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SCULLY MANSUKHANI

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No Good Deed Goes Unpunished:

What you need to know about design-assist projects before you bid and sign the contract in order to prevent a bet the company mistake.

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February 2, 2021

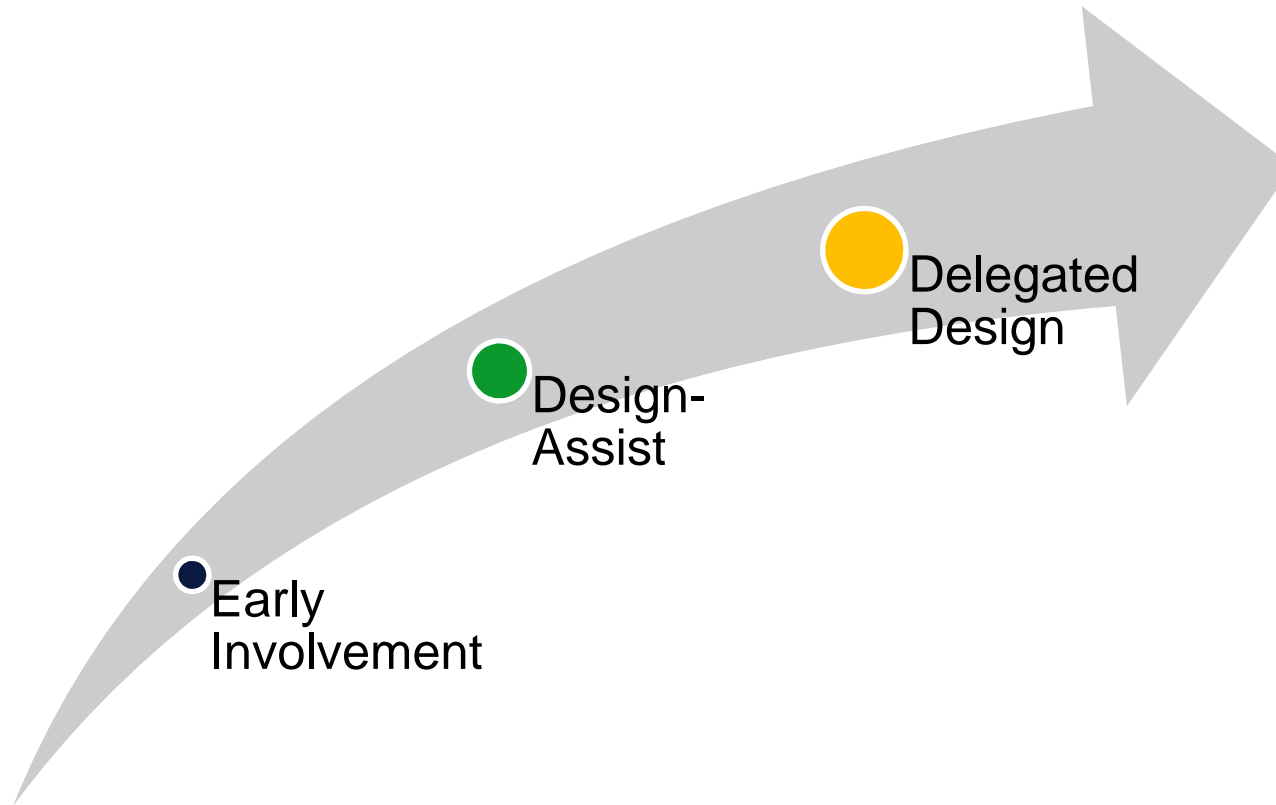
Session Overview

- Definitions & Scope
 - Early Involvement v.
 - Design Assist v.
 - Delegated Design
- Key Issues with Design-Assist
 - Scope of Work
 - Schedule
 - Payment



