



Navajo Nation Infrastructure Conference

CONSTRUCTION LAW AND PROJECT DELIVERY SYSTEMS

Presented by

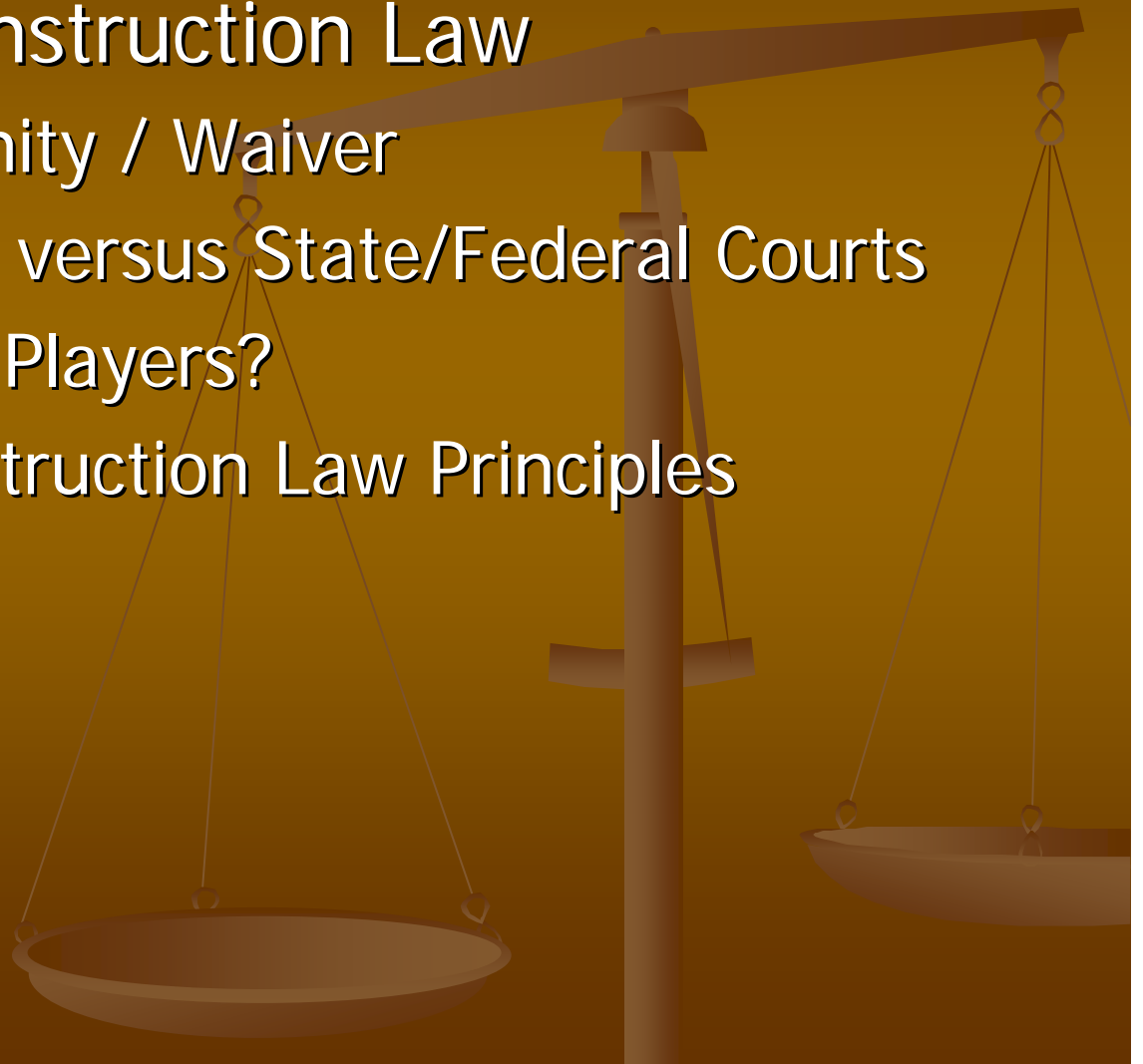
Design and Engineering Services
and
Navajo Department of Justice

Falmouth Institute's

- This powerpoint "Construction Law and Project Delivery Systems for Indian Country" was presented by ***Matthew J. DeVries, Esq., WICKWIRE GAVIN P.C. and Michael J. Carrato, Esq., PATTON BOGGS LLP*** at the Planning and Managing Construction Projects in Indian Country on Feb. 22-24, 2006 at Fort McDowell (Scottsdale), Arizona. This is edited for presentation at the Navajo Nation Infrastructure Conference on November 29, 2006 at the Albuquerque Convention Center in Albuquerque, New Mexico.

Overview

- Principles of Construction Law
 - Tribal Immunity / Waiver
 - Tribal Courts versus State/Federal Courts
 - Who are the Players?
 - General construction Law Principles

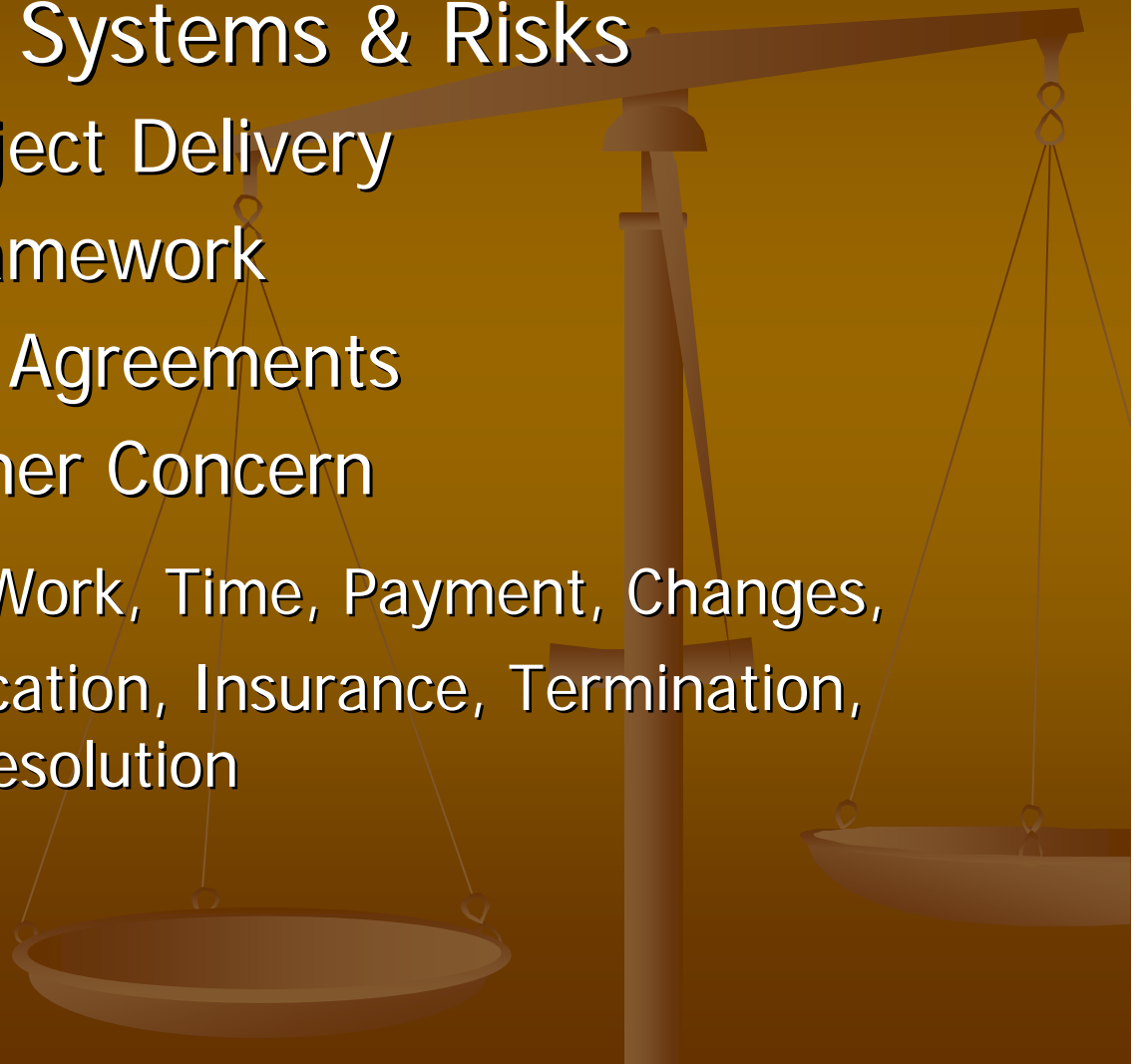


Overview (cont'd)

■ Project Delivery Systems & Risks

- Types of Project Delivery
- Cost-Risk Framework
- Construction Agreements
- Areas of Owner Concern

Scope of Work, Time, Payment, Changes,
Indemnification, Insurance, Termination,
Dispute Resolution



