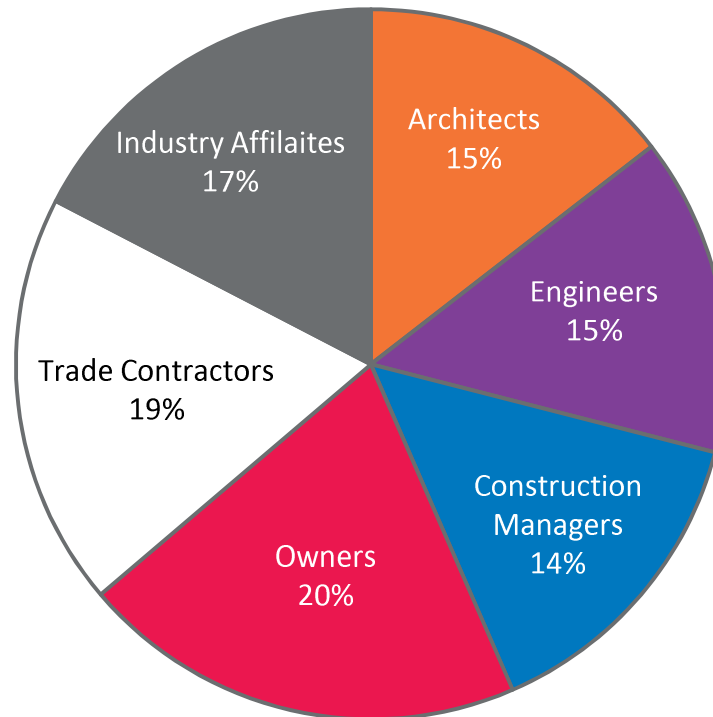
Is Collaborative Contracting an Oxymoron?

14 September 2016



Cogence Partnership Demographics

Cogence Partners as of September 2016



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Mission + Purpose

Cogence *(Latin)*

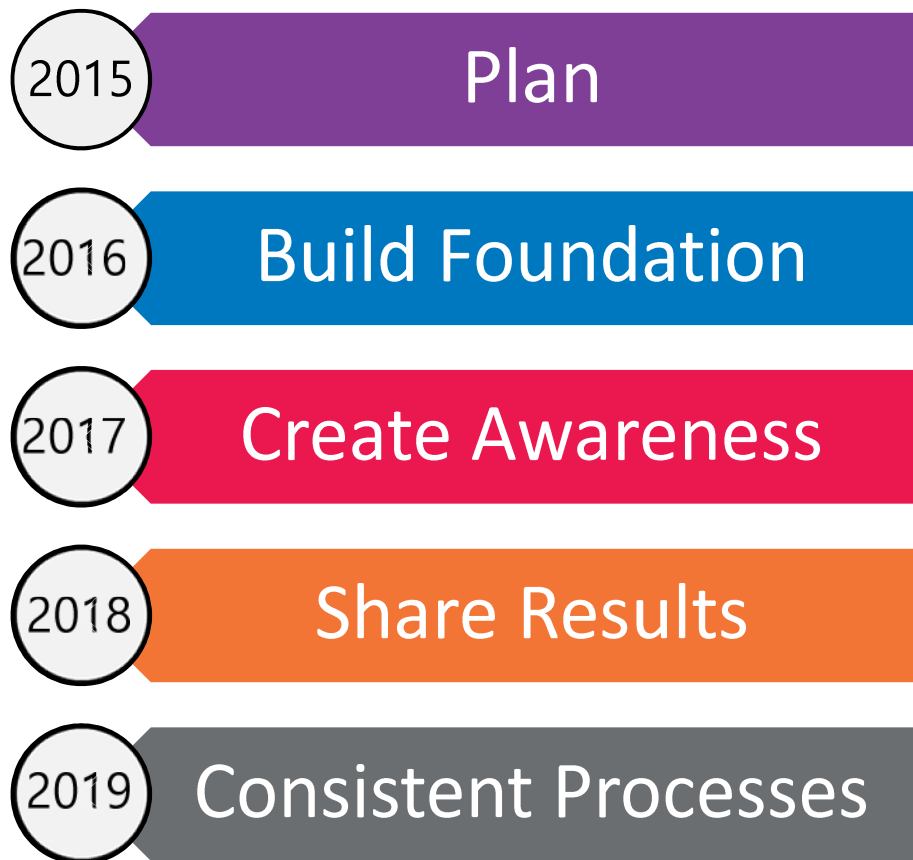
“To drive together” or “Thinking that is well organized”

The purpose of the Alliance is to bring Owners and Developers, Architects and Engineers, Construction Managers and Contractors, and Allied Industry Professionals together to **advocate and be a **resource** for improved project delivery.**

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Cogence Strategy Timeline



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Agenda

- Introduction
- Collaborative Contracting
- General Updates
- Plus/Delta

Introduction

Questions for Exploration

- Can the principles and benefits of collaboration extend to the contracting process itself?
 - Area of Focus 1: Contract structure (legal, financial and process terms; negotiating process)?
 - Area of Focus 2: Contract administration?
 - Area of Focus 3: Issue Resolution?
- What tools/techniques can be employed to enhance collaboration and opportunities for success for each of these areas of focus?

Some Housekeeping Notes

- Meeting Minutes
- Cell Phones off or “on Stun”
- Social Hour



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More Housekeeping Notes

- This is an interactive session
- Work with the same keypad the entire time
- Please answer all questions
- Please tell the truth.... think of the keypad as a lie detector!

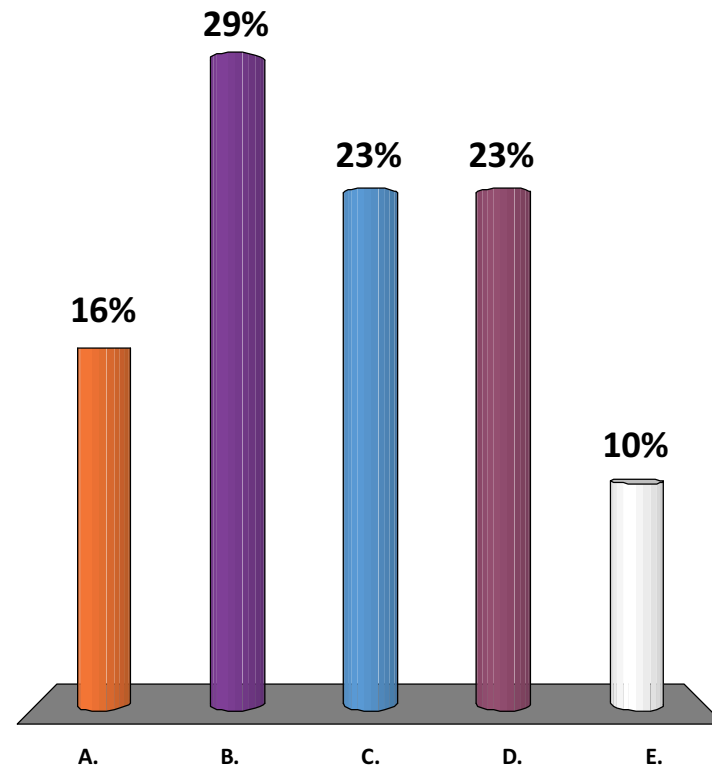




Demographics

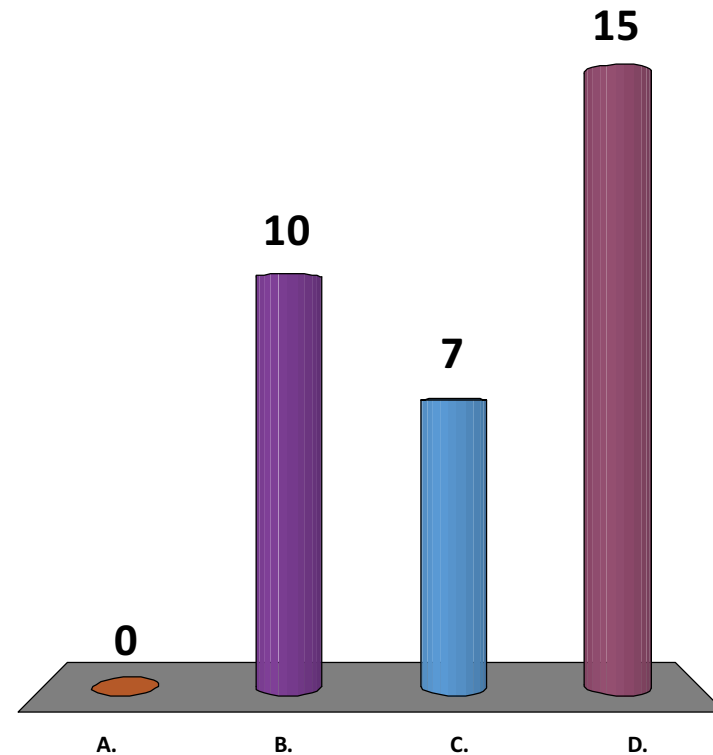
My primary affiliation is:

- A. Owner
- B. Architect/Engineer
- C. CM/General Contractor
- D. Subcontractor
- E. Other Service Provider



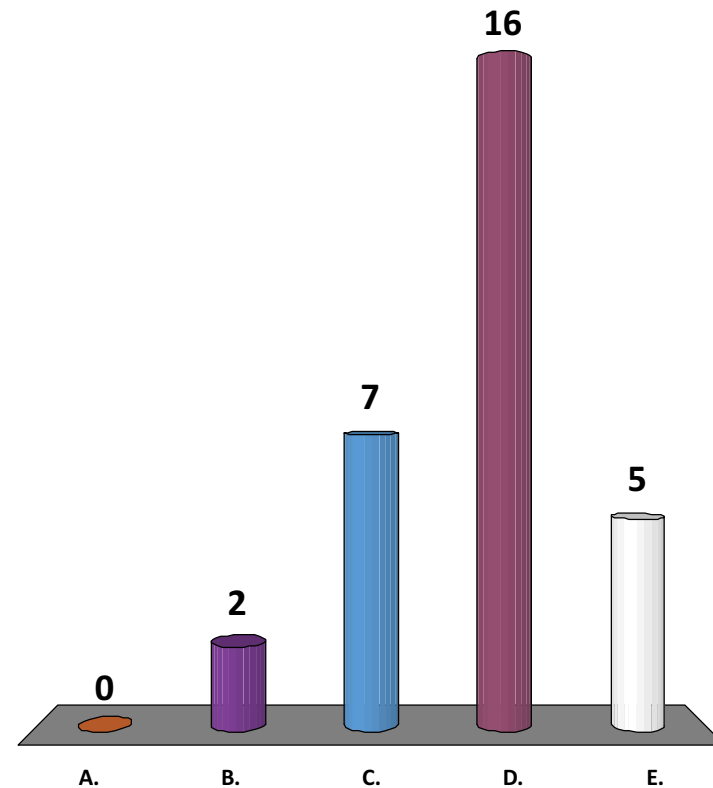
I have been involved in the design/construction industry:

- A. Less than 10 years
- B. Ten to 20 years
- C. 20 to 30 years
- D. More than 30 years



The percentage of my work on public sector projects is:

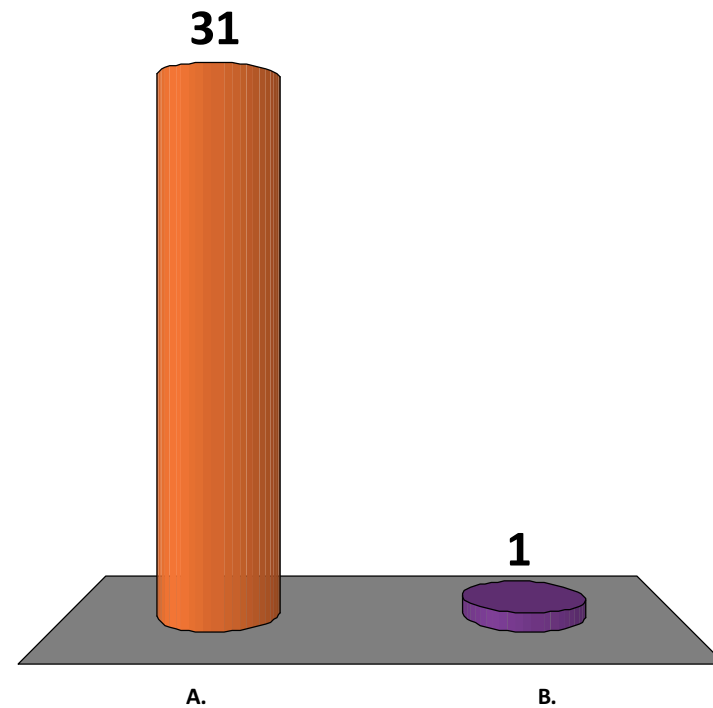
- A. 100%
- B. 67 to 99%
- C. 34 to 66%
- D. 1 to 33%
- E. 0%



I have been directly involved in the preparation, negotiation or pricing of a design or construction contract

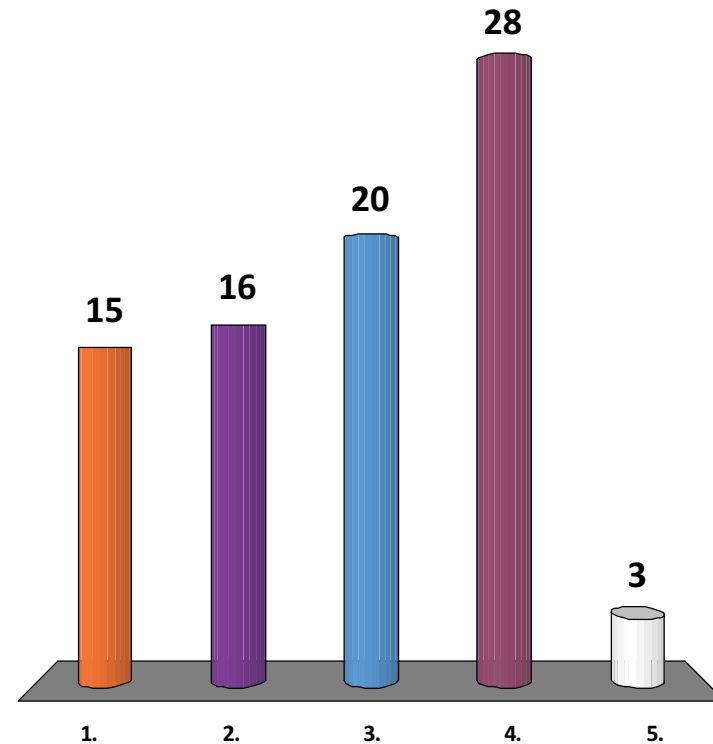
A. Yes

B. No



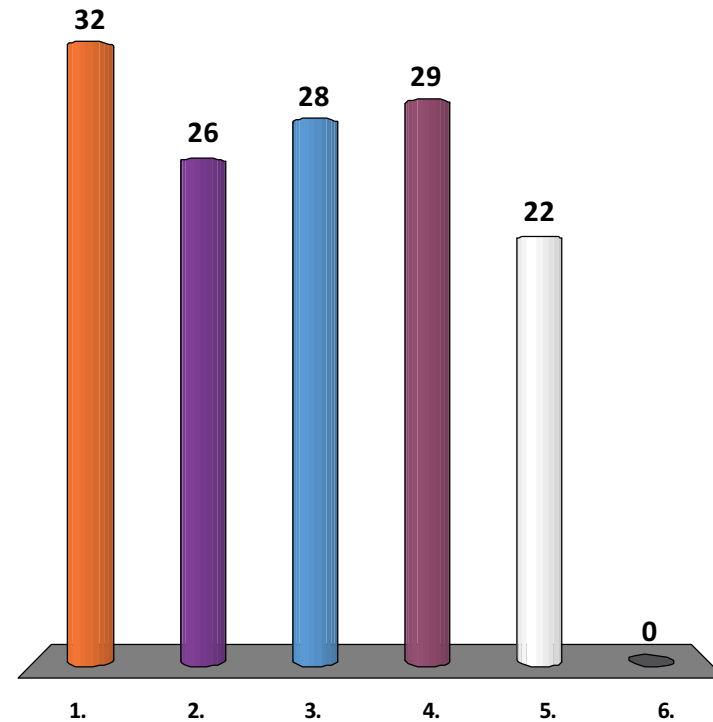
I have been directly involved in following (check all that apply):

1. Litigation of a design or construction claim
2. Arbitration of a design or construction claim
3. Mediation of a design or construction claim
4. Informal resolution of a design or construction claim
5. None of the above



I have personally worked in the following contractual settings (check all that apply):

1. Design-Bid-Build (Single Prime)
2. Design-Bid-Build (Multiple Prime)
3. CM at Risk
4. Design/Build
5. IPD (Integrated Project Delivery)
6. None of the Above



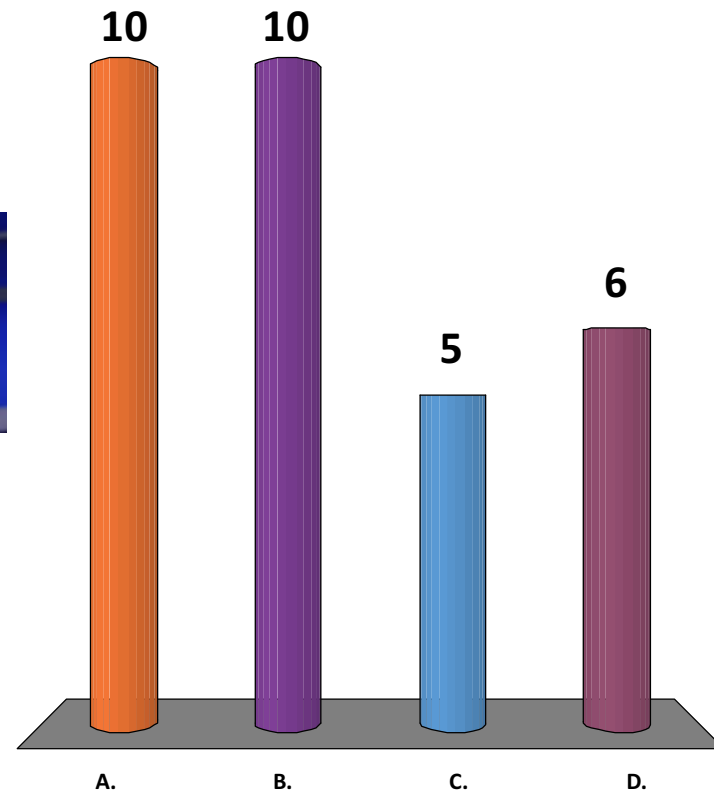
If the election took place tomorrow, I would vote for....

A. Clinton

B. Trump

C. Third Party

D. Not Vote



Topic #1: Contracting Philosophy

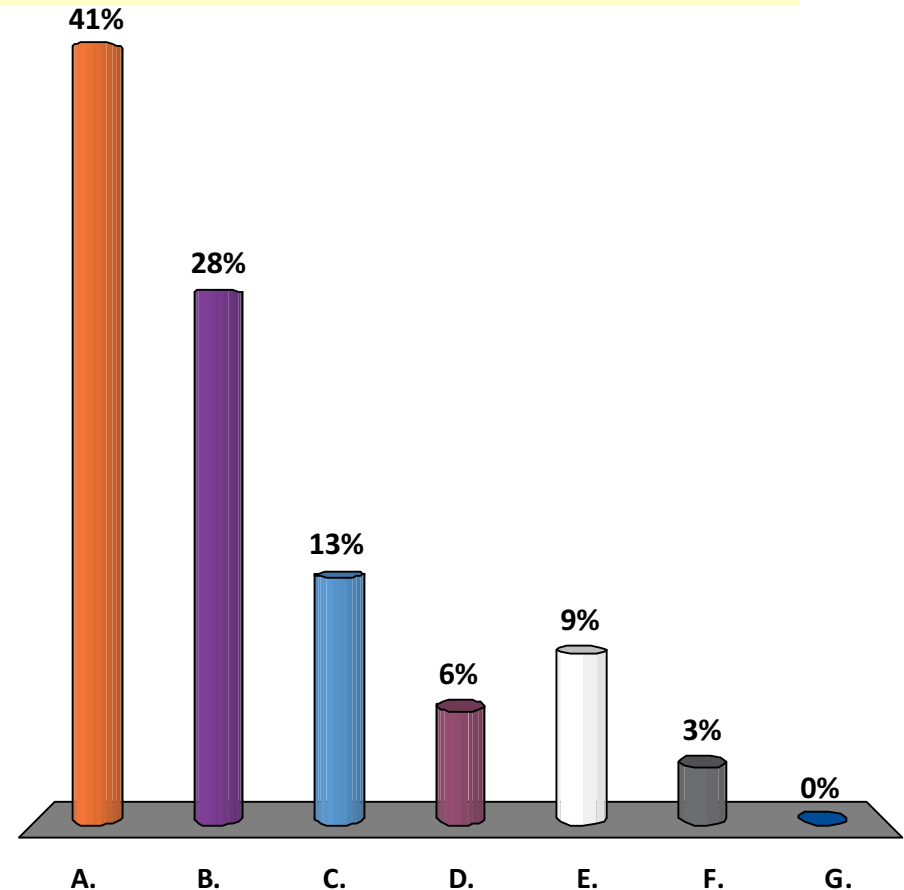
Some Preliminary Questions



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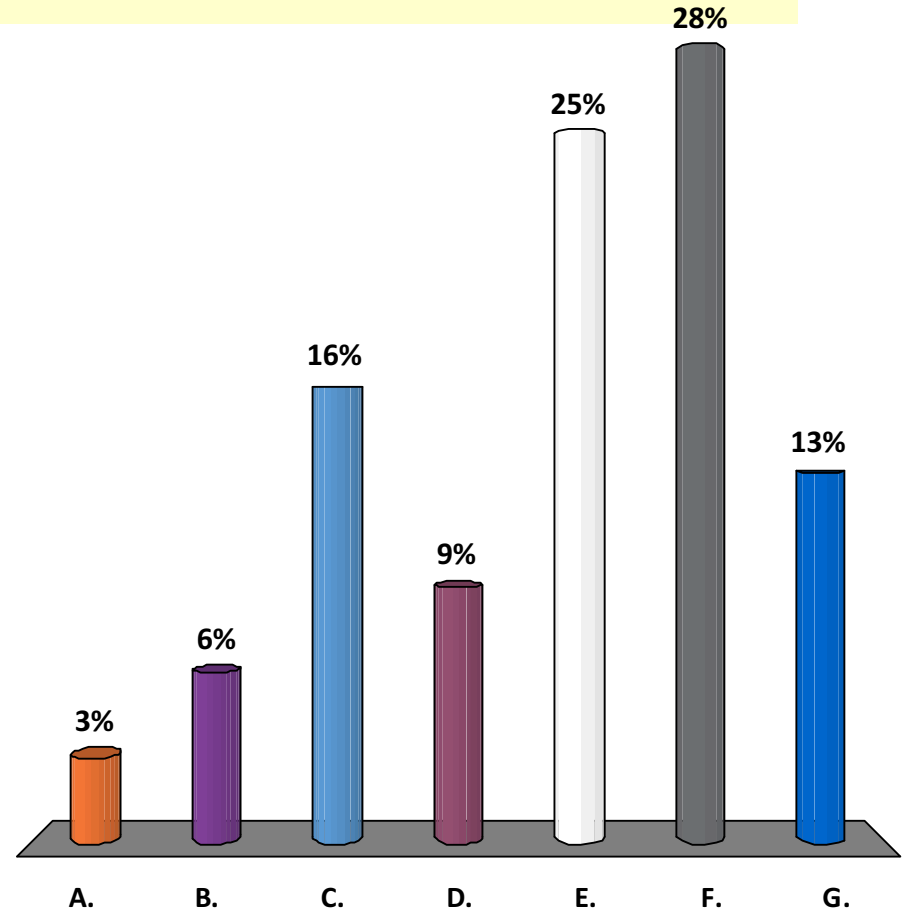
Most Owner's attempt to shift as much design and construction risk to the A/E or contractor as possible.

- A. Strongly Agree
- B. Agree
- C. Somewhat Agree
- D. Neutral
- E. Somewhat Disagree
- F. Disagree
- G. Strongly Disagree



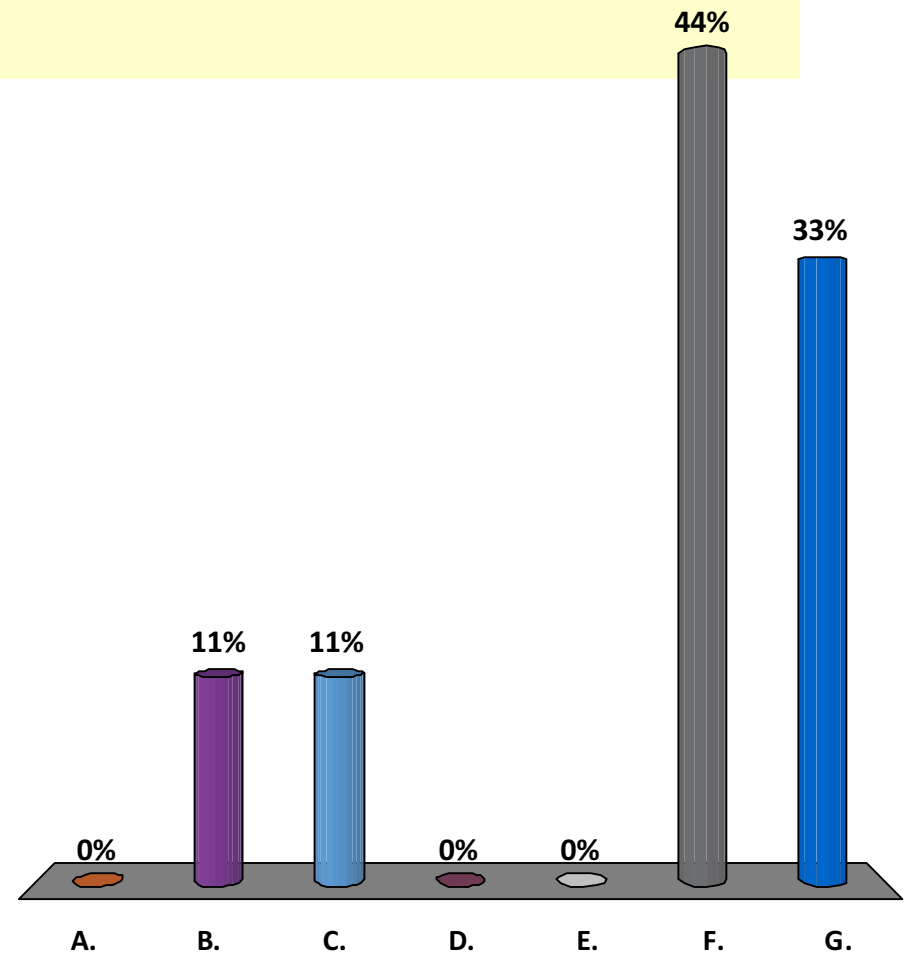
It is usually in the Owner's best interest to shift as much design and construction risk to the A/E or contractor as possible.

- A. Strongly Agree
- B. Agree
- C. Somewhat Agree
- D. Neutral
- E. Somewhat Disagree
- F. Disagree
- G. Strongly Disagree



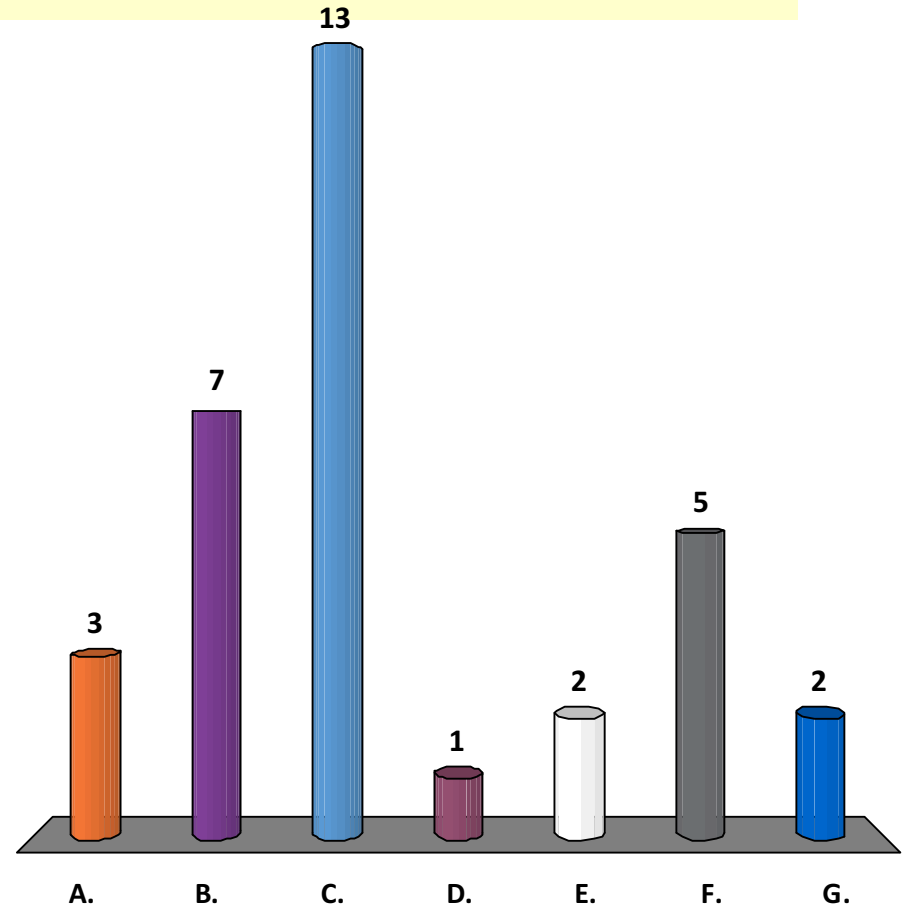
As a general proposition, Design Professionals can adjust to contractual risk shift by pricing their services or work accordingly.

- A. Strongly Agree
- B. Agree
- C. Somewhat Agree
- D. Neutral
- E. Somewhat Disagree
- F. Disagree
- G. Strongly Disagree



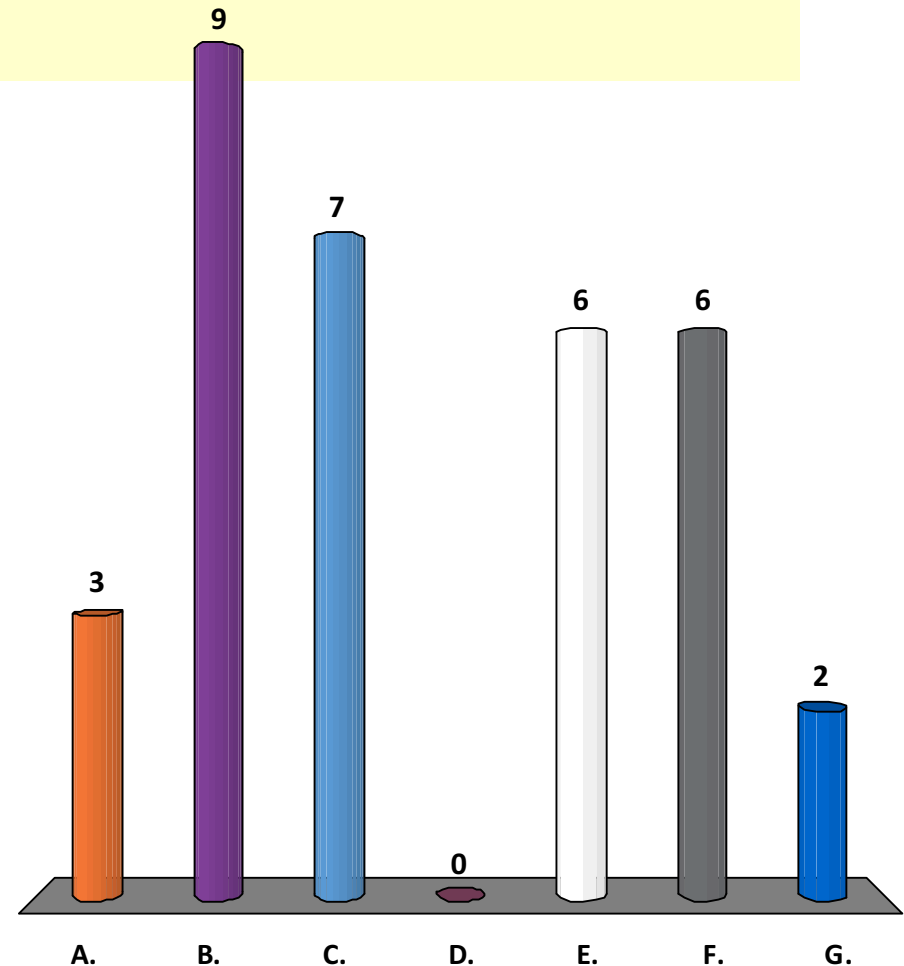
As a general proposition, GC/CMs can adjust to contractual risk shift by pricing their services or work accordingly.

- A. Strongly Agree
- B. Agree
- C. Somewhat Agree
- D. Neutral
- E. Somewhat Disagree
- F. Disagree
- G. Strongly Disagree



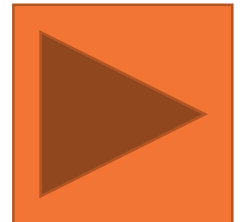
As a general proposition, Subcontractors can adjust to contractual risk shift by pricing their services or work accordingly.

- A. Strongly Agree
- B. Agree
- C. Somewhat Agree
- D. Neutral
- E. Somewhat Disagree
- F. Disagree
- G. Strongly Disagree



Topic #1: Contracting Philosophy

- **What is the purpose/function of design and construction contracts?**
- **What, if anything, about contracts and their formation process should be collaborative?**
 - Is it important that contracts (as opposed to contract administration) evidence a collaborative philosophy?
 - Of the purposes/functions listed, which should, and practically can be, subject to collaborative discussions and outcomes during the contract formation stage?
- **How does this vary according to the Owner and project delivery method.**



Opportunities for Collaborative Contracting and Contract Administration

Opportunities for Collaboration	Public Project		Private Project	
	Design/Bid/Build	Alt. Delivery	Design/Bid/Build	Alt. Delivery
1. Contract Formation...Legal Terms				
2. Contract Formation...Financial Terms				
3. Contract Administration...Pre-Construction				
4. Contract Administration...Construction				
5. Issue Resolution				





Topic #1: Contracting Philosophy

- What tools are available to enhance collaboration and collaborative behavior in the design and construction contracting process?
 - Tools to help abate, properly transfer or allocate risk?
 - Tools to implement a successful budget reconciliation/GMP structure?
 - Tools to achieve successful issue resolution?



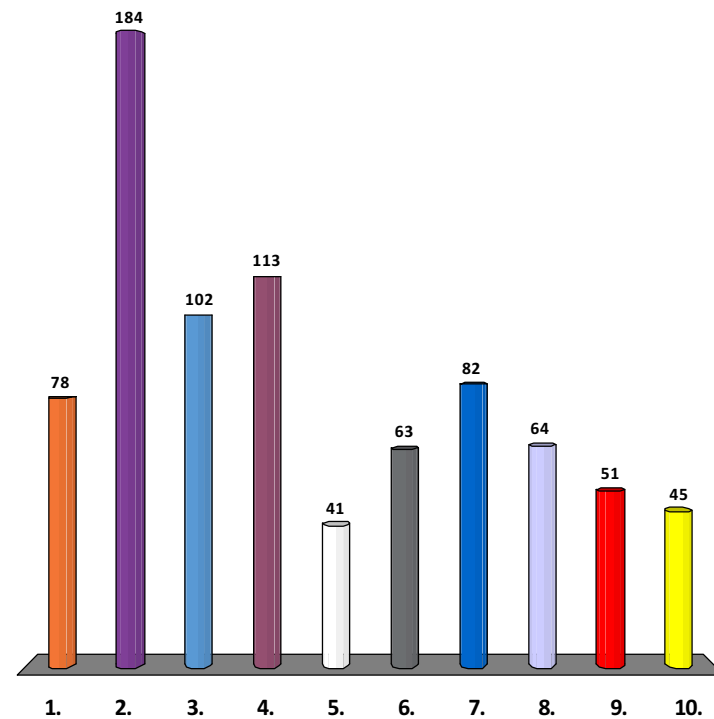
Topic #2: The Contract Formation Issues

- What are the most pressing issues that should be addressed (but are often ignored) during contract formation?
- What are some of the most difficult issues to be resolved during contract formation and negotiations?



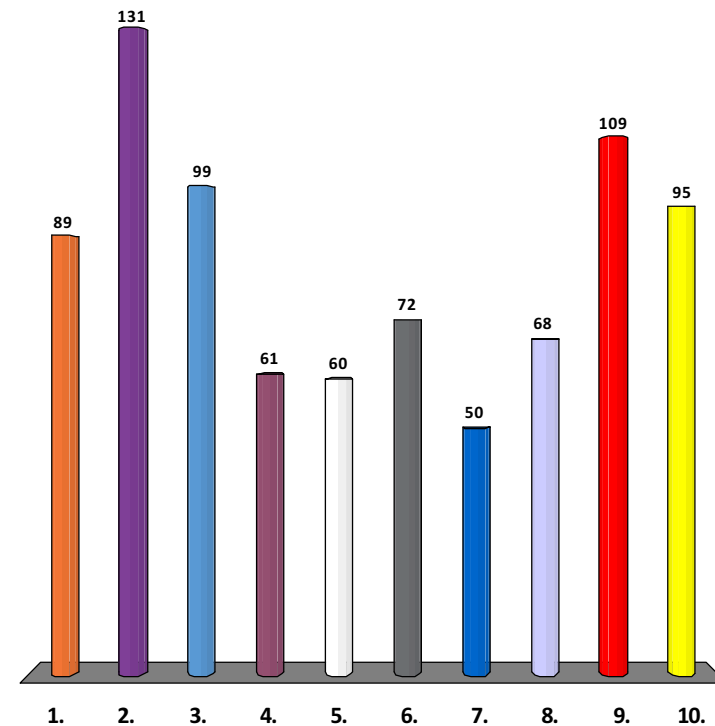
Most significant cause of project failure (Rank top 5)

1. Lack of trust
2. Poor communication
3. Untimely decision making
4. Failure to surface/resolve issues
5. Failure to manage changes
6. Poor process for managing budget/costs/GMP
7. Incomplete plans and specs
8. Failure to properly schedule/coordinate work
9. Unrealistic risk transfers
10. Misalignment of stakeholder roles and responsibilities



Which of these issues is either exacerbated, or not adequately addressed, by typical contracts or contracting process? (Rank top 5)

1. Lack of trust
2. Poor communication
3. Untimely decision making
4. Failure to surface/resolve issues
5. Failure to manage changes
6. Poor process for managing budget/costs/GMP
7. Incomplete plans and specs
8. Failure to properly schedule/coordinate work
9. Unrealistic risk transfers
10. Misalignment of stakeholder roles and responsibilities



Contractual Issues— Subcontractor Perspective

- Scope definitions/exclusions/overreaching scope provisions
- Undefined/unreasonable Flow Down provisions
- Exposure to Economic Loss/Consequential Damages
- Unreasonable Insurance/Indemnification requirements
- Unit price/labor rate/change order rate and justification
- Payment terms (including pay when/if paid; unreasonable retention/back charge provisions)



What else would you place on the list that is of similar importance?

Contractual Issues—CM/GC Perspective

- Extent of responsibility for incomplete design in GMP setting
- Exposure to Economic Loss/Consequential Damages
- Unreasonable Insurance/Indemnification requirements
- Conditions for use of contingency



What else would you place on the list that is of similar importance?

Contractual Issues—A/E Perspective

- Timing of fee negotiation (before scope/terms are fully defined)
- Standard of Care (definition; exoneration for reasonable omissions, etc.)
- Insurance terms and limits
- Payment terms
- Obligation to design to budget; no payment for redesign regardless of lack of fault
- Limitation of liability; exposure to consequential and other damages
- Scope of indemnification

What else would you place on the list that is of similar importance?



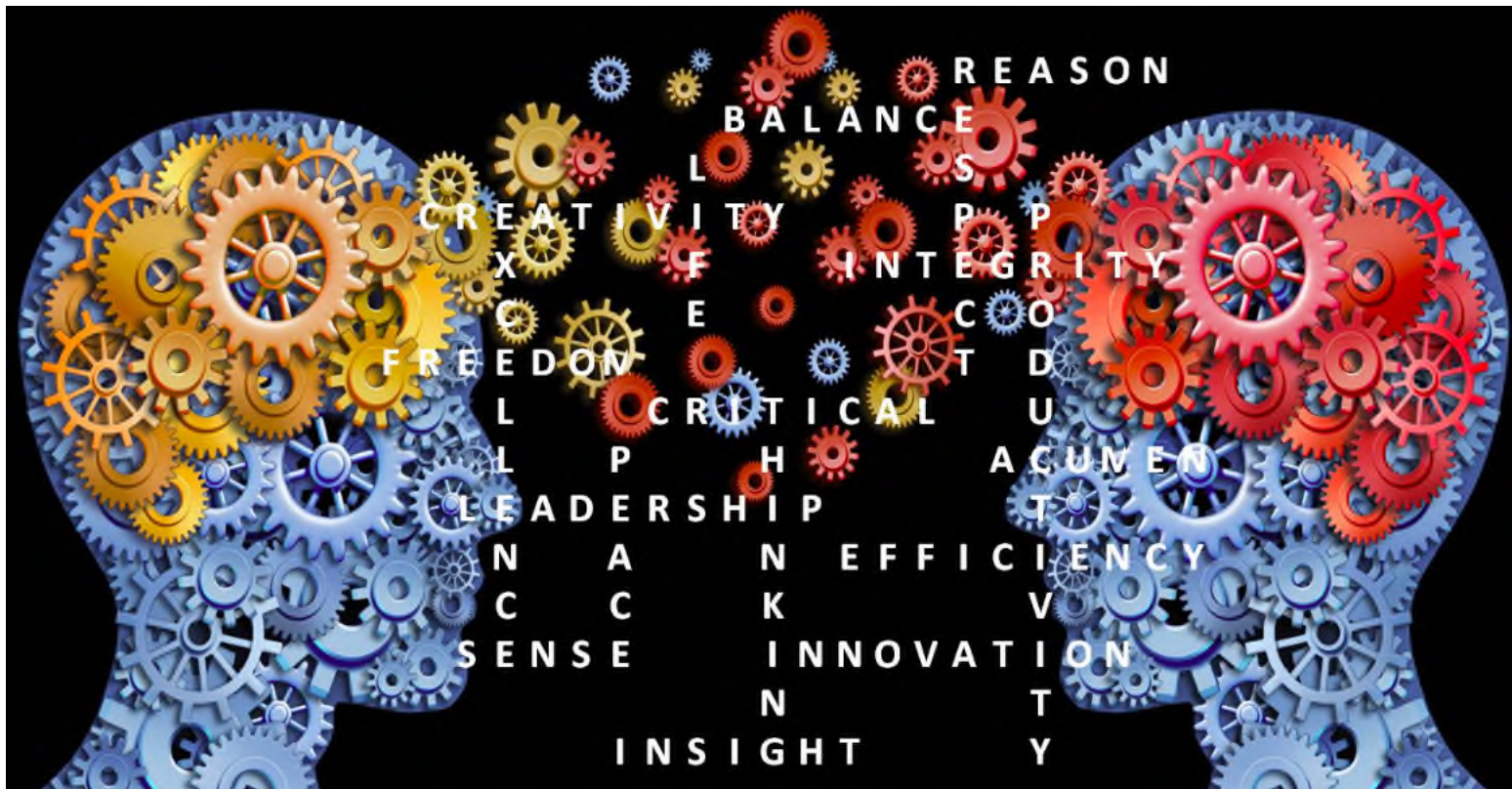
Contractual Issues – Owner Perspective

- Since we didn't get much of a response to the survey---you are on the spot now!!!
- What is on your list?

*I think I would possibly like to know some of the things I'm going to be asked about beforehand just because I think it's useful rather than being **put on the spot.***



Specific Issues Discussion



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Issue #1: Design Responsibility

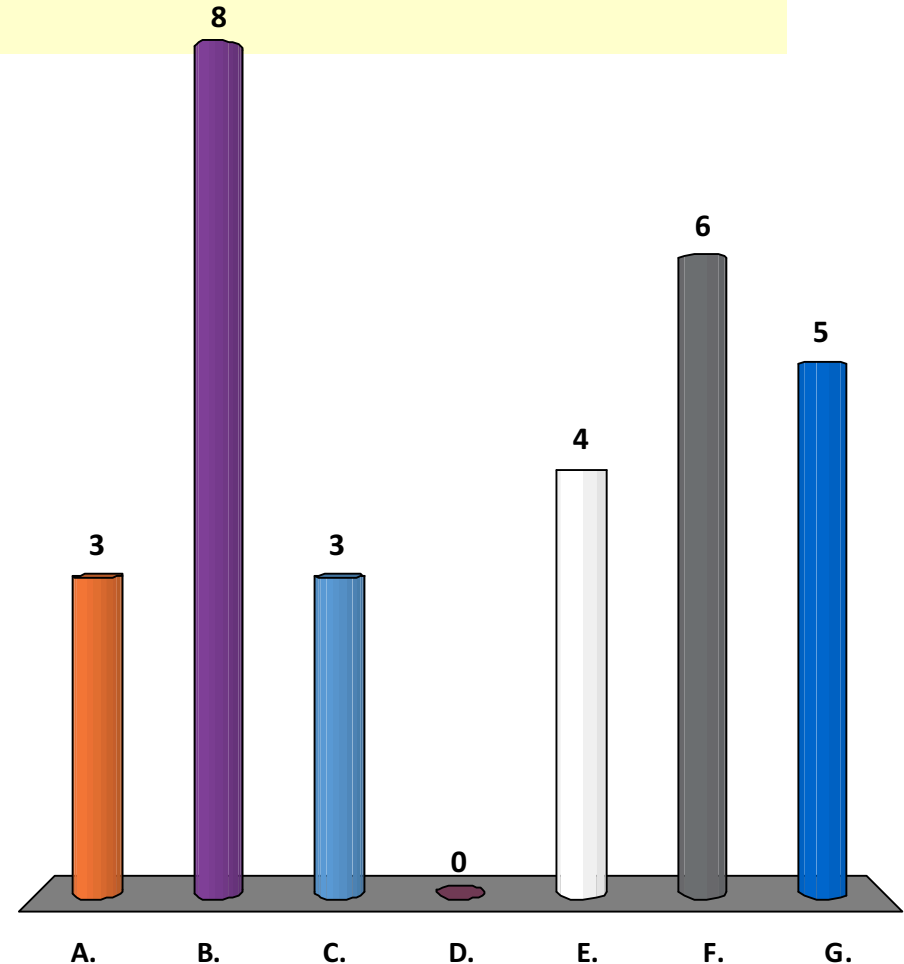
Some preliminary questions



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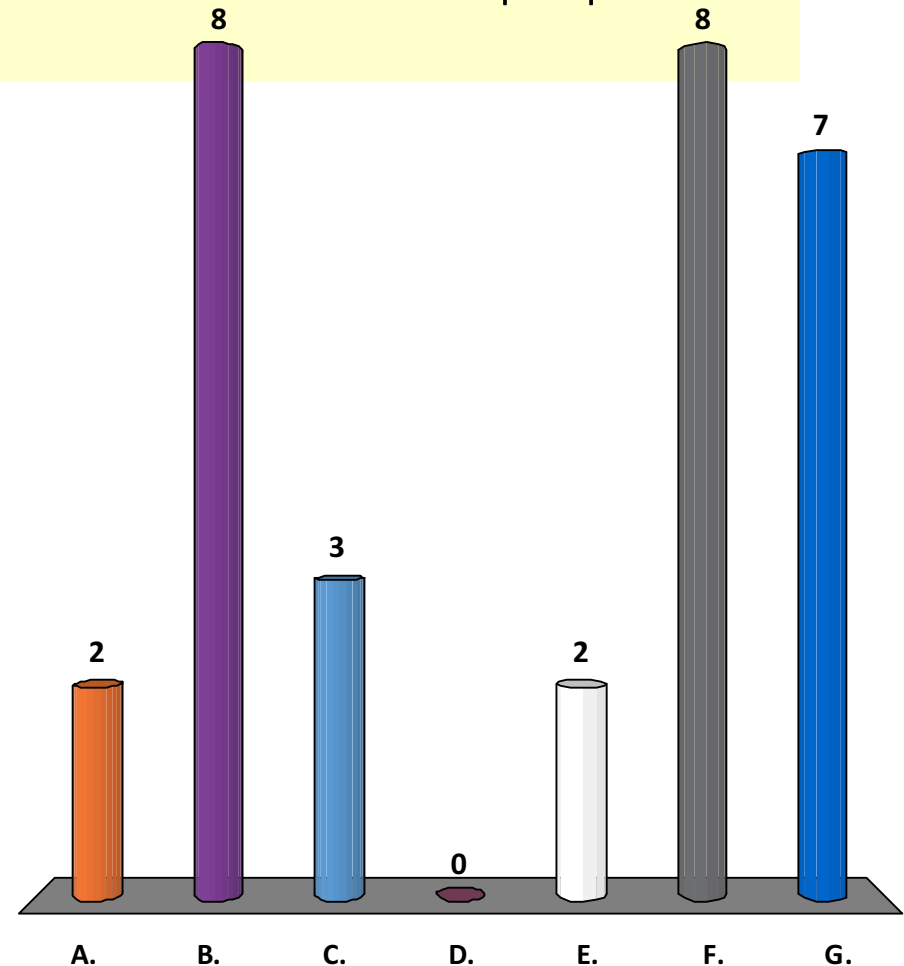
As a general proposition, the Owner warrants to the contractor the adequacy of plans and specifications prepared by the A/E.

- A. Strongly Agree
- B. Agree
- C. Somewhat Agree
- D. Neutral
- E. Somewhat Disagree
- F. Disagree
- G. Strongly Disagree



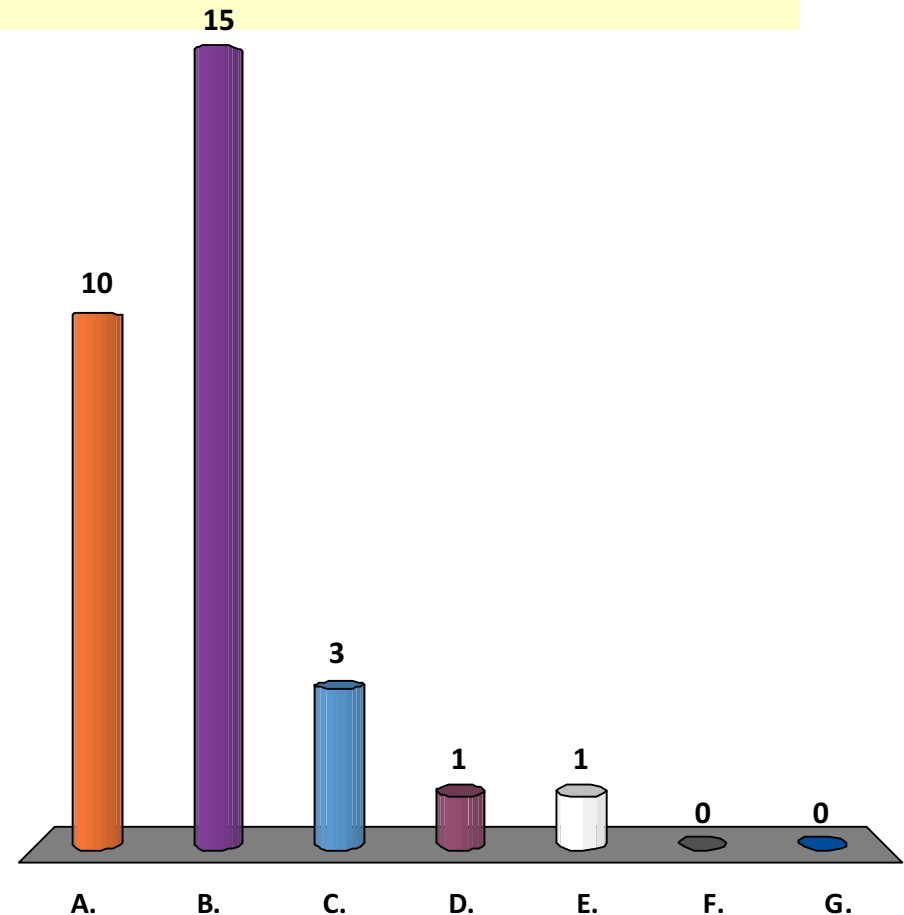
As a general proposition, the A/E warrants to the Owner the adequacy of the plans and specifications that it has prepared.

- A. Strongly Agree
- B. Agree
- C. Somewhat Agree
- D. Neutral
- E. Somewhat Disagree
- F. Disagree
- G. Strongly Disagree



As a general proposition, most Owners believe that the A/E warrants to the Owner the adequacy of the plans and specifications that the A/E has prepared.

- A. Strongly Agree
- B. Agree
- C. Somewhat Agree
- D. Neutral
- E. Somewhat Disagree
- F. Disagree
- G. Strongly Disagree



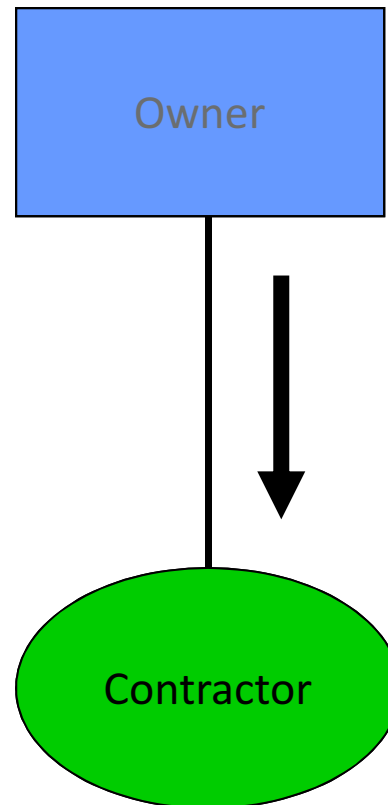
“ A Brief Detour to Discuss Design Responsibility”

The Spearin Rule

The Spearin Rule:

“The Owner warrants (to Contractor) the adequacy of plans and specifications”

United States v. Spearin, 248 U.S. 132 (1918);

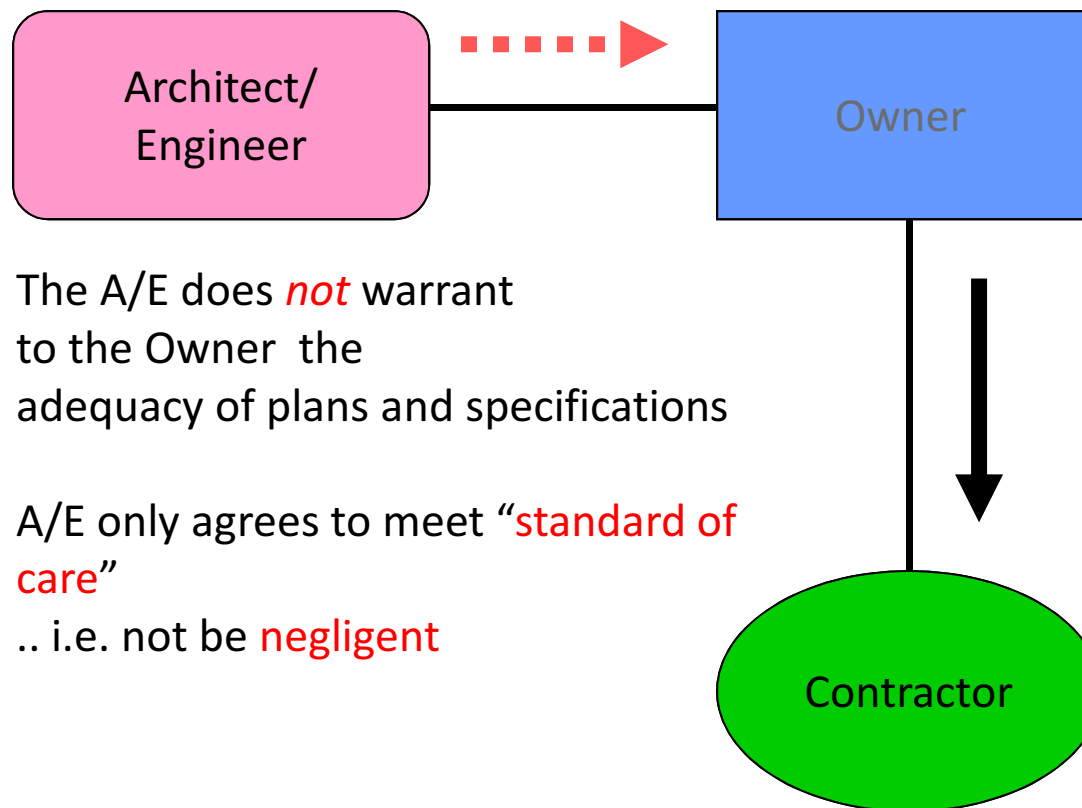


The Spearin Gap

The Spearin Rule:

“The Owner warrants (to Contractor) the adequacy of plans and specifications”

United States v. Spearin, 248 U.S. 132 (1918);





Issue #1: Design Responsibility

What Are the Contractual Implications of the Spearin Gap

- How is each party impacted?
 - Owner?
 - A/E?
 - CM/GC
 - Subcontractor?
- How does this issue arise in contract negotiations?



Issue #1: Design Responsibility

Owner's Clause: Designer shall perform the Services with the highest and best degree of skill, care, diligence and quality in the Owner's sole judgment and warrants that the Design Documents will be adequate for the Owner's intended purposes.

 **How does A/E discuss this provision with an Owner?**



Issue #1: Design Responsibility

Owner's Clause: Designer shall perform the Services with the highest and best degree of skill, care, diligence and quality in the Owner's sole judgment and warrants that the Design Documents will be adequate for the Owner's intended purposes.

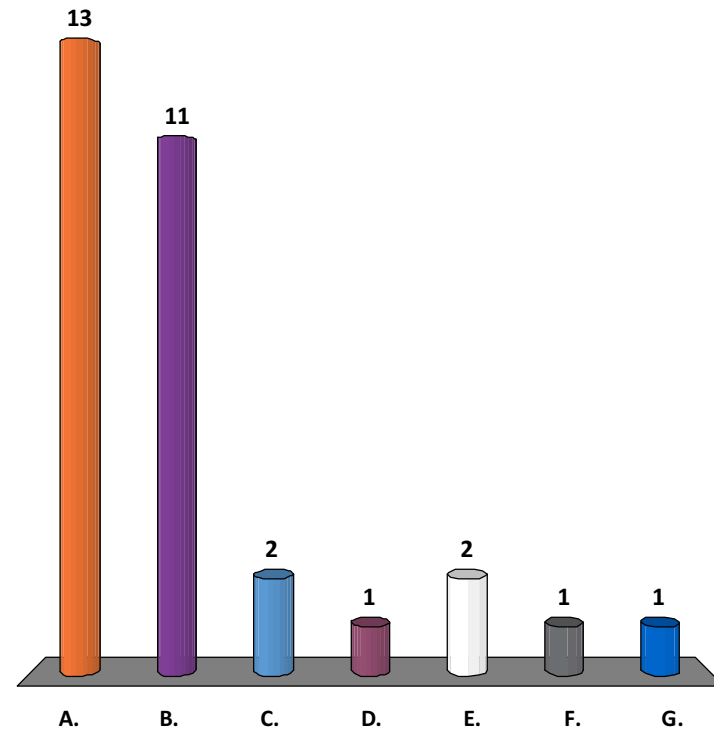
- How does A/E discuss this provision with an Owner?
- Assume A/E provides this alternative...

Designer shall perform the Services with the ~~highest and best degree~~ *standard* of skill, care, diligence and quality *ordinarily exercised by Designers performing similar services for projects in this locality.* ~~in the Owner's sole judgment and warrants that the Design Documents will be adequate for the Owner's intended purposes.~~

- What are the Owner's legitimate concerns with this markup?

Perfection is not required of the A/E. On a \$20M (construction cost) project, if additional work necessitated by errors caused by the A/E totals \$100k (1/2%), the A/E has met the standard of care.

- A. Strongly Agree
- B. Agree
- C. Somewhat Agree
- D. Neutral
- E. Somewhat Disagree
- F. Disagree
- G. Strongly Disagree







Issue #1: Design Responsibility

- Aside from uncertainty, what other issues does Spearin create in contracts?
- What Tools are available to create collaborative solutions? What successes have you had dealing with this issue in a collaborative fashion?
- What are the implications for Owners, Design Professionals and Contractors as we increase reliance on Building Information Modeling and delegated design?

Issue #2: Extraordinary Risks; Delay and Consequential Damages

-  How do we deal with the issues of Economic Damages, Consequential Damages and Delay
-  Some questions...



Stupid Questions

There are no stupid questions.
Only stupid people who ask questions.

A Mutual Waiver of Consequential Damages is normally appropriate in agreements between the Owner and A/E (or Design Builder and A/E)

A. Strongly Agree

B. Agree

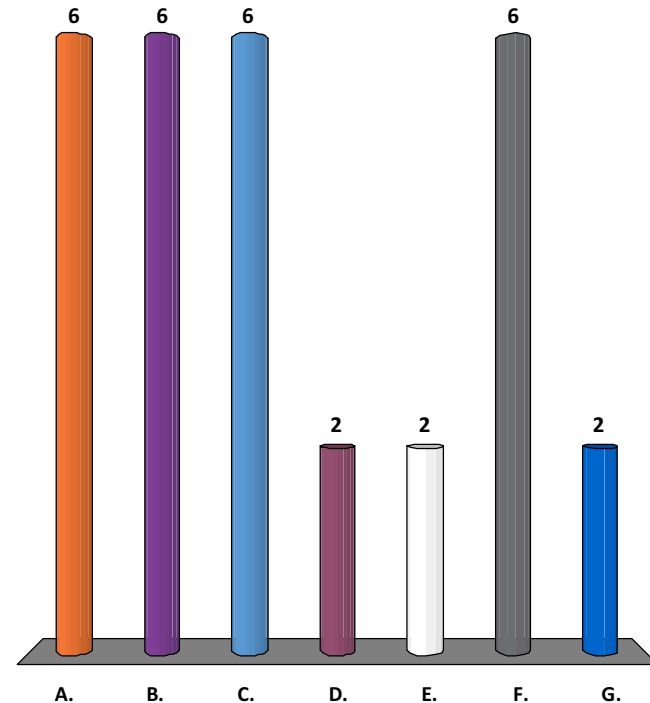
C. Somewhat Agree

D. Neutral

E. Somewhat Disagree

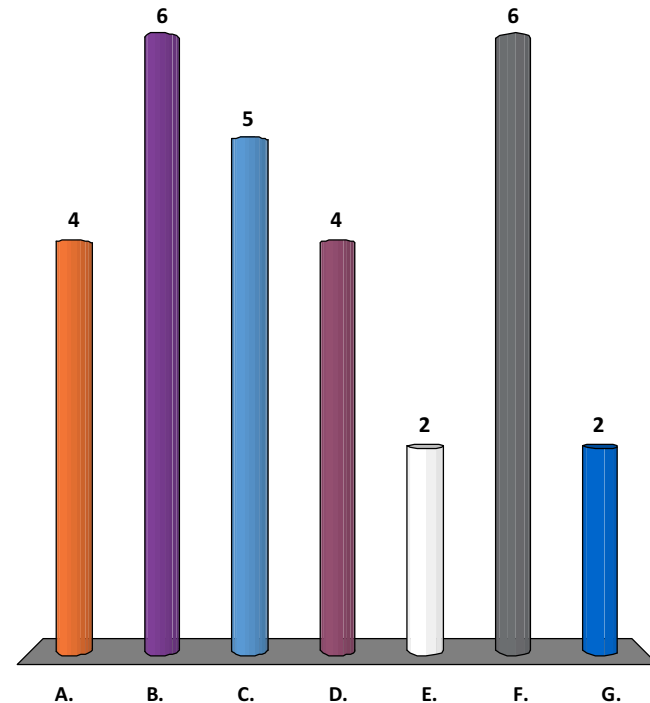
F. Disagree

G. Strongly Disagree



A Mutual Waiver of Consequential Damages is normally appropriate in agreements between the Owner and GC/CM (or Design Builder).

- A. Strongly Agree
- B. Agree
- C. Somewhat Agree
- D. Neutral
- E. Somewhat Disagree
- F. Disagree
- G. Strongly Disagree



A Mutual Waiver of Consequential Damages is normally appropriate in agreements between the GC/CM (or Design Builder) and the Subcontractor.

A. Strongly Agree

B. Agree

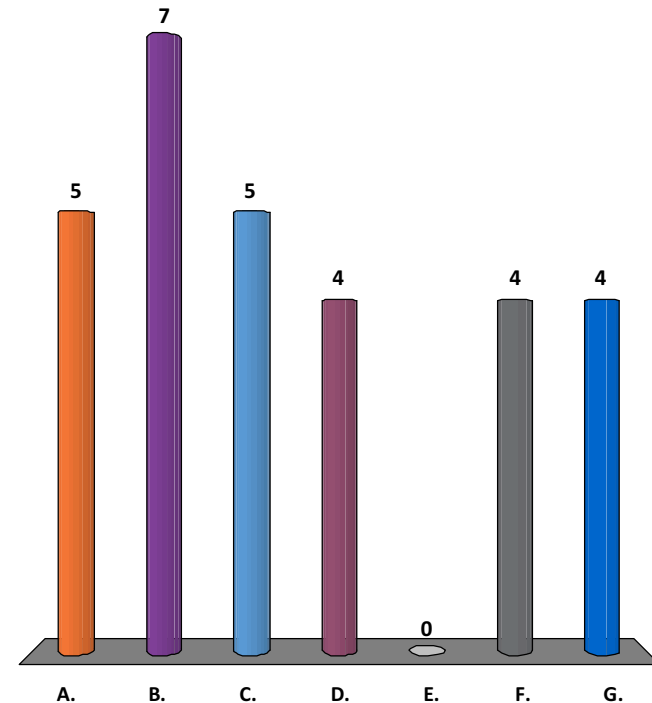
C. Somewhat Agree

D. Neutral

E. Somewhat Disagree

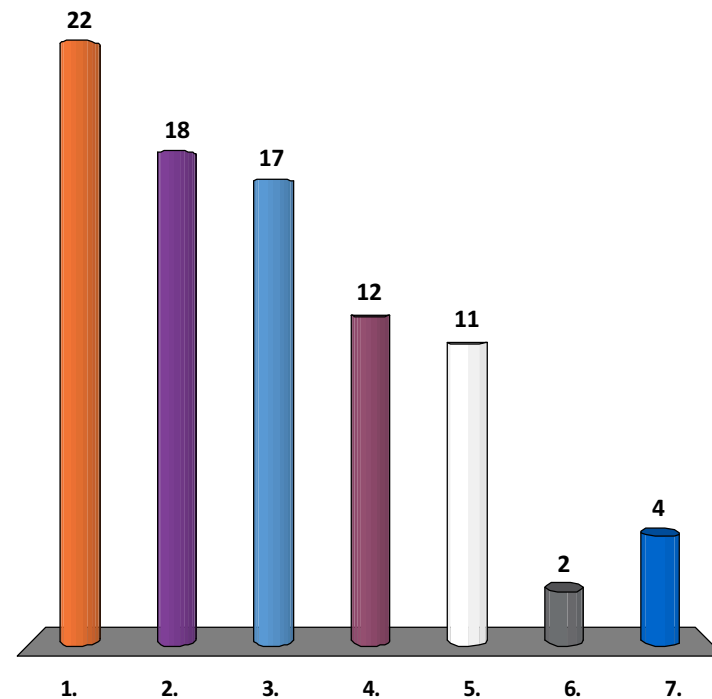
F. Disagree

G. Strongly Disagree



It is appropriate for construction contracts to include a “No Damage for Delay Clause” provided contractor receives a time extension and: (check all that are true):

1. Contractor is compensated for Owner caused delays.
2. Contractor is compensated for A/E caused delays.
3. Contractor is compensated for force majeure delays (beyond normal weather days).
4. Contractor is equitably compensated for concurrent delays based on “percentage of responsibility”.
5. On GMP projects, available contractor contingency can be used to cover contractor costs regardless of cause of delay if Owner doesn’t pay.
6. None of these exceptions is appropriate so long as contractor had ability to bid or price work.
7. A NDFD clause is never appropriate



Issue #2: Extraordinary Risks; Delay and Consequential Damages

- How do we deal with the issues of Consequential Damages and Delay
 - The Architects Viewpoint
 - The Contractors Viewpoint
 - The Owners Viewpoint
- What are the Tools at our Disposal to create Collaborative Solutions?
 - Contractual Tools?
 - Insurance Tools?
 - Financial Tools?
- What successful, collaborative solutions have you employed?

Issue #2: Delay and Consequential Damages

- **Use of LDs**
 - **Impact on subcontractors and subcontract pricing**
 - **Method of establishing values**
 - **Should LDs be capped**
 - **Use for milestone dates as well as substantial completion**
 - **Ability for CM/GC to use Contingency to cover**

Issue #3: The GMP Process and Effective Contingency Management



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Issue #4: Flow Down Provisions

-  What are the issues? (Flow down or “incorporation by reference”)

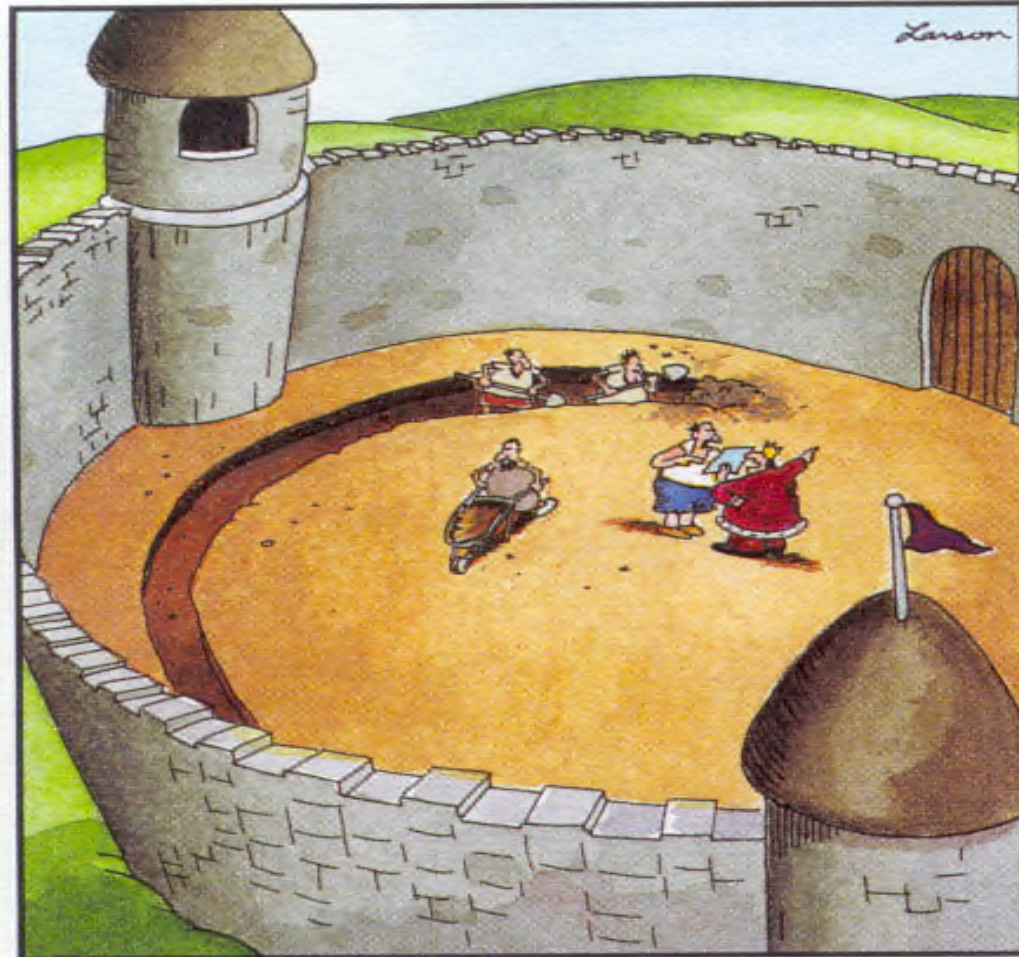


Issue #5 Indemnification

- **How many issues can you spot in this clause?**
- **How do we engage the Owner and create a collaborative solution?**

Designer (Contractor) shall indemnify, protect, defend and hold harmless the Owner, Contractor (Designer), Owner's Representative, the Additional Insureds, and their officers, employees, agents, consultants, and affiliated entities ("Indemnitees") from and against any and all claims, causes of action, losses, damages, liabilities and expenses (including attorneys' fees and other costs of defense), to the extent arising out of or relating to the Designer's Services (Contractor's Work).

Topic #3 Issue Resolution



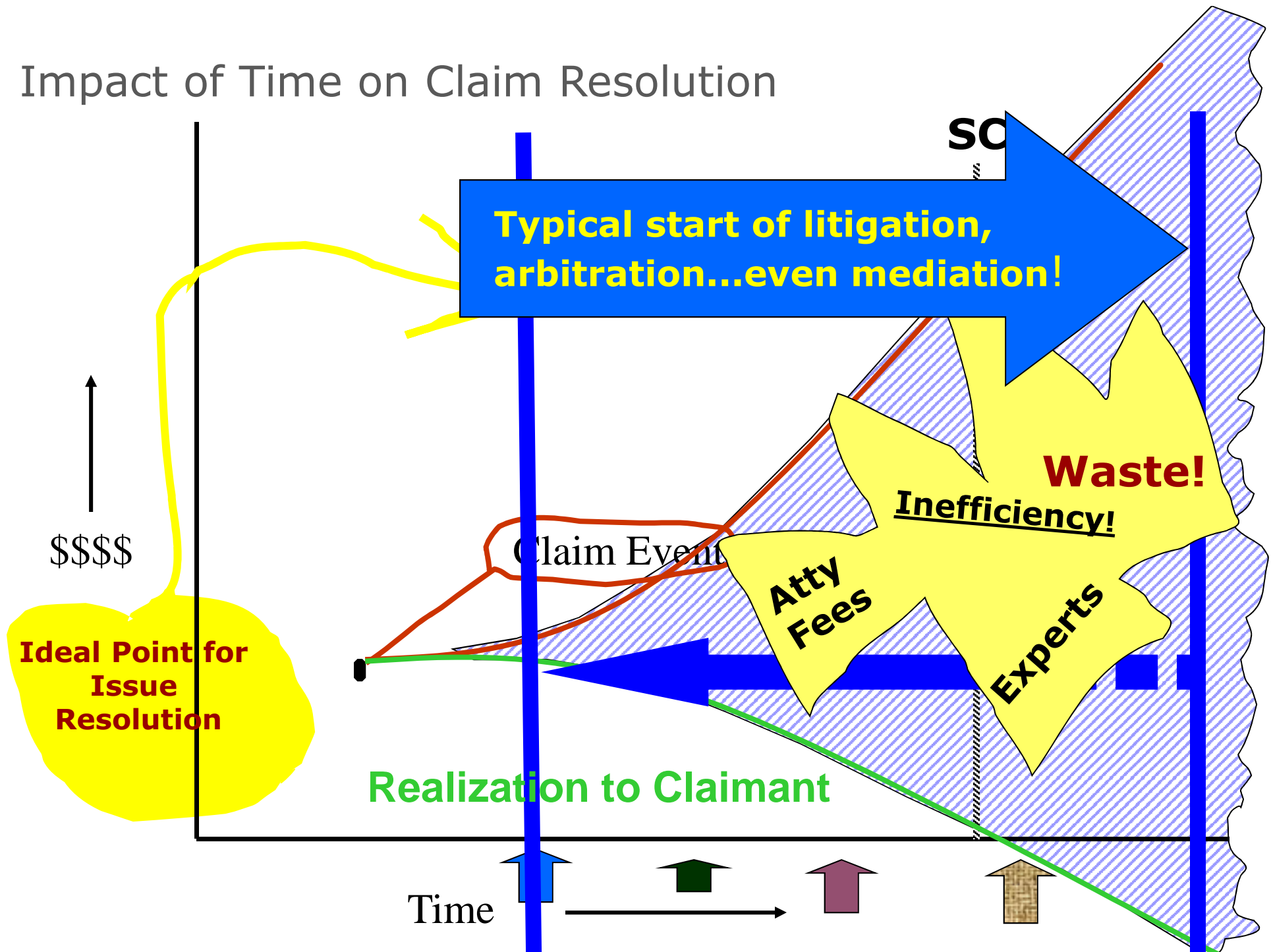
Suddenly, a heated exchange took place between the king and the moat contractor.

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The Ground's Day Exercise

Impact of Time on Claim Resolution



Topic #3: Issue Resolution



- All standard documents include lengthy processes for ultimate dispute resolution.
- How can a collaborative process change that?
- What are the best practices, techniques you have employed?

2017

Create Awareness

Create Awareness

Strategic Workshop

12 October 2016

3:00 at Karpinski Engineering

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Advocating a project culture that reduces risk while improving project delivery outcomes.



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Partnership in COGENCE Alliance is offered on an invitation basis only at the discretion of the Board of Directors. Partners of the organization come together at bi-monthly core meetings and periodic seminars. Partners are advocated for innovations in collaborative, team-based project delivery to their respective organizations, trade associations, and the broader construction community. Most importantly, the meetings are not a form of business development.

Mission/Goals

Our purpose is to bring owners, architects, engineers, and contractors together to advocate and be a resource for improved project delivery.

The focus of this program is to discuss the success and challenges to collaborative, team-based project delivery methods. The goal is for partners to develop a collective understanding of the risks we face, the outcomes we need, and examine all aspects of team culture to gain an understanding of how they impact individual risks and project outcomes. Roundtable discussions allow for an open and collegial, yet substantive and challenging exchange of thoughts and experiences.

Recent Partner Documents

Documents, presentations, and resources available only to COGENCE Partners.

- [COGENCE Data Exercise Final Packet](#)
July 12, 2016 • Risk ranking and scoring by whole group and partner type
- [COGENCE Alliance: Strategic Plan](#)
August 3, 2016 • The COGENCE Alliance Strategic Plan presentation
- [COGENCE Risk Summary Matrix](#)
July 9, 2016 • Learn how risk impacts COGENCE partners



ABOUT COGENCE

Encouraging a culture that reduces risk while improving project delivery outcomes.



CONTACT COGENCE

Contact us to learn more about our Partners and programs.



PARTNER PROFILE

Have you completed the COGENCE Partner profile questionnaire?



PARTNER ONLY CONTENT

COGENCE Partners have access to exclusive content and information.

oswald



Gilbane



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RESOURCES ▾

ADVOCACY

PARTNERS ▾

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Programs

2016

Jan 2016

PROGRAM: RISKY BUSINESS

Our first partner roundtable of 2016 engaged Owners, Architects, Engineers, and Construction Professionals in a candid dialog regarding design and construction project risk.

[View Event Description](#)
[View Program Presentation](#)

PROGRAM: COLLECTIVE RISKS

COGENCE Partners participated in a large survey to determine common risks we face as owners, architects, engineers and contractors.

[View Event Description](#)
[View Program Presentation](#)

Mar 2016

May 2016

PROGRAM: LEADERSHIP

Effective Leadership Mitigates Risk

Leaders are:

- Engaged
- Consistent
- Inclusive

[View Event Description](#)
[View Program Presentation](#)

Resources

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Resources

Risk Management

Design Assist

Design Build

COGENCE Partners have exclusive access to resources that are unavailable elsewhere.

Please [contact us](#) for more information about how COGENCE is helping our Partners manage project risk and outcomes.



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PARTNERS ▾

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Partners - COGENCE Alliance

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All Partners

Charter Partners

Owners

Architects

Engineers

Contractors



Cleveland Clinic

- ✓ Charter Partner
- ✓ Owner



Bostwick Design Partnership

- ✓ Charter Partner
- ✓ Architect



Lake Erie Electric

- ✓ Charter Partner
- ✓ Contractor



Donley's

- ✓ Charter Partner
- ✓ Contractor



Karpinski Engineering

- ✓ Charter Partner
- ✓ Engineer



Bowling Green State University

- ✓ Charter Partner
- ✓ Owner



Fredrick, Fredrick & Heller Engineers

- ✓ Charter Partner
- ✓ Engineer

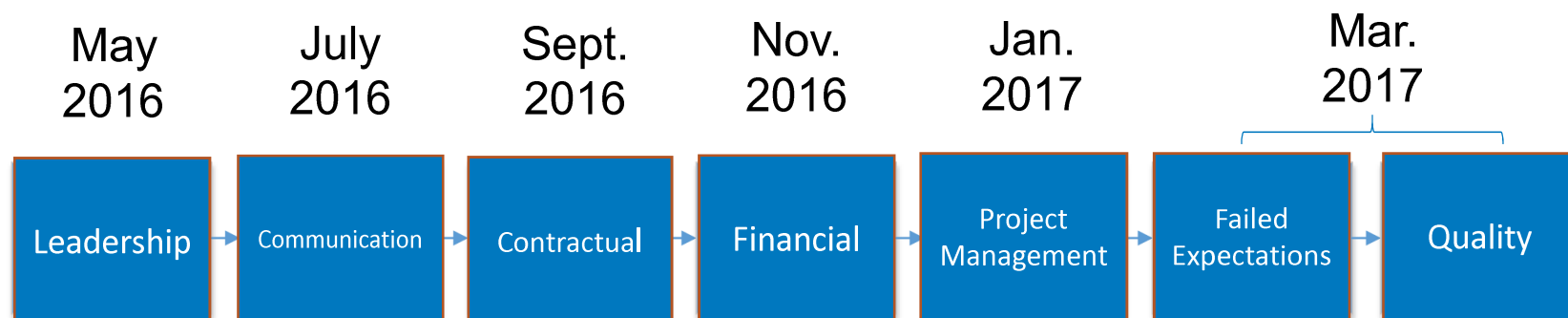


Hasenstab Architects

- ✓ Charter Partner
- ✓ Architect



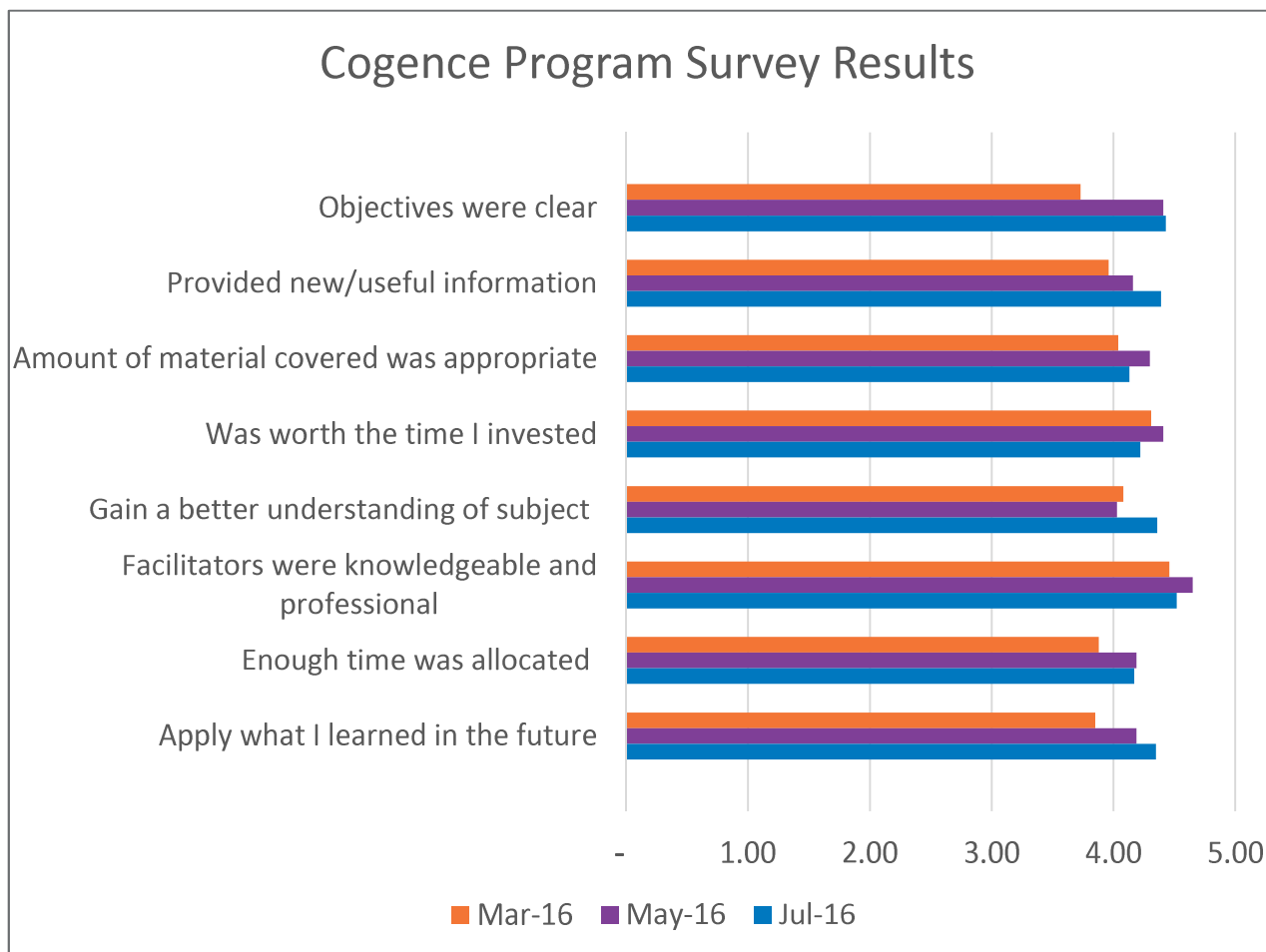
2016 - 2017 Program Timeline



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July 2016 Program Recap



March 2016 Program: Attendees 43, Survey Responses 26 (60% Response)

May 2016 Program: Attendees 41, Survey Responses 37 (90% Response)

July 2016 Program: Attendees 34, Survey Responses 23 (68% Response)

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July 2016 Program Recap

Plus

- » Organized event – effort and preparation was evident
- » Great participation
- » Practical solutions
- » New ideas learned

Delta

- » Make information available
- » Make solutions/tools practical to “resource limited” projects
- » Get information out to industry
- » Ask for feedback to shape discussion when invitation goes out

COGENCE Turns 1!

Next Meeting

9 November 2016 | 4:30

The End!!