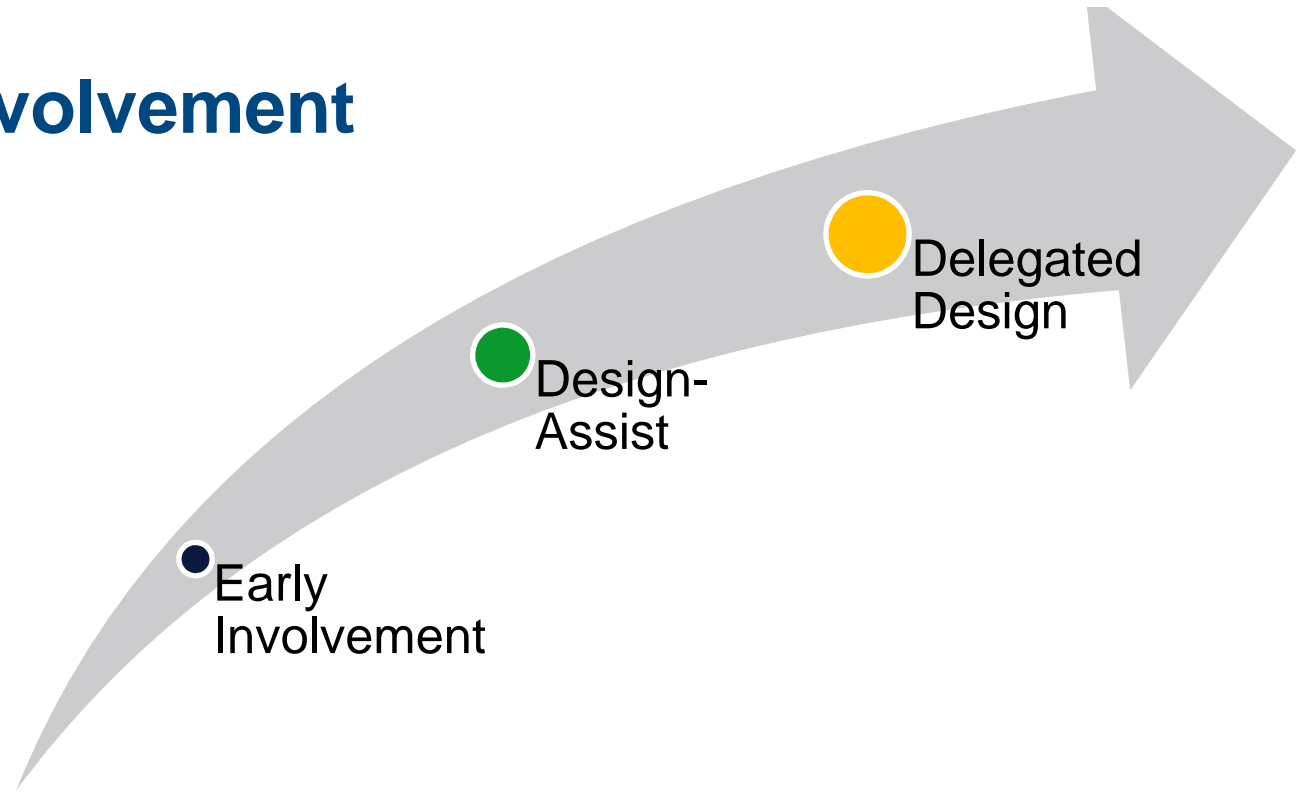
Definitions

Levels of Design Input



Sliding Scale of Liability for:
Information conveyed v. Adequacy of the design.

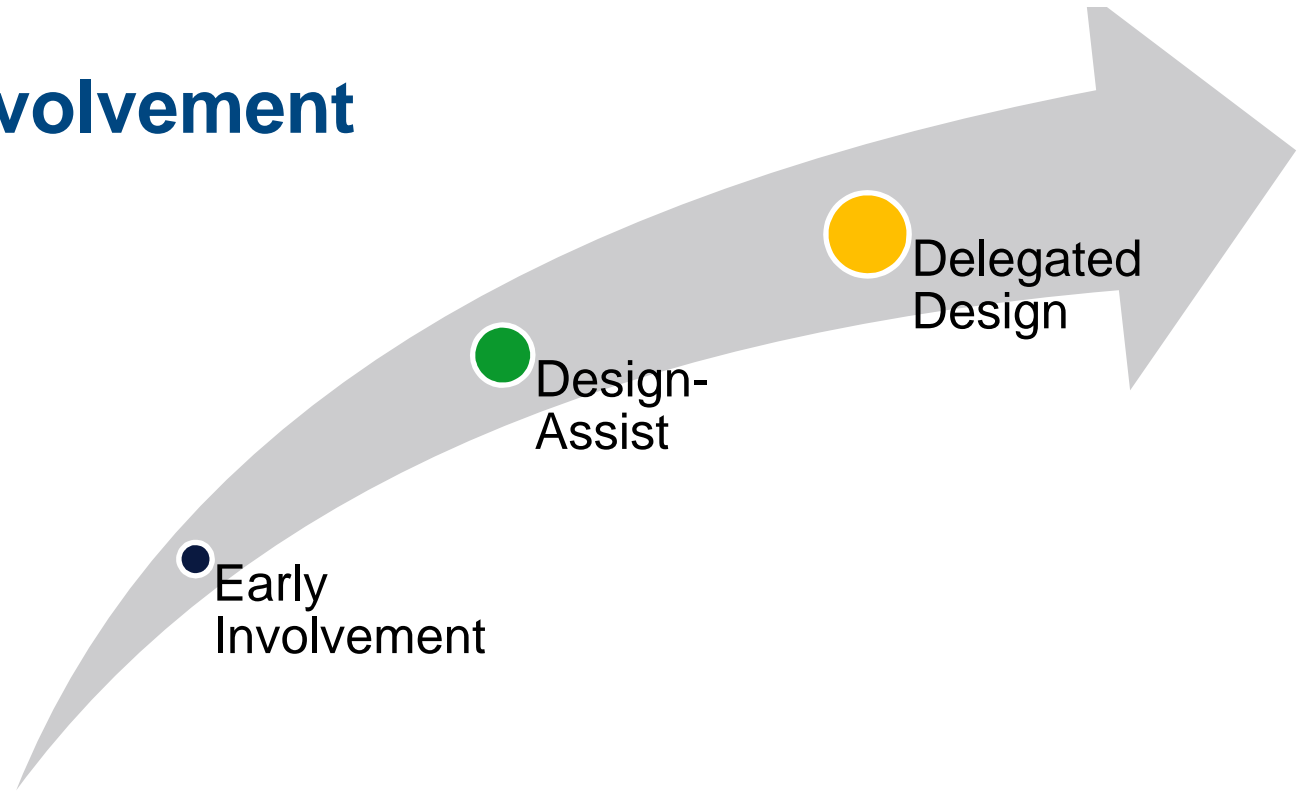
Early Involvement



Offer opinions, feedback, recommendations on:

- Constructability and product reliability
- Scheduling
 - Availability of materials and labor;
 - Timing of fabrication; and
 - Timing of erection.
- Price
 - Preliminary budgets;
 - Costs of alternative designs; and
 - Cost reductions.

Early Involvement



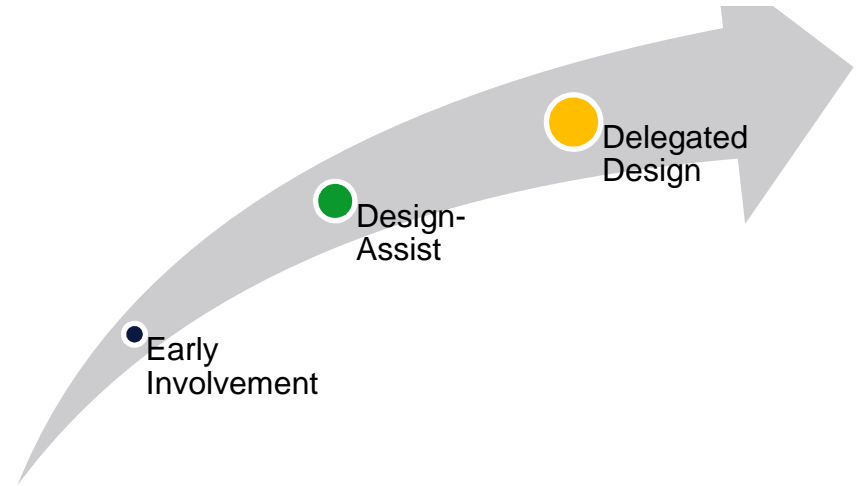
No contract

No guarantees that the information will be accurate, or you will be liable

Opinions are just intended as means and methods

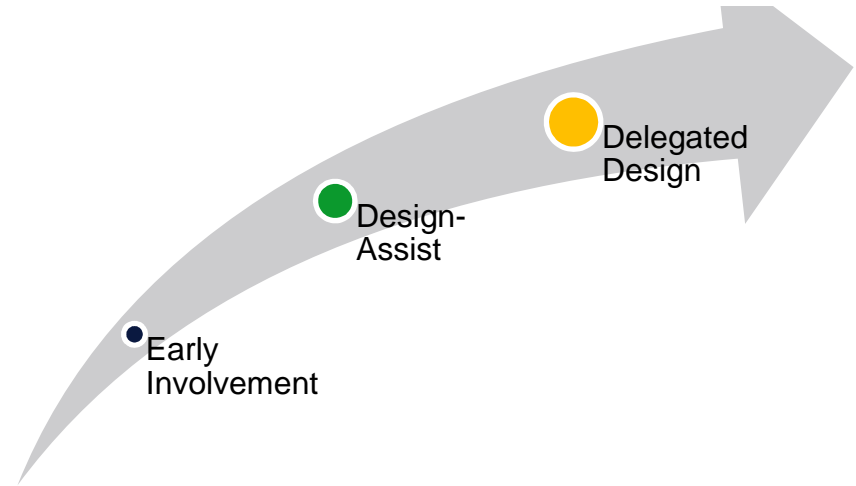
EOR remains solely responsible for suitability, adequacy, and building code conformance of design

Early Involvement



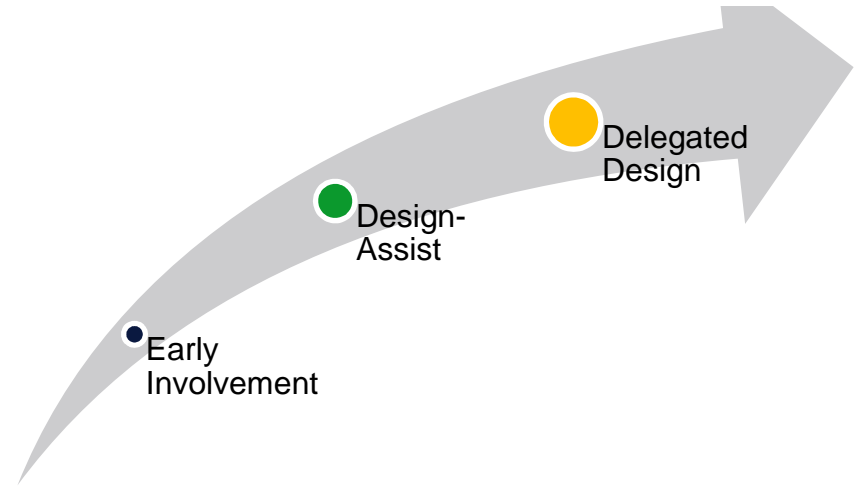
- **No Guarantees.** Fabricator does not warrant or guarantee estimates, schedules, and material availability except as may be included as part of a written agreement between Design-Builder and Fabricator.

Early Involvement



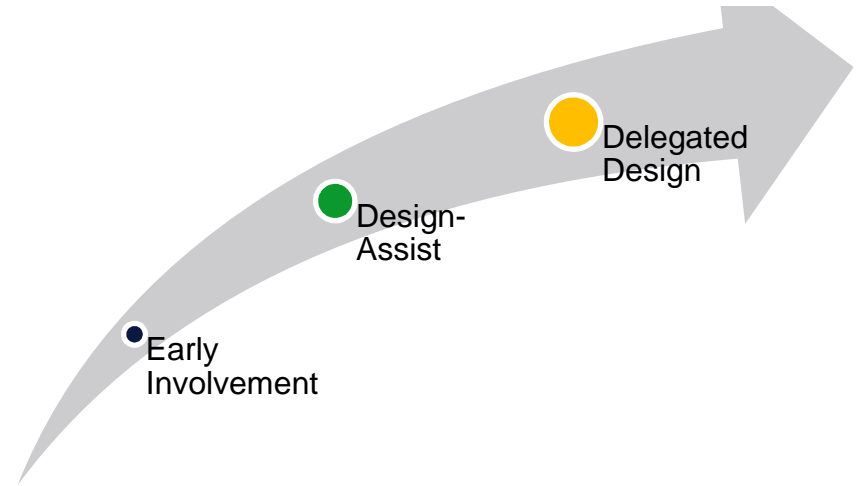
- **Disclaimer.**
 - Fabricator does not assume responsibility for the suitability, adequacy, building-code conformance of the design, or for determining that the Owner's requirements have been included in the Drawings and Specifications.
 - Design-Builder shall retain a separate, independent professional engineer to provide stamped drawings, specifications, and associated professional services.
 - Fabricator's recommendations are made only in the context of construction means, methods, techniques, sequences, and procedures and are not intended as professional services.
 - Fabricator makes no warranty, express or implied, regarding professional services provided.

Early Involvement



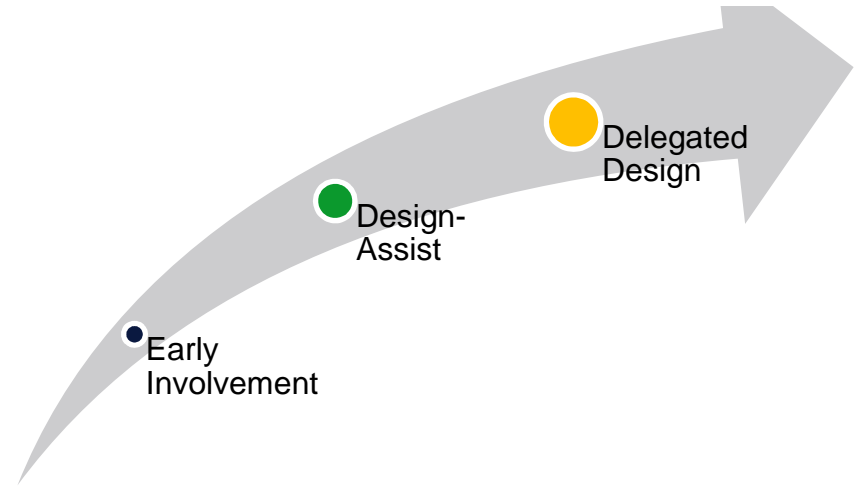
- **Incorporation of COSP.** Fabricator and Design Builder agree that the Work shall be performed in accordance with the American Institute of Steel Construction Code of Standard Practice for Buildings and Bridges, **current edition** as of the date of this letter.

Early Involvement



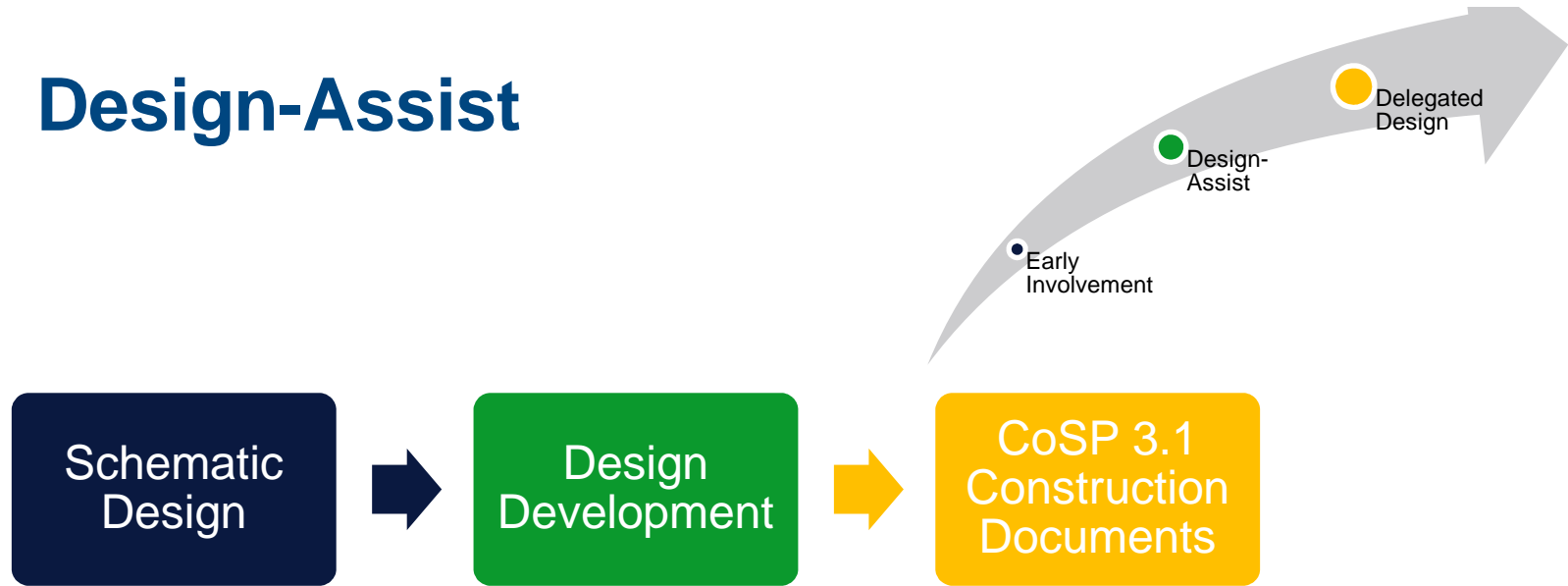
- **Copyright** - Any copyright or other property or proprietary rights owned by the fabricator shall remain the exclusive property of the fabricator. (Similar to COSP 4.2.2)

Early Involvement



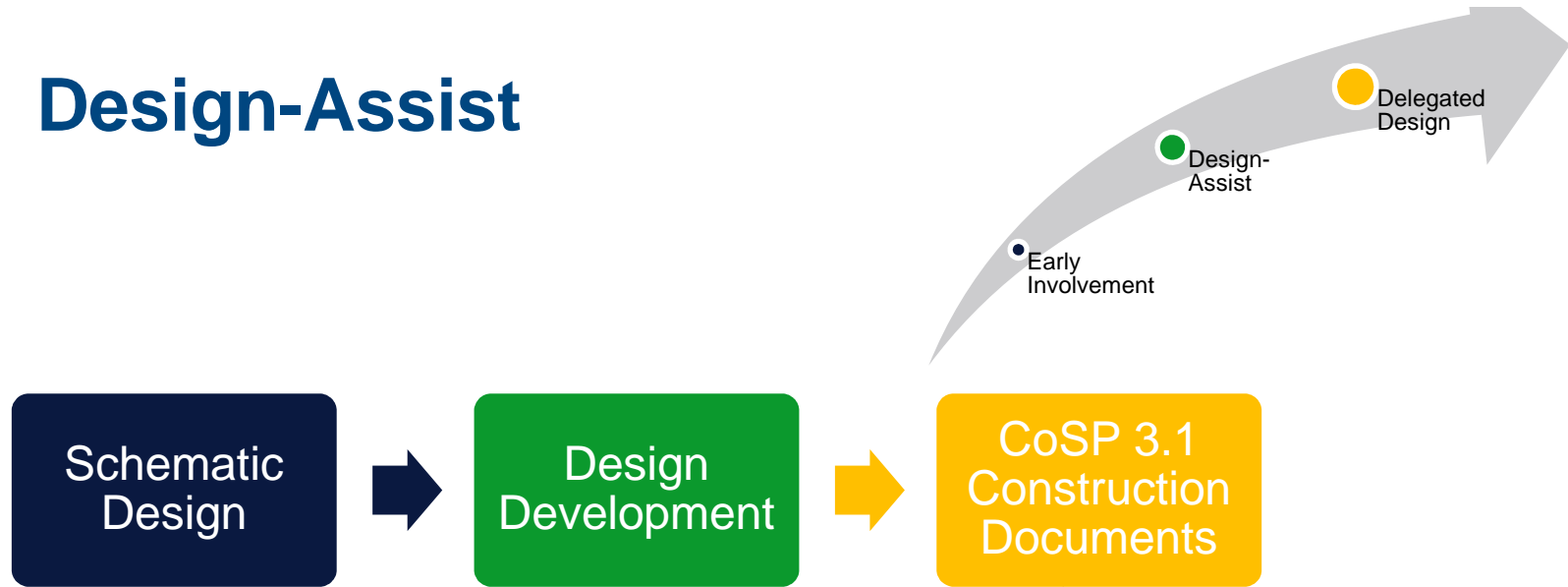
- **Confidentiality & Non-Disclosure.** All budgets, estimates, and cost information provided by Fabricator to Design-Builder shall be deemed “Confidential Information.” Design-Builder shall not at any time disclose such Confidential Information to any other fabricator or competitor of Fabricator.

Design-Assist



- **LIMITATIONS NEEDED DEPENDING ON DEVELOPMENT OF DESIGN**
- Offer opinions, feedback, recommendations – **NOT GUARANTEES** on:
 - Constructability and product reliability
 - Scheduling
 - Price
- Typically a contract is provided

Design-Assist



- No Guarantees on Schedule or Price until
- The goal is to collaborate and provide recommendations; not assume design responsibility.
- The EOR should retain responsibility for the suitability, adequacy, and building code conformance of the design.
 - The Fabricator is not the EOR

Design Assist Gone Wrong

What services do you want to provide?

- Subcontractor . . .required to
 - carefully and fully review all design documents . . .
 - coordinate, value-engineer, adapt and/or modify the Subcontract Work . . .
 - to maintain the Project scope, budget and schedule. .

Design Assist Gone Wrong

What services do you want to provide?

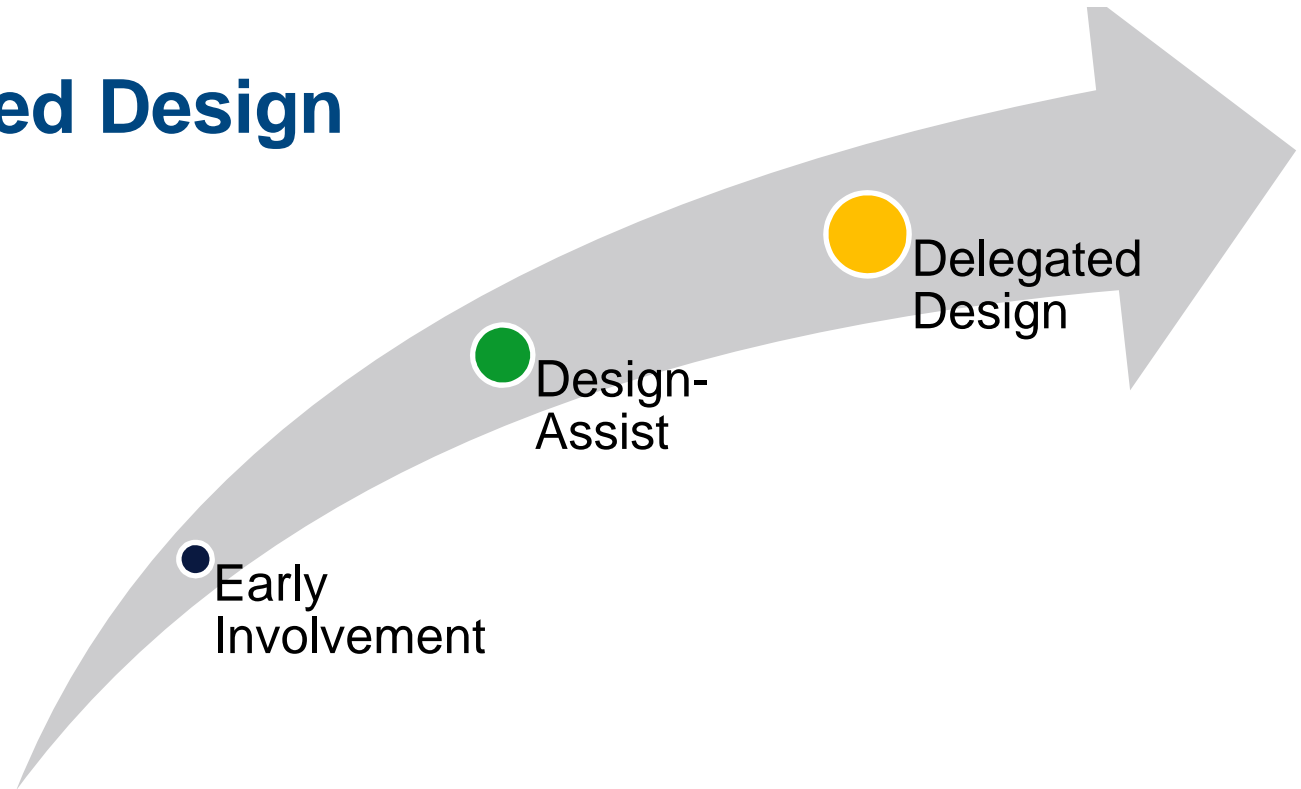
- Subcontractor shall
 - review . . . all building codes . . . applicable to the design”
 - and provide comments to conform to these legal requirements and the Contract Documents . . .

Design Assist Gone Wrong What services do you want to provide?

- such [work] . . . [is] included in the Subcontract Sum
 - . . . not be entitled to any adjustment to the Subcontract Sum as a result of the development of the final Construction Documents. . .



Delegated Design



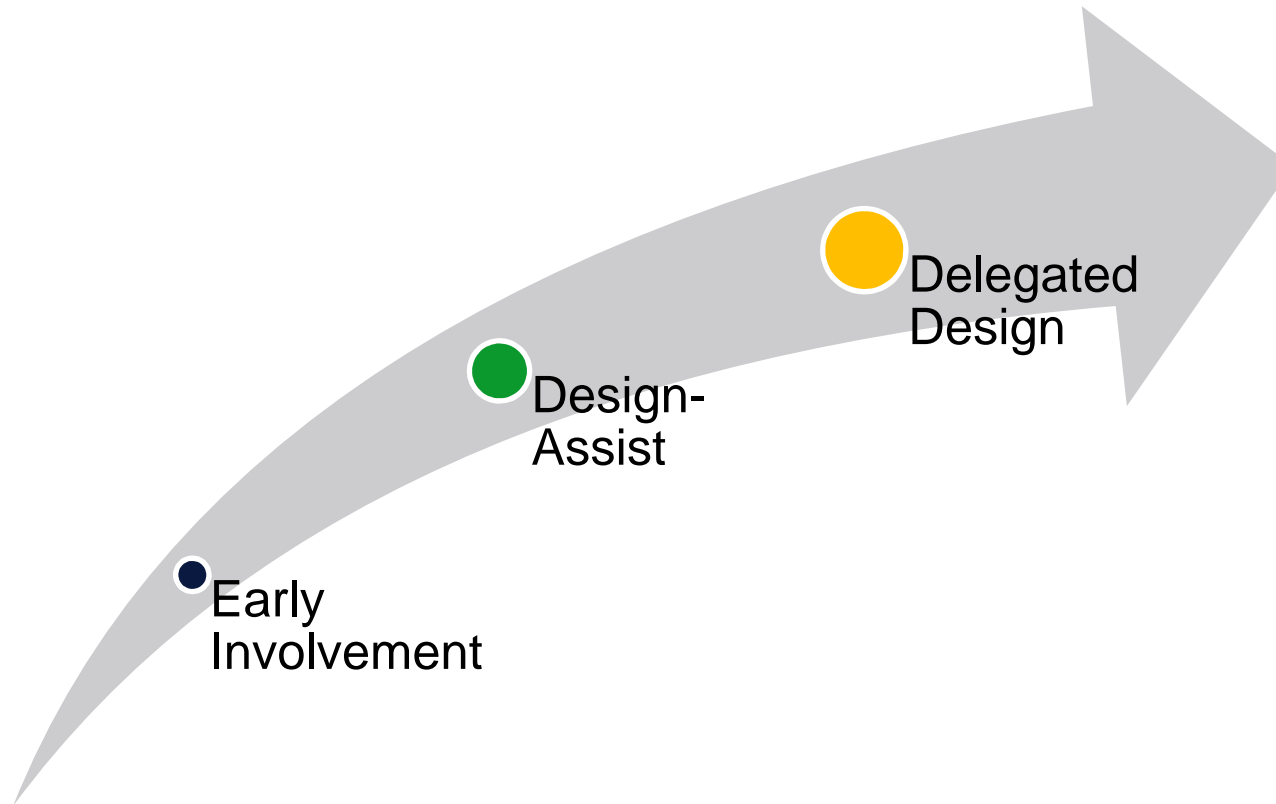
Fabricator is responsible for the design details for all or a portion of the design.

Liability lies with the party creating the design

Delegated Design – A201 Example

- “The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents.”
- Where design services are required by the Contractor, the Contractor shall retain “an appropriately licensed design professional, . . . [and] [t]he Owner and the Architect shall be entitled to rely upon the adequacy and accuracy of the services, certifications, and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor the performance and design criteria that such services must satisfy.”
- “[T]he Architect will review and approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.”

Levels of Design Input



The Key is to watch what your scope includes:
design recommendations v. liability



Scope

Useful Contract Terms to Watch

Design & Engineering Calculations



- Specifically limit your Work "but only to the extent Connection Design is expressly included in Subcontractor's Work"

Design-Assist

- The Fabricator's Contract Sum and Contract Time will not be established until all information set forth in Section 3.1 of the COSP is provided.

3.1. Structural Design Documents and Specifications

Unless otherwise indicated in the *contract documents*, the structural *design documents* shall be based upon consideration of the design loads and forces to be resisted by the *structural steel* frame in the completed project.

The structural *design documents* shall clearly show or note the work that is to be performed and shall give the following information with sufficient dimensions to accurately convey the quantity and complexity of the *structural steel* to be fabricated:

- (a) The size, section, material grade and location of all members.
- (b) All geometry and working points necessary for layout.
- (c) Floor elevations.
- (d) Column centers and offsets.
- (e) The camber requirements for members.
- (f) Preset elevation requirements, if any, at free ends of cantilevered members relative to their fixed-end elevations.
- (g) Joining requirements between elements of built-up members.
- (h) When the requirements of ANSI/AISC 341 are applicable, the information required in ANSI/AISC 341 Section A4.
- (i) The information required in Sections 3.1.1 through 3.1.6.

The *structural steel specifications* shall include any special requirements for the fabrication and erection of the *structural steel*.

The structural *design documents*, *specifications* and addenda shall be numbered and dated for the purposes of identification. 3D digital models shall contain a unique identifier.

Design-Assist

- The Subcontract Time and Price are based upon the assumption that the Structural Engineer of Record has provided a **suitable structural steel design** that complies with the building code. If the structural steel design is changed in order to provide a suitable structural steel design which complies with the building code, Subcontractor may seek a change to the Contract Price and/or Time order in accordance with this Agreement. **Subcontractor shