



CONSTRUCTION
SUPERCONFERENCE
2021

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HOT ISSUES IN DESIGN-BUILD BETWEEN DESIGN-BUILDERS AND THEIR LEAD DESIGNERS

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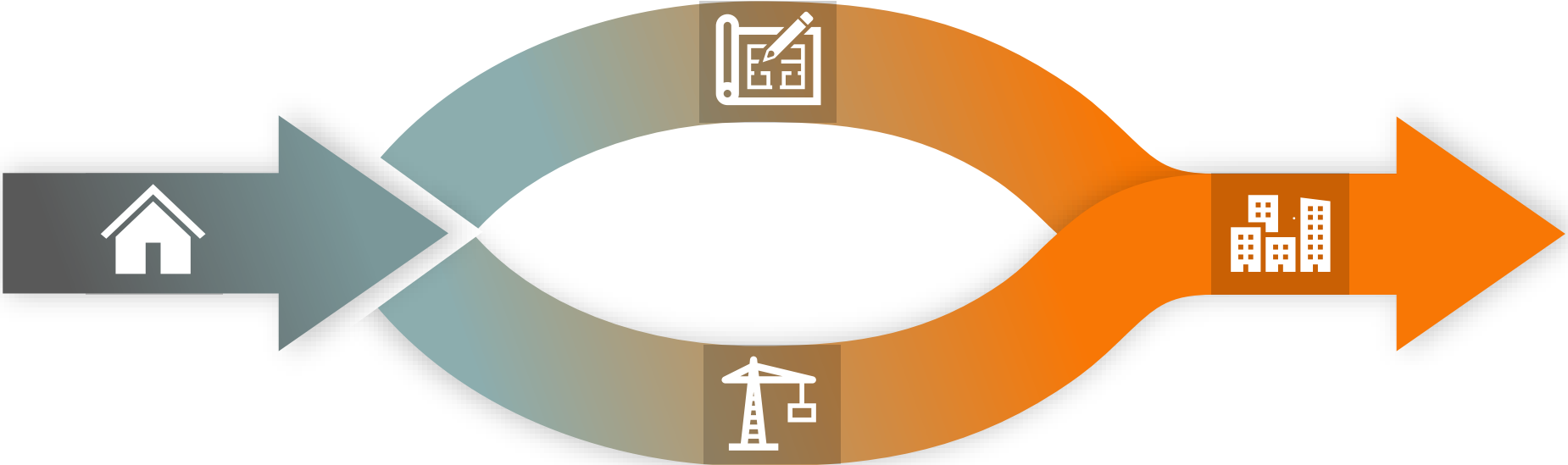
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Background & Context

HISTORICAL ORIGINS OF DESIGN-BUILD

DESIGN

**Master
Builder**



**Modern
Design-Build**

CONSTRUCTION

TRADITIONAL VS. FAST-TRACK

TRADITIONAL



FAST-TRACK



**PRIME
CONTRACT
CONCERNING
TRENDS**

Design-Build can “solve any problem”

Owner unable or unwilling to relinquish control

Design-Build is “change free”

Heightened standard of care

Misuse of design-build delivery

Trickle-down of P3 risk allocation

Designer & Engineering Agreements

KEY LEGAL AND RISK ALLOCATION ISSUES

**KEY DESIGN
SUBCONTRACT
ISSUES**

**Preliminary Design & Design Development
Risks**

Design Delays

Limitations of Liability

Payment Withholding

Preliminary Design & Design Development

PRELIMINARY DESIGN & DESIGN DEVELOPMENT RISKS

- Generally not an issue in traditional design-bid-build delivery
- Risk in **setting price & schedule** based on preliminary design
- **Examples:**
 - Quantity of work
 - Quality of work
 - Complexity of work
 - Site Conditions
 - Design Schedule

EXAMPLE DESIGN DEVELOPMENT RISK: QUANTITY GROWTH

Significant risk in design-build transportation projects

- Bid is based on “neat line” quantities in preliminary design.
- Actual construction quantities are based on IFC design.
- Deviations between preliminary quantities and IFC quantities create risk of unreimbursed additional construction costs.

EXAMPLE DESIGN DEVELOPMENT RISK: QUANTITY GROWTH

Design Builder Position: Designer is obligated to develop design consistent with preliminary design.

Designer Position: Designer should only be liable if preliminary design failed to meet the standard of care.

Question: Is there a difference in the standard of care for preliminary design?

DESIGN DEVELOPMENT RISK RISK ALLOCATION



Designer
Risk



Design-Builder
Risk



Shared
Risk

Methods of Allocating Risk

- Quantity variation matrix/cumulative quantity variation thresholds
- Separate sub-caps on liability for (1) quantities and (2) delay
- Differentiated treatment of E&O vs. Non-E&O quantity growth
- Design Contingency

**Distinguish errors and omissions in the preliminary design
versus errors and omissions in the final design**

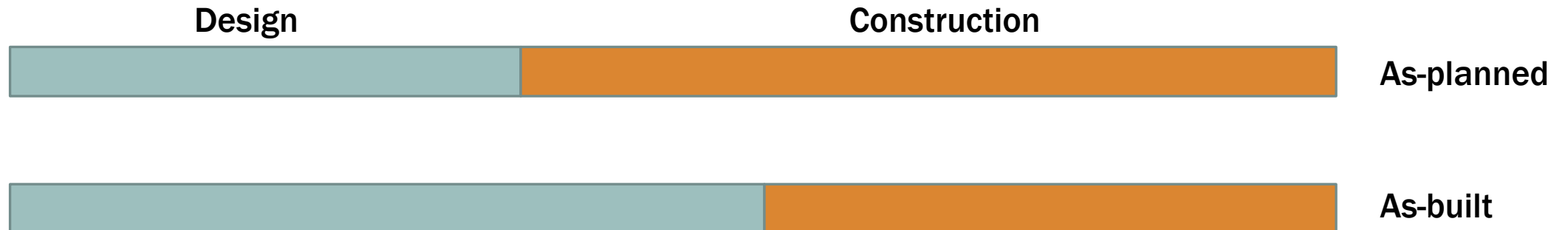
Design Delays

DESIGN DELAYS

LATE DESIGN VS. E&O CAUSING DELAY

Late Design Delivery

- Delivery of design fails to comply with design schedule
- Design may be on critical path of project

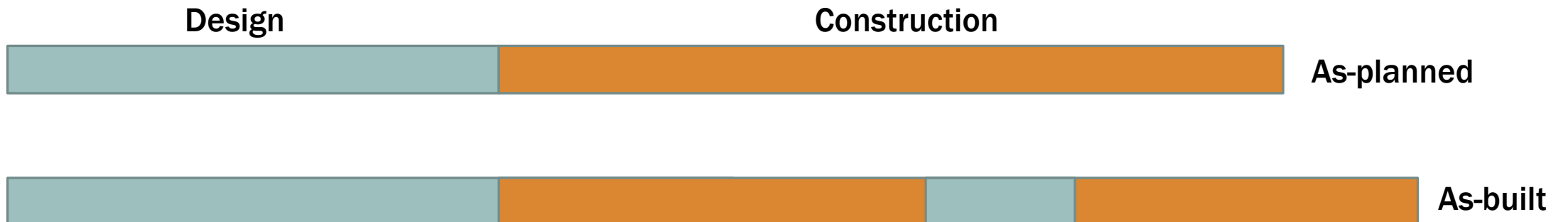


DESIGN DELAYS

LATE DESIGN VS. E&O CAUSING DELAY

E&O Causing Delays to Construction

- Errors or omissions in IFC design discovered during construction
- Errors or omissions in preliminary design result in changes to IFC design causing delays to construction



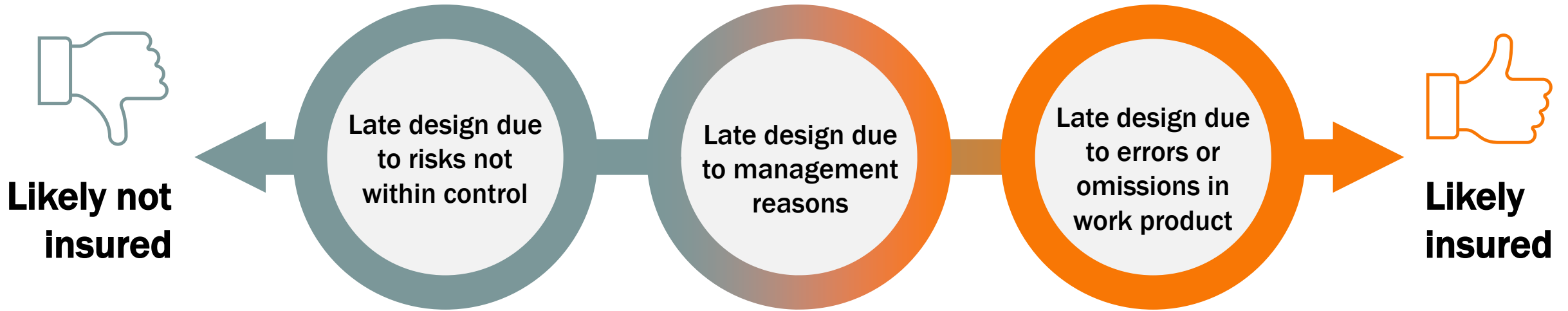
DESIGN DELAYS

COMMON CONTRACT NEGOTIATION ISSUES

- Exposure to Contractor Damages vs. Owner Damages
- Contingency Use
- Critical path and float
- Sub-limits of liability for delay
- Insured vs. uninsured delay

DESIGN DELAYS INSURANCE FOR LATE DESIGN

Is the delay covered under E&O insurance?



Limitations of Liability

LIMITATIONS OF LIABILITY

COMMON EXAMPLES

Limitations of Liability are frequently the most difficult issue in negotiations

- Acceptable approaches to limitations of liability must be evaluated on a project-by-project basis
- Frequently drafting separate limitations of liability:
 - Overall LoL
 - Delay
 - Quantities

LIMITATIONS OF LIABILITY NEGOTIATION ISSUES

Common Issues:

- Overall limitation of liability
- Subcaps for delay, quantities, and uninsured damages
- Interplay between subcaps on liability
- Interplay with insurance (is insurance in or out of cap)
- Carve-outs from limitations of liability

LIMITATIONS OF LIABILITY

COMMON CARVE-OUTS

- Intentional acts
- Third-party claims
- Insurance (and failure to insure)
- Employee claims
- Payment claims
- Breach of law
- Intellectual property infringement

Payment Withholding

PAYMENT WITHHOLDING



WHY?

Why it is important?



WHEN?

When to do it?



LIMITATIONS?

Limitations on
withholding?



PROCESS?

Process for
withholding?

QUESTIONS?

THANK YOU

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The MasTec logo, featuring a blue square icon with a white grid pattern to the left of the word "MasTec" in a bold, blue, sans-serif font.

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