Focus Questions

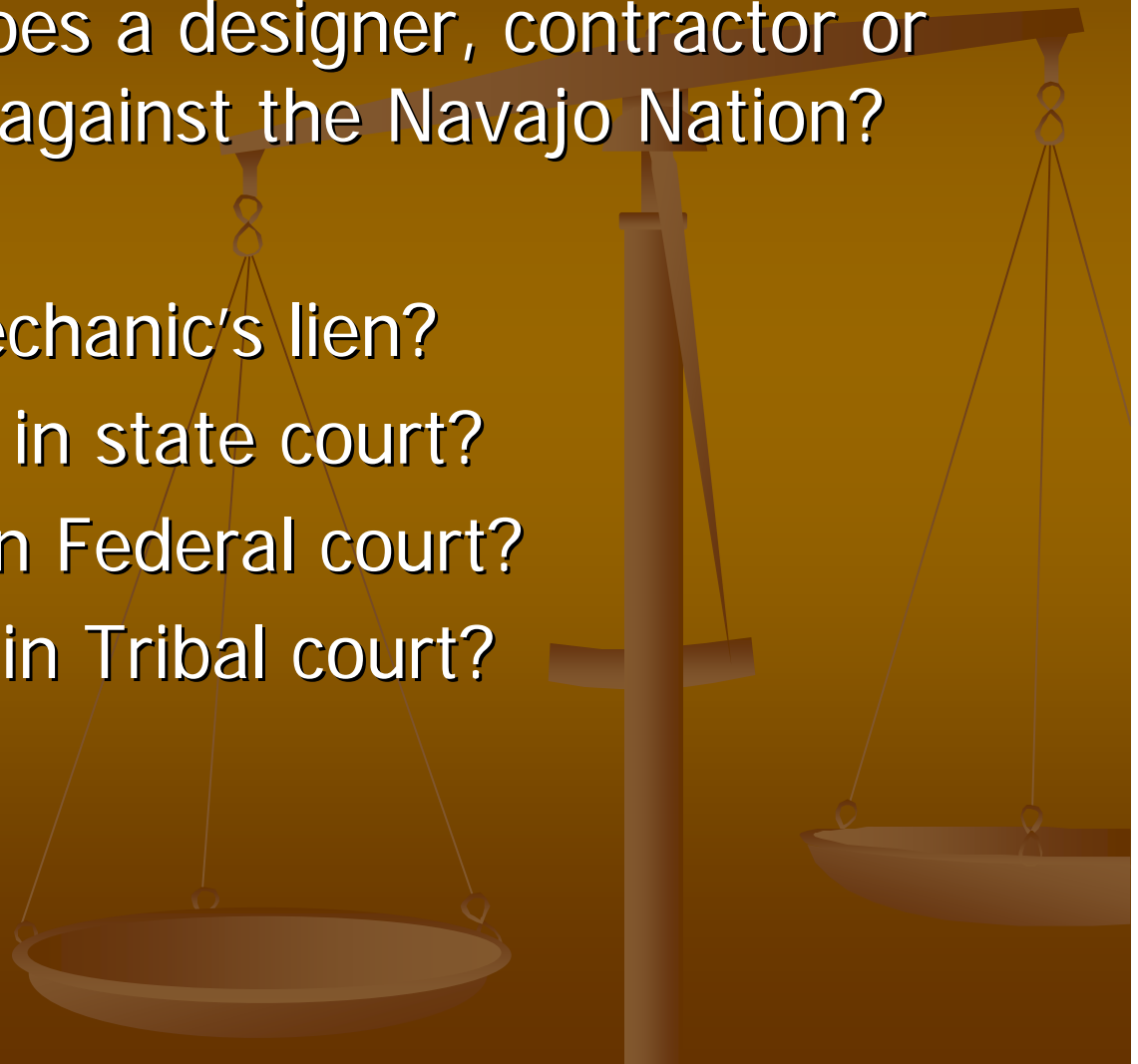
What remedies does a designer, contractor or supplier have against the Navajo Nation?

Mechanic's lien?

Suit in state court?

Suit in Federal court?

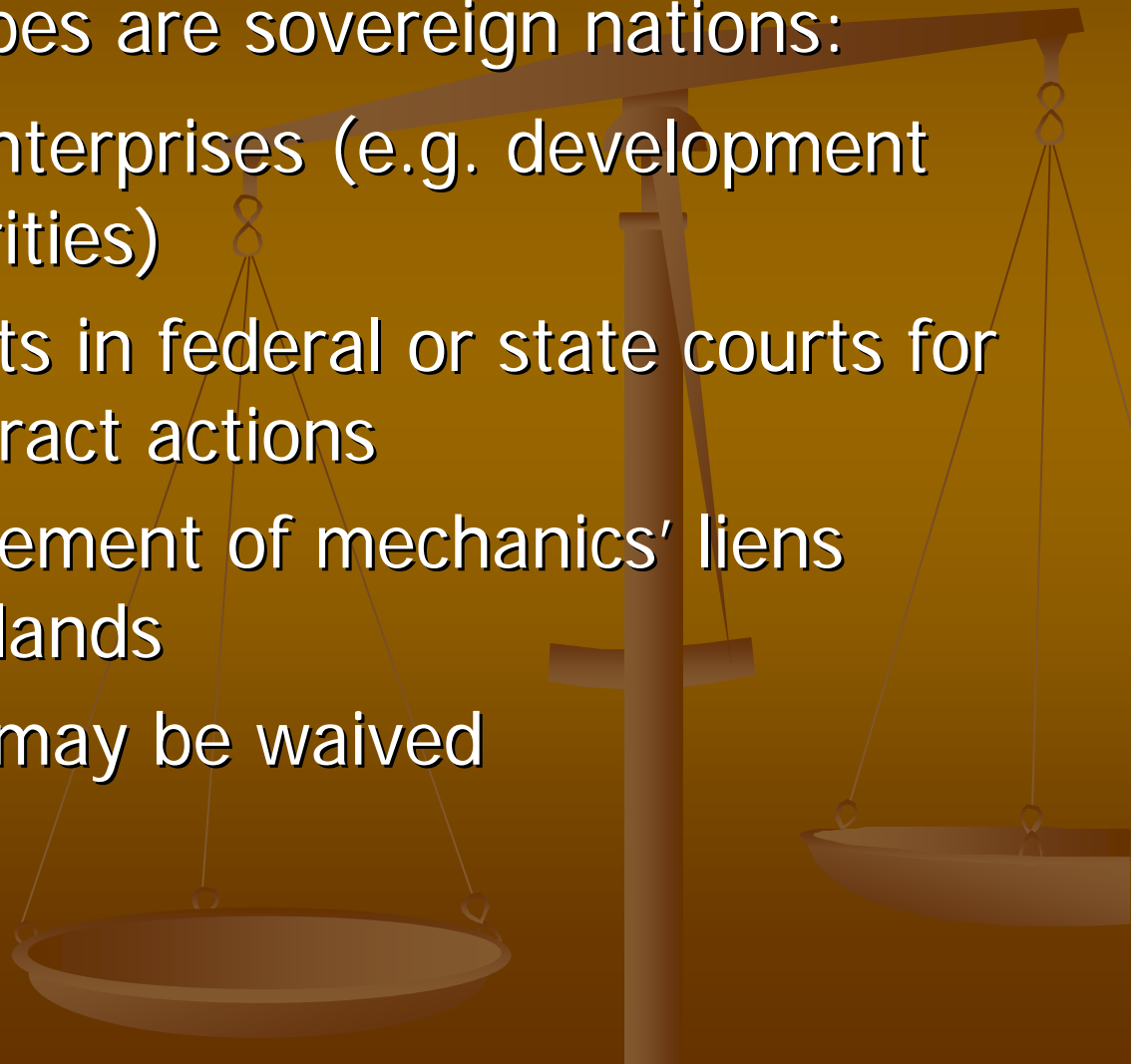
Suit in Tribal court?



Tribal / Sovereign Immunity

Native American Tribes are sovereign nations:

- Includes tribal enterprises (e.g. development or gaming authorities)
- Precludes lawsuits in federal or state courts for breach of contract actions
- Precludes enforcement of mechanics' liens against Tribal lands
- Tribal immunity may be waived



Waiver of Sovereign Immunity



- Formal resolution of the Tribal Council
- Supreme Court Decision

- *C&L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001)

Tribe entering into a contract containing an arbitration clause that clearly governs all disputes and provides for the enforcement of arbitral awards in state courts waives its sovereign immunity from such suits

What Courts Have Jurisdiction?

