



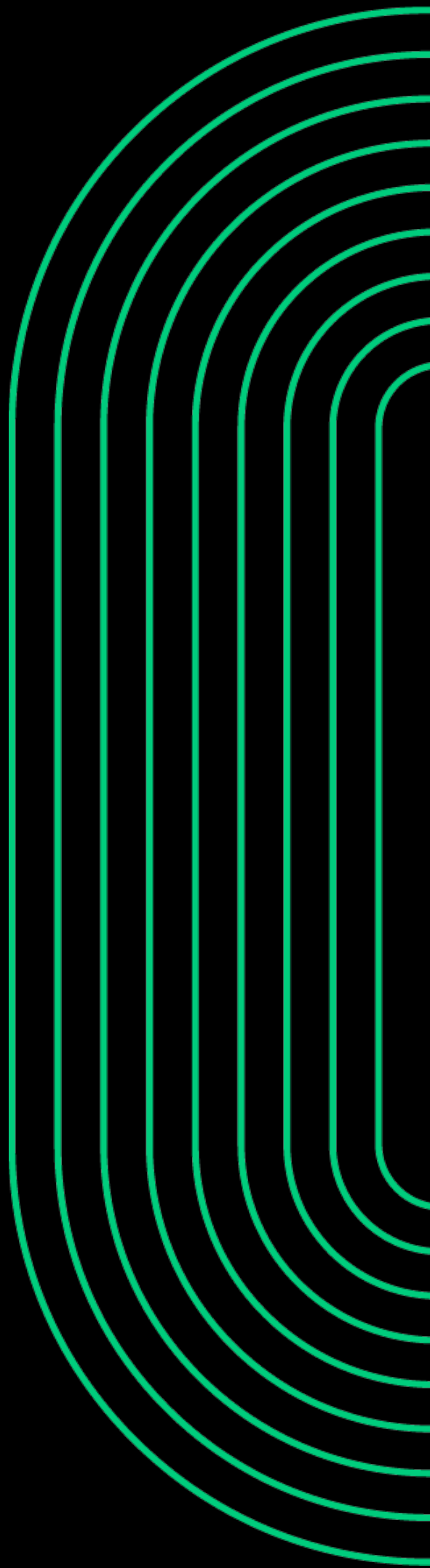
Construction Projects: Clarifying Widespread Misunderstandings About Laws and Procedures

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What's on Tap?

- **Construction Process Overview**
- **The Delivery Methods for Construction Projects**
- **Legal Framework**
- **Procurement of Services**
- **Common Misperceptions**
- **The Do's and Don'ts**



Players and Delivery Methods



The Construction Players

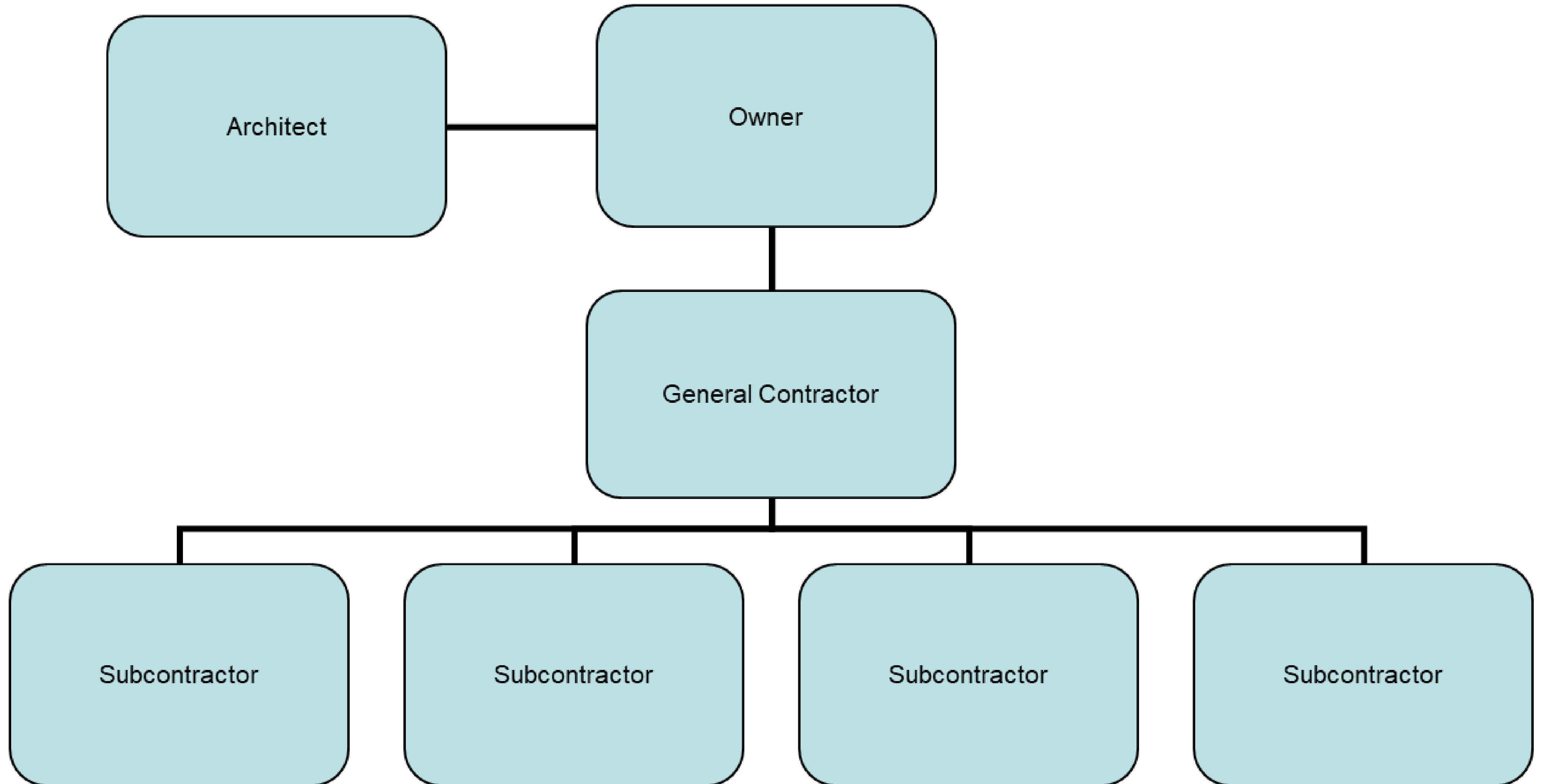
There are various “players” that may be involved in a Construction Project.

- 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

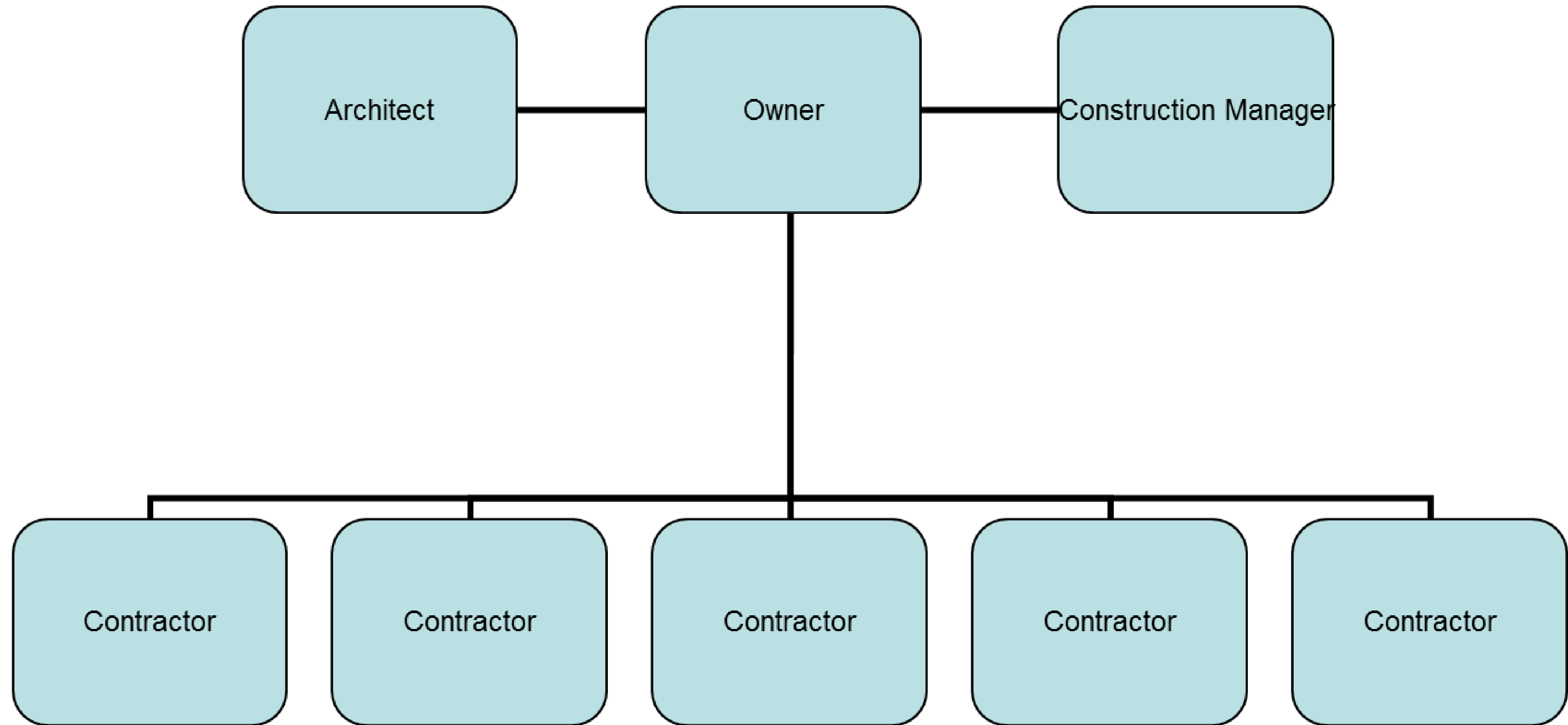
Not all of these “players” will be involved in every construction project. It depends on the delivery method utilized by the Owner.



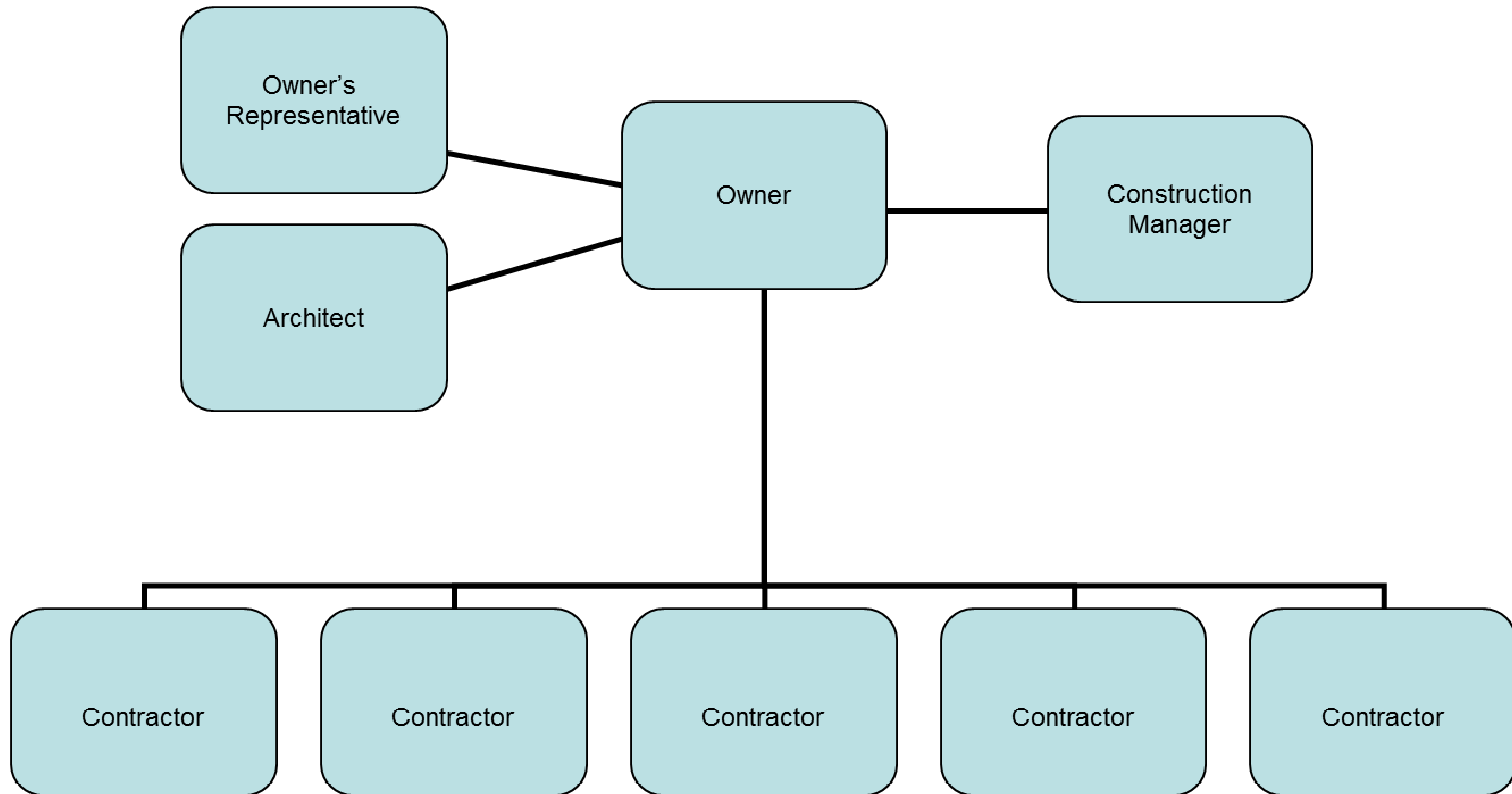
Delivery Method – Owner with General Contractor



Delivery Method – Owner with Construction Manager



Delivery Method – Owner with CM and Owner’s Representative



Legal Framework for Construction



General Procurement Powers

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 Powers for Procurements and Contracting:
 - ❖ 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.”**

Construction Projects

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 repairs in emergency situations**, the school district shall obtain competitive bids on all **material and labor** to complete construction costing **\$29,572 (*SY23-24)** 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



Construction Projects

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.
- ❖ Energy conservation improvements or substance removal or treatment authorized by this section is **subject to the competitive bidding requirements of section 1267.**

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 **at least 25%** of Contract Amount
 - Surety must be licensed in Michigan

Performance and Payment Bonds are required for all School Construction procurements in excess of the \$50,000 threshold, but school districts may require performance and/or payment bonds in other types of procurements/contracts.



Michigan's Reinstated Prevailing Wage Act – MCL 408.1101 (Public Act 10 of 2023)

❖ Effective February 13, 2024

❖ Brought back similar requirements from prior Act which was in effect from 1966-2018

❖ **Basic Law:** Every contract executed between a **contracting agent** and a successful bidder as contractor and **entered into pursuant to advertisement and invitation to bid** for a **state project** which requires or involves the employment of **construction mechanics**..... and which is **sponsored or financed in whole or in part by the state** shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of its subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the **locality** in which the work is to be performed.

- "Contracting agent" means any officer, **school board**, board or commission of the state, or a state institution **supported in whole or in part by state funds**, authorized to enter into a contract for a state project or to perform a state project by the direct employment of labor.
- "State project" means new construction, alteration, repair, installation, painting, decorating, completion, demolition, conditioning, reconditioning, or improvement of public buildings, **schools**, works, bridges, highways, or roads **authorized by a contracting agent**.
- "Locality" means the county, city, village, township, or **school district** in which the physical work on a state project is to be performed.

❖ **Requirement:** A contracting agent, **before** advertising for bids on a state project, shall have the commissioner determine the prevailing rates of wages and fringe benefits for all classes of construction mechanics called for in the contract.

❖ **408.1109 Inapplicability of the Act:**

- (1) Except as otherwise provided in subsection (2), the provisions of this act shall not apply to contracts entered into or the bids made before the effective date of this act.
- (2) This act does not apply to a state project if the state project was paid for, in whole or in part, from revenue from a millage that meets both of the following conditions:
 - The millage was authorized under the revised school code, 1976 PA 451, MCL 380.1 to 380.1852
 - The millage was authorized before the effective date of this Act.



Independent Design and Supervision of Project

When and Why do we need to engage professionals to design and/or supervise a project?

❖ Section 1263 of the Revised School Code (MCL 380.1263)

- Design or construction of school buildings used for **instruction or non-instructional purposes** must comply with requirements of School Building Construction Act. **Sole and Exclusive Jurisdiction vested in the State Superintendent of Public Instruction.**

❖ 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.
- Department of Licensing and Regulatory Affairs (“LARA”) authorized to administer Act and Single-State Construction Code Act.

Procurement of Services



Engaging Professional Services

How must a School District engage professional services?

- ❖ No [legal requirement](#) in Michigan Revised School Code to seek competitive bids for professional services that would be needed for design and supervision of a construction project.
- ❖ However, utilization of a [competitive bidding process](#) to secure professional services in construction projects often provides [benefits](#) to the School District, such as:
 - Transparency.
 - Obtain Competitive Pricing.
 - Secure best fit for School District and project.
 - Secure best terms and conditions for School District and project.

Procurement of Services

- ❖ No express legal requirement under **State law** to seek competitive bids for services. However, exceptions apply:
 - Federal funding used to pay or support services (ESSER & Food Service Contracts).
 - Privatizing or outsourcing non-instructional service with “unionized workforce” - must give union the “opportunity to bid on an equal basis as other bidders.”
 - Required by Board Policy

- ❖ However, utilization of a competitive bidding process to secure services may be advantageous:
 - Transparency
 - Obtain Competitive Pricing
 - Secure correct “contractor fit” for project
 - Secure best terms and conditions for school district and project

- ❖ Professional Services & Outsourcing/Privatization RFPs/Procurements are very unique depending upon the Service. Can be difficult to obtain “apples to apples” proposals/bids.

Federal Regulations - Procurements

What is required under the Uniform Grant Guidance (UGG)?

- ❖ Procurement standards apply to: **(i)** supplies, materials & equipment; **(ii)** construction **and** **(iii)** services.
- ❖ School district **must maintain records** sufficient to detail the history of procurement, including:
 - Rationale for the method of procurement.
 - Selection of contract type and basis for contract price.
 - Contractor selection or rejection.
- ❖ Must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement (**lowest responsible bidder**). Cannot award to **debarred** contractors.
- ❖ All procurement transactions must be conducted in a manner providing **full and open competition** to engage responsible contractors with ability to perform successfully.
- ❖ A **Contractor that develops or drafts** invitation for bids or request for proposals **must be excluded** from competing for such procurements.
- ❖ Must **not preclude potential bidders** or place unreasonable requirements on contractors to qualify to do work.
- ❖ Geographic **preferences** are not allowed (i.e., Michigan-based preference).



Federal Regulations - Procurements

When is competitive bidding required?

- ❖ School districts must have and use documented procurement procedures, consistent with State, local, and the applicable federal regulations of the UGG.
- ❖ Under State law (and local policy) bidding threshold is **\$29,572** (SY23-24).
- ❖ Under Federal law:
 - Micro Purchases Threshold (**\$10,000**) – If under MPT, do not require informal or competitive process.
 - Simplified Acquisition Threshold (**\$250,000**) – If over MPT but under SAT, require quotes from adequate number of qualified sources.
 - Formal Bidding – If over SAT, require sealed bids.
 - Must ensure objective contractor performance and eliminate unfair competitive advantage.
- ❖ Non-competitive Procurements allowed in limited circumstances.
 - Acquisition of property or services, the aggregate dollar amount of which does not exceed the MPT.
 - The item is available only from a single source.
 - Emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation.
 - After solicitation of a number of sources, competition is determined inadequate.

Federal Contracting Requirements

What provisions must be in the contract and when?

- ❖ Depending on type and value of contract, various provisions must be included in the contract.
 - Contracts for more than the SAT must address administrative, contractual, or legal remedies in instances where contractors violate or **breach contract terms**, and provide for such sanctions and penalties as appropriate.
 - All contracts in excess of \$10,000 must address **termination for cause and for convenience by the school district**, including the manner by which it will be effected and the basis for settlements.
 - All construction contracts must include the **equal employment opportunity clause**.
 - All construction contracts in excess of \$2,000 must require **FEDERAL PREVAILING WAGES** be paid and require documentation of compliance.
 - All contracts in excess of \$100,000 that involve the employment of mechanics or laborers must include a provisions relating to “**Wage and Hour**” and payment of overtime.
 - Contracts in excess of \$150,000 must contain a provision that requires the contractor to comply with all applicable standards, orders or regulations under the **Clean Air Act and the Federal Water Pollution Control Act**.
 - Contracts exceeding \$100,000 must require contractors to certify compliance with the Byrd Anti-Lobbying Amendment.
 - All construction or facility improvement contracts exceeding the SAT must require a **bid bond (5%)** and **performance and payment bonds (100%)**.



Iran Sanctions Certifications

Iran Economic Sanctions Act - MCL 129.311 et seq.

- ❖ 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.



Common Misperceptions of the Law



Common Misperceptions of the Law

- ❖ No sole or **single source exception** for Section 1267, but Federal regulations may apply depending upon funding source and procurement process requirement.
- ❖ **Emergency Exception**
 - ONLY applies to repairs to school buildings (Section 1267).
 - NO “Emergency” exception for supplies, materials and equipment purchases.
 - “**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.
- ❖ Obtaining supplies, materials and/or equipment via a **cooperative/consortium bidding** process is NOT permissible and/or legally compliant for school construction projects.
- ❖ \$**100,000** increased competitive bidding threshold only applies to **food purchases**.

Common Misperceptions of the Law

❑ Waiver of RFP vs. Legal Requirements

- Bid Bond
- Familial Disclosure Affidavit
- Iran Linked Business Certification (Affidavit)
- RFP Requirements

❑ 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



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!

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