- State Courts
- Federal Courts
- Tribal Courts



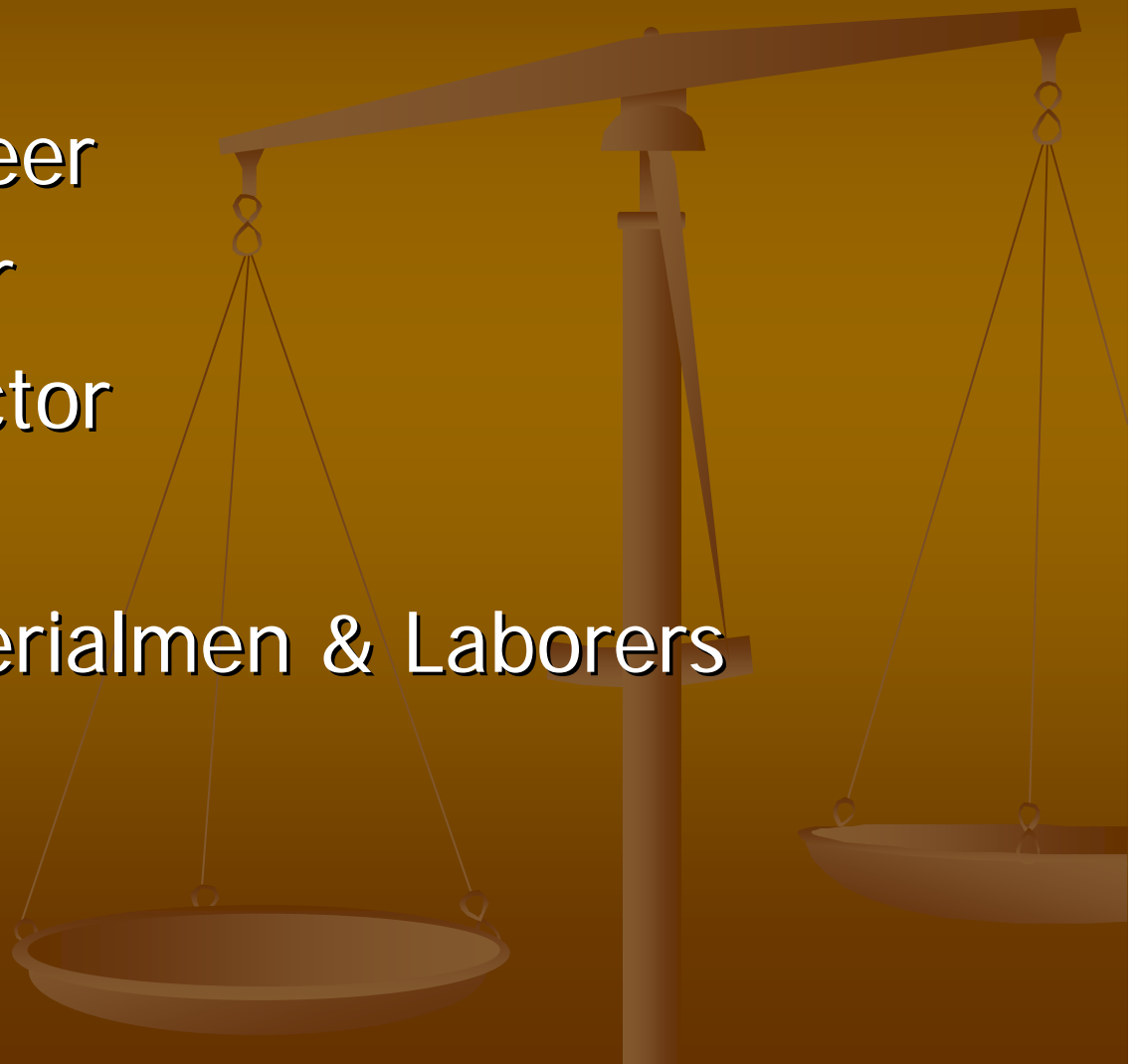
Sources of Contract Rights & Duties

- Basic Agreements
- Drawing & Specifications
- General Conditions & Supplemental Conditions



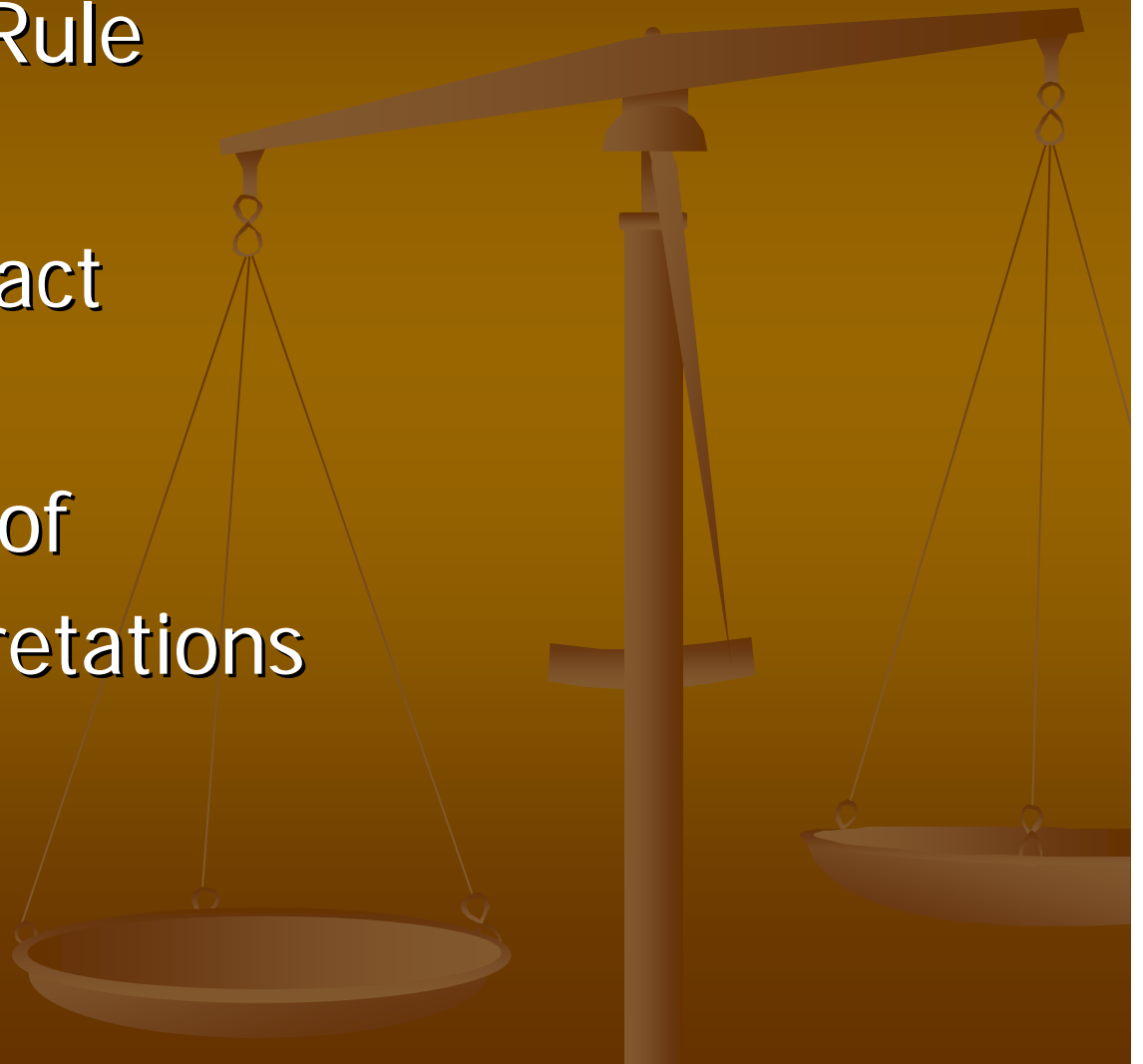
Potential Players

- Owner
- Designer/Engineer
- Project Manager
- General Contractor
- Subcontractors
- Suppliers / Materialmen & Laborers



General Construction Law Principles

- Parol Evidence Rule
- Modifications
- Breach of Contract
- Damages
- Elements of Proof
- Contract Interpretations



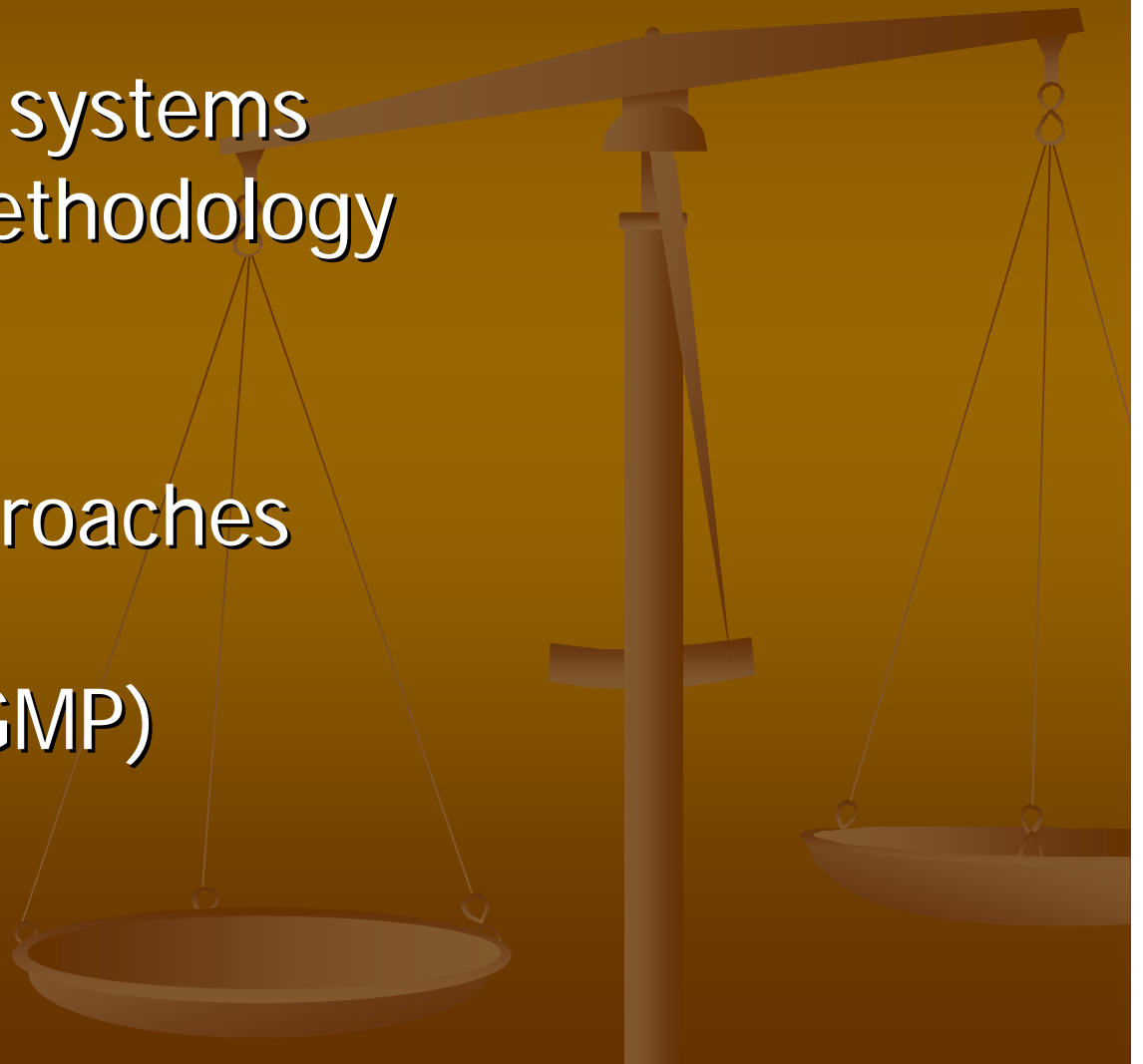
Project Delivery Systems

- Systems
- Cost-Risk Analysis
- Contracting Form Documents



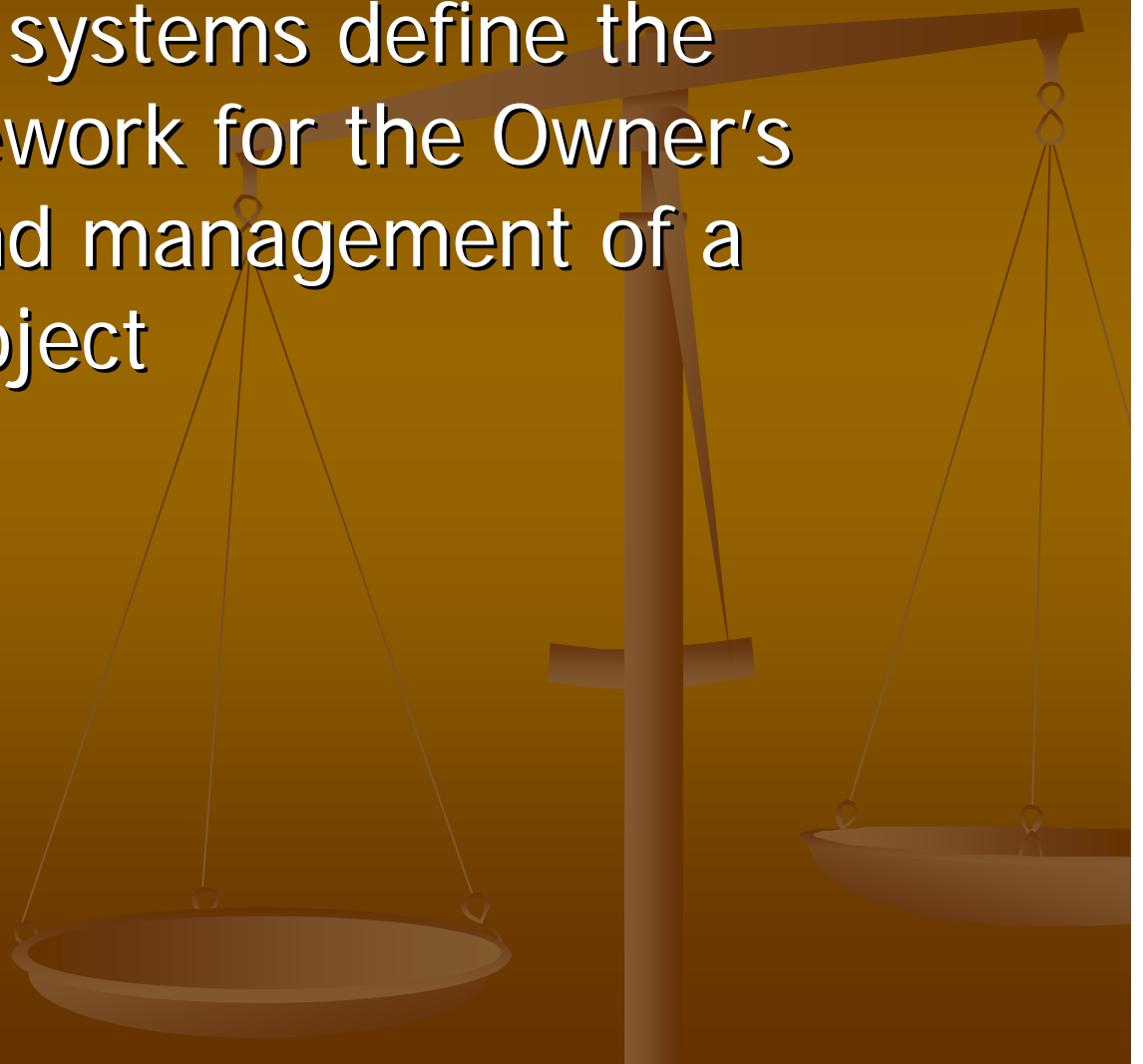
Structural Framework of a Construction Project

- Project delivery systems
- Procurement methodology
 - Negotiated
 - Competitive
- Contracting approaches
 - Lump sum
 - Cost plus (GMP)
 - Unit Price



Project Delivery: Definition

- Project delivery systems define the structural framework for the Owner's development and management of a construction project



What Do Project Delivery System Establish?

- Who will be involved in process
- Roles of parties
- Relationship between & among parties
 - legal & contractual responsibilities
 - "chain of command"
 - reporting requirements

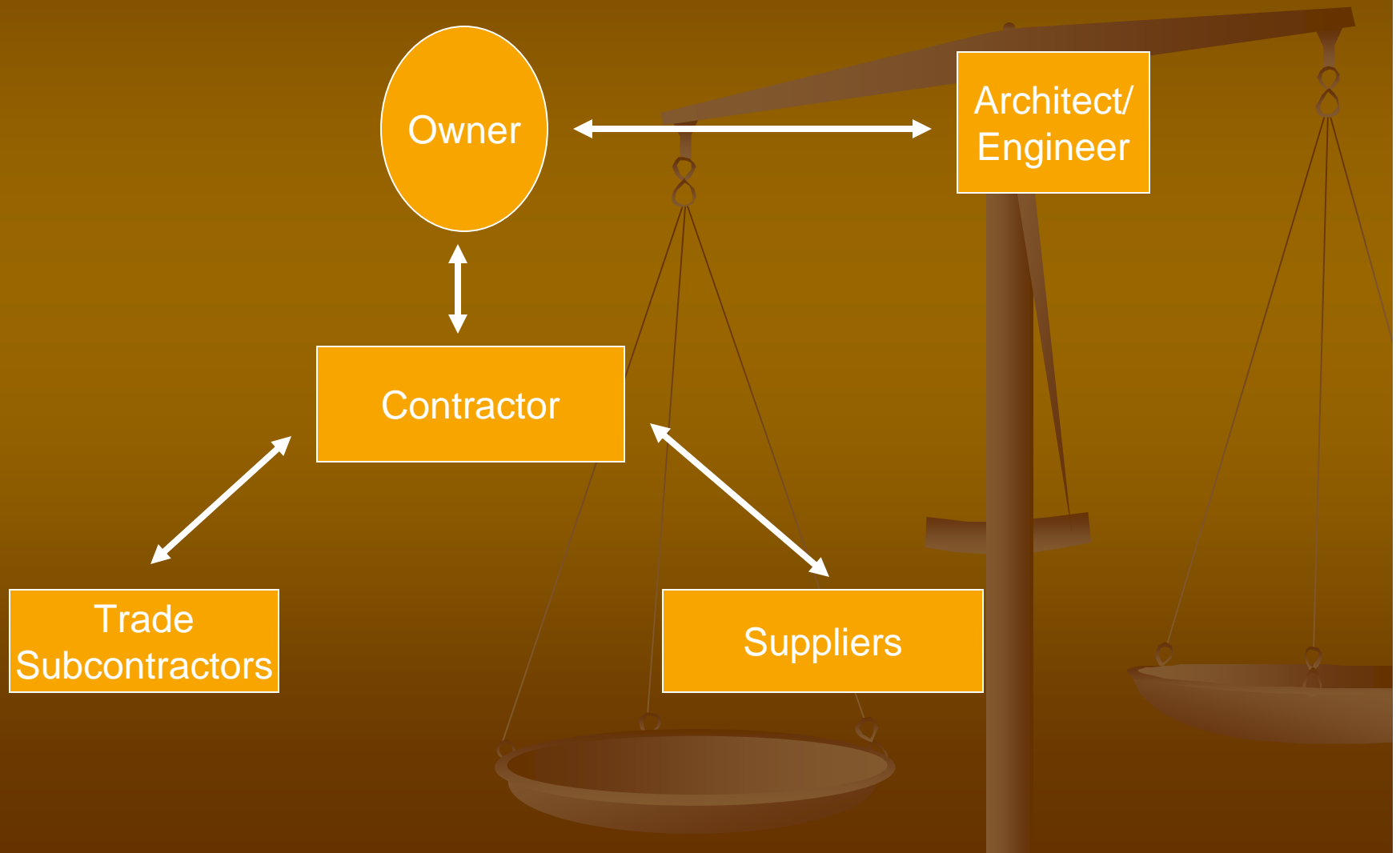


Mainstream Project Delivery Systems

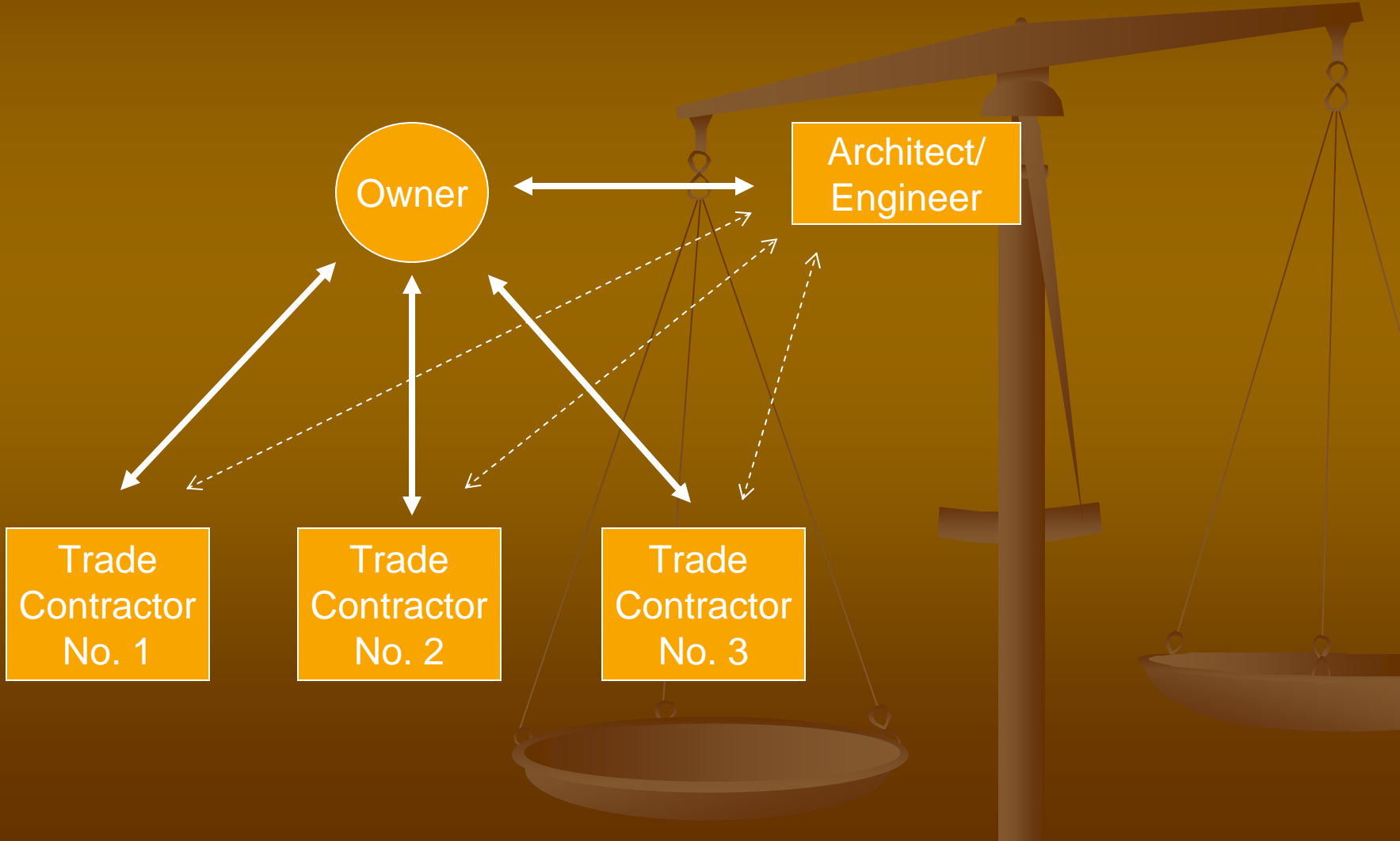
- Design-bid-build
- Multiple prime contracting
- Construction management
 - Agency
 - At-risk
- Design-build



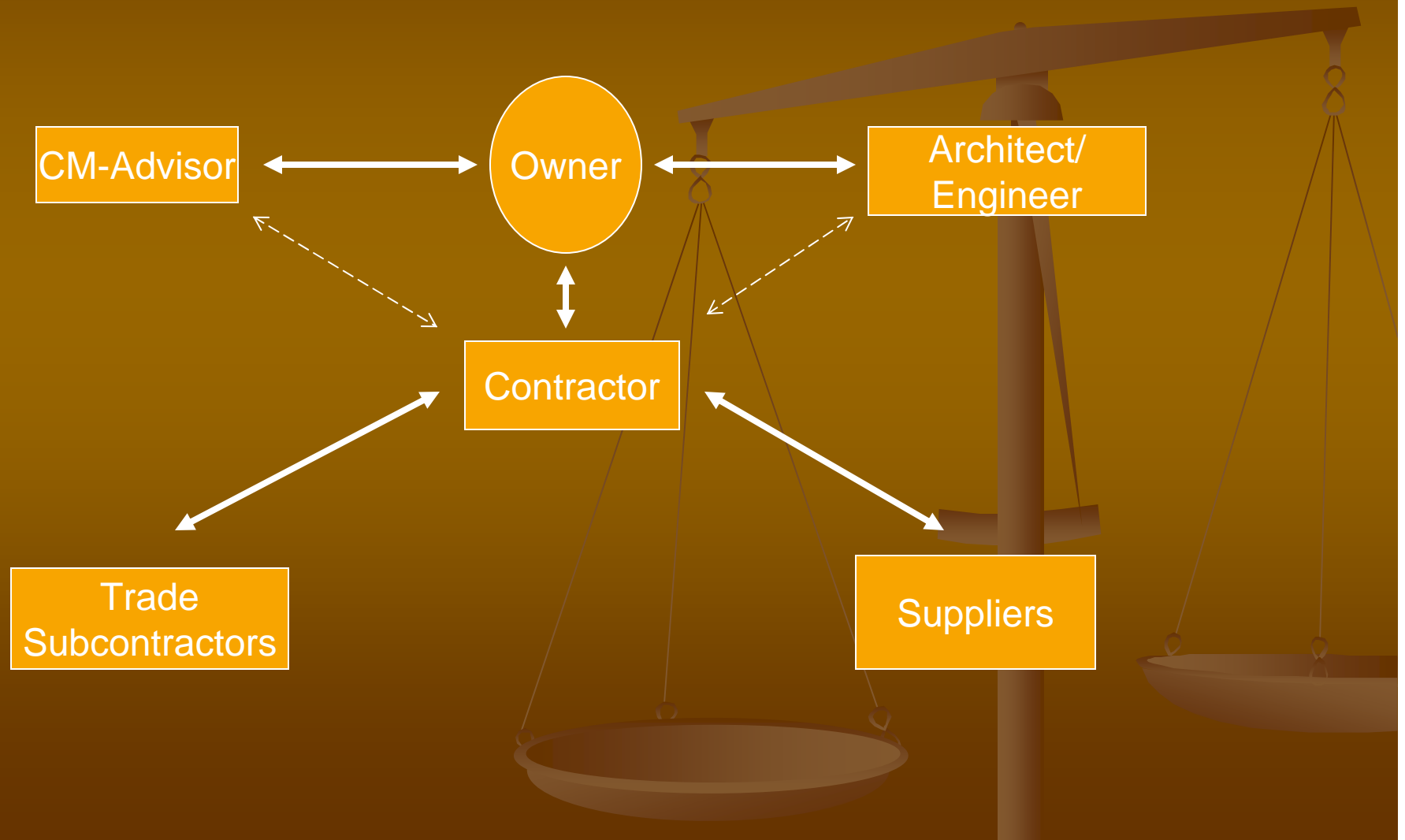
Design-Bid-Build



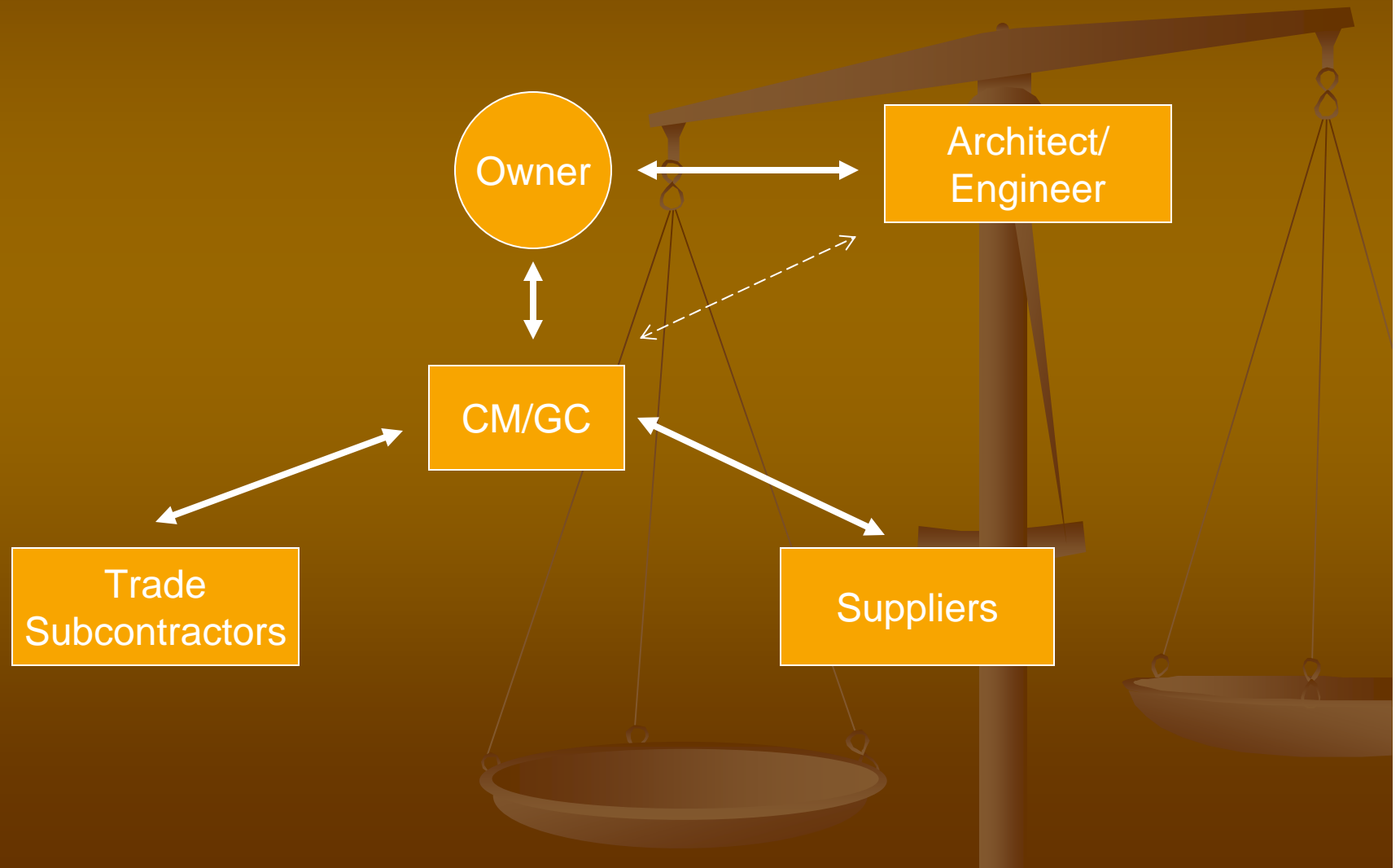
Multiple Prime Contracting



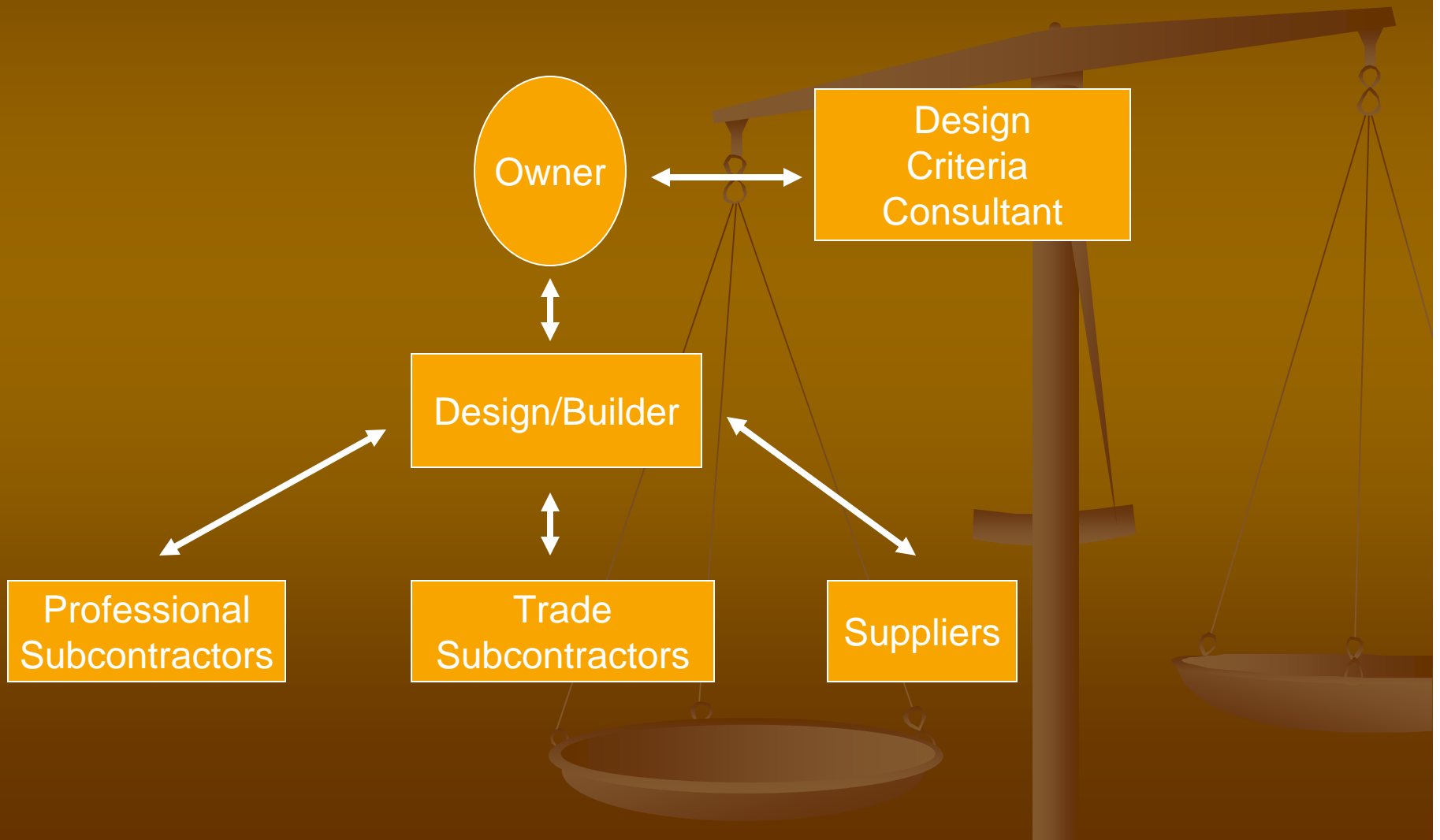
CM Advisor



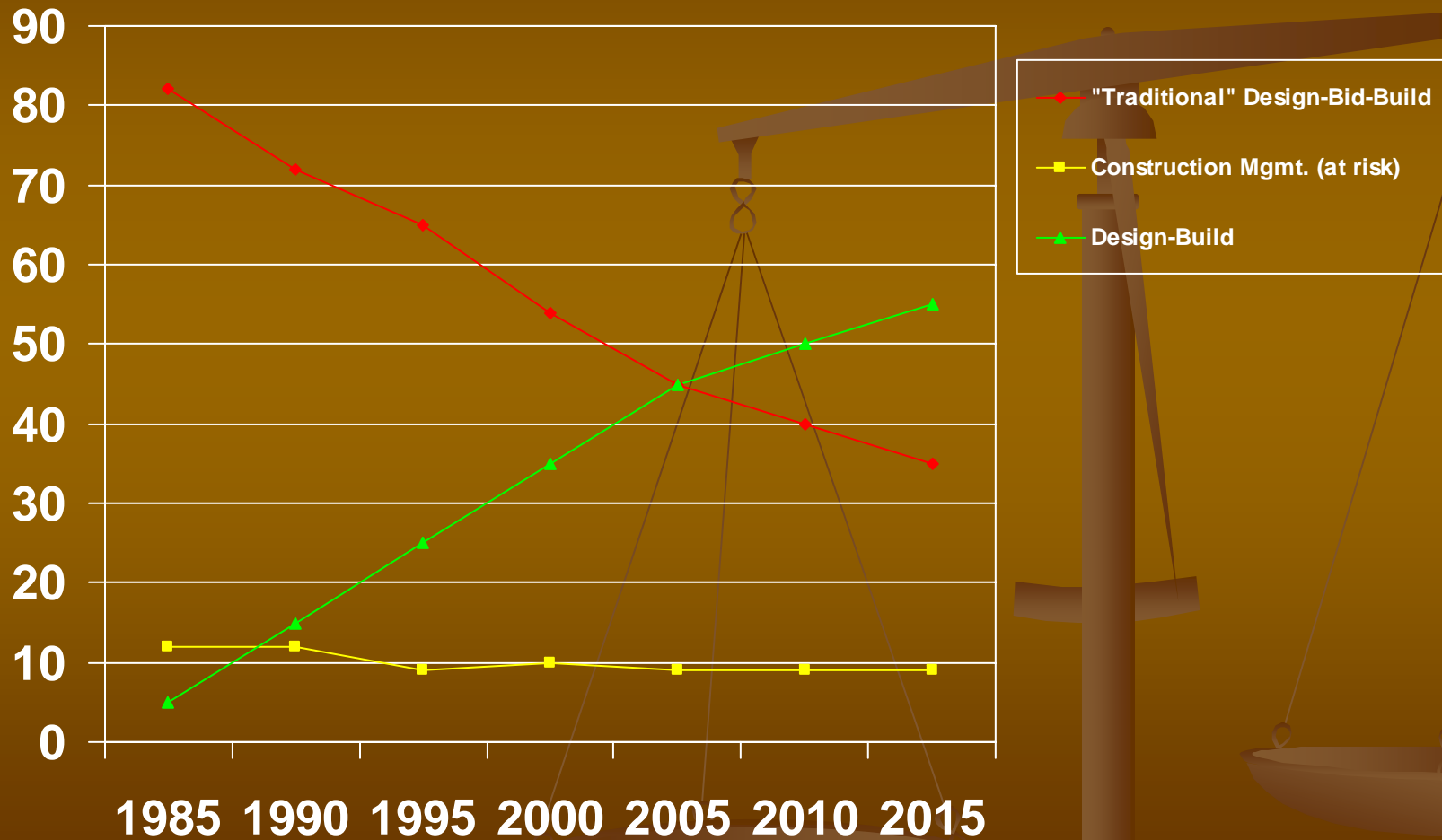
CM / GC



Design-Build

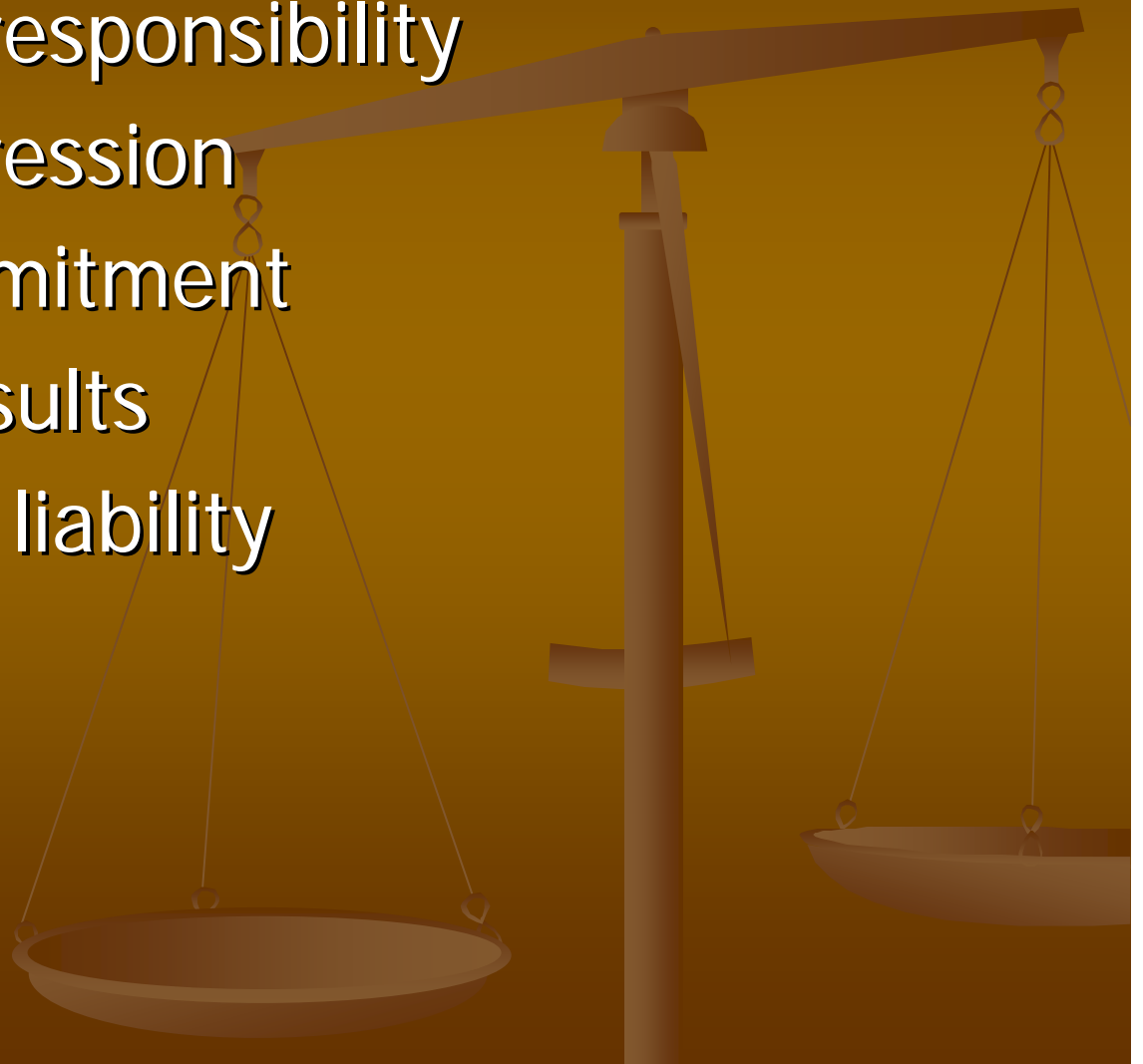


Market Penetration of Major Project Delivery Systems



Reason for DB Growth

- Single point of responsibility
- Schedule compression
- Early price commitment
- Good quality results
- Reduced owner liability

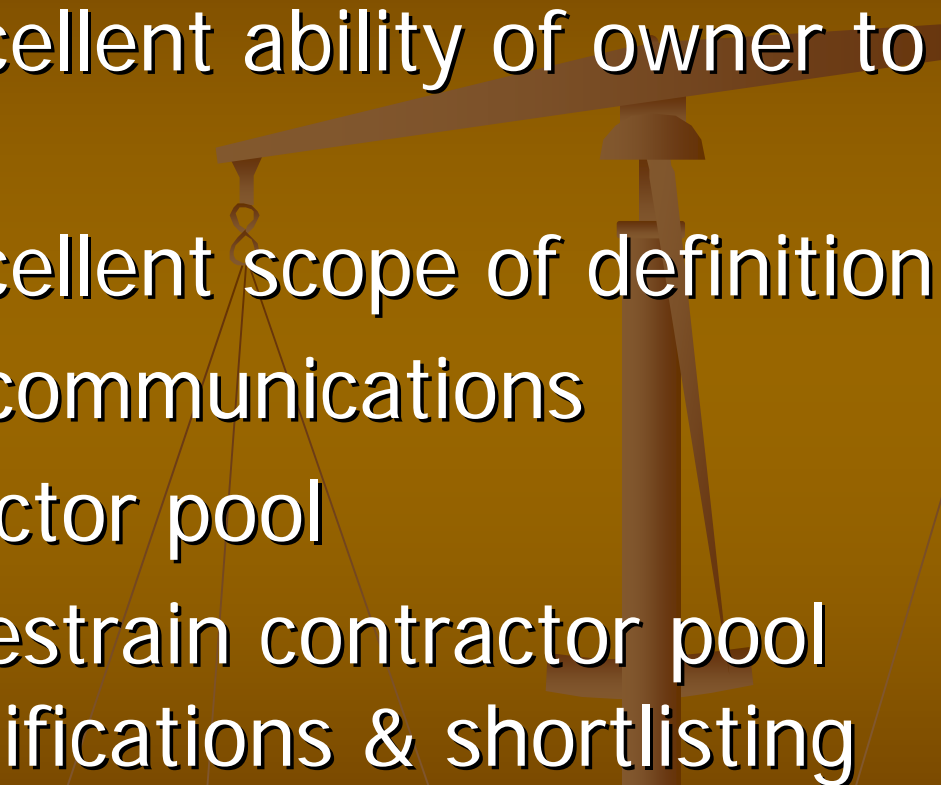


What System Works Best?

- Owner's needs & comfort level
- Nature of project
- Licensing requirements
- Relationship among team members

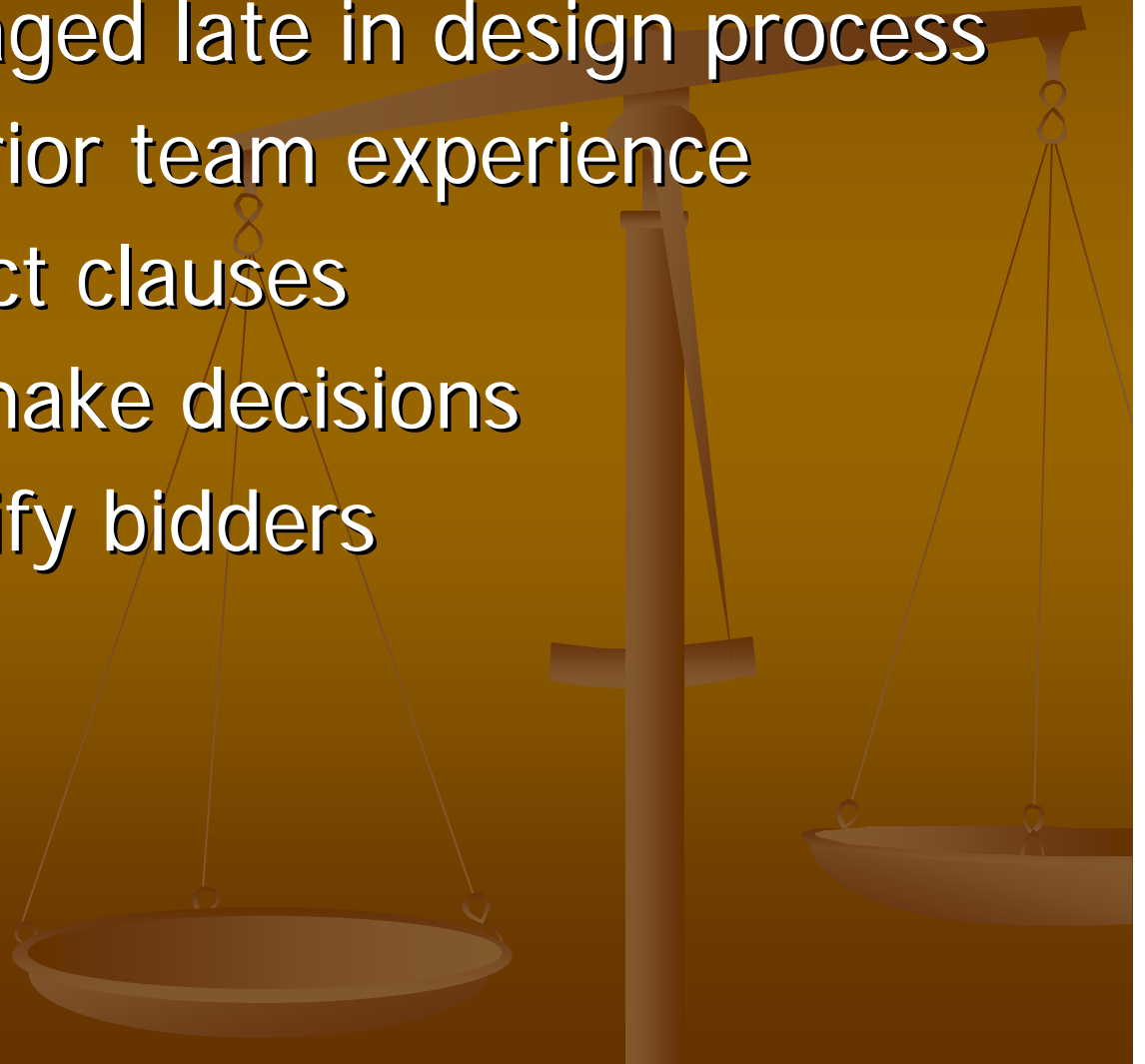


Best Performing Projects

- Adequate to excellent ability of owner to make decision
 - Adequate to excellent scope of definition
 - Excellent team communications
 - Qualified contractor pool
 - High ability to restrain contractor pool through prequalifications & shortlisting
- 

Worst Performing Projects

- Contractor engaged late in design process
- Limited or no prior team experience
- Onerous contract clauses
- Poor ability to make decisions
- Did not prequalify bidders



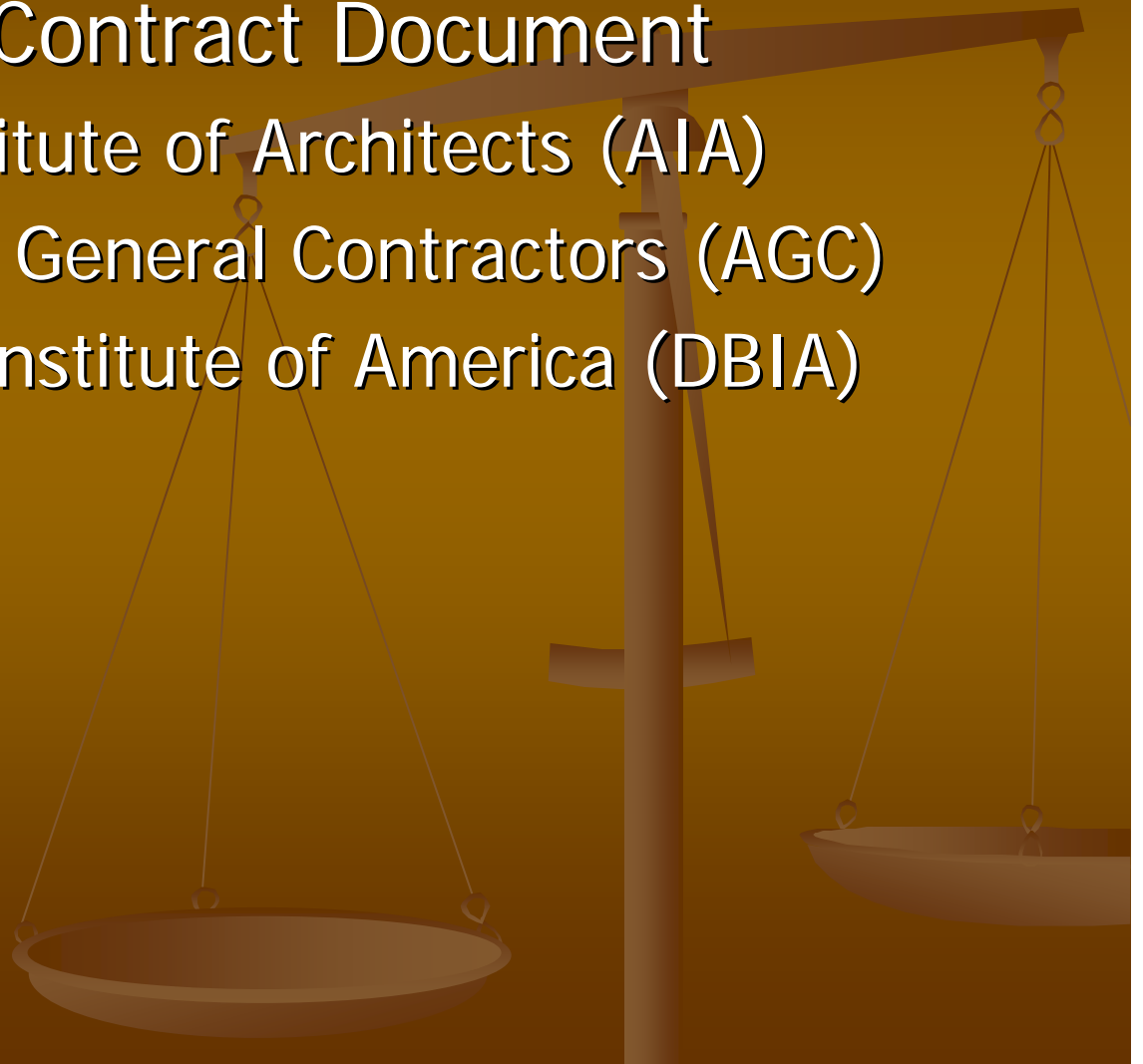
Cost-Risk Framework

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



Construction Agreement

- Standard Form Contract Document
 - American Institute of Architects (AIA)
 - Association of General Contractors (AGC)
 - Design Build Institute of America (DBIA)



Areas of Owner Concern

- Scope of Work
- Time
 - Substantial Completion
 - Force Majeure
 - Schedule Delays
- Payment
- Changes
- Indemnification



Areas of Owner Concern (cont'd)

- Indemnification / Insurance
- Termination
- Dispute Resolution



Questions?

- Matthew J. DeVries, Esq.
- Wickwire Gavin P.C.
- 8100 Boone Blvd., Suite 700
- Vienna, Virginia 22182
- (703) 761-2743
- mdevries@wickwire.com
- Michael J. Carrato, Esq.
- Patton Boggs LLP
- 2550 M Street, NW
- Washington, D.C. 20037
- (202) 457-6000
- mcarrato@pattonboggs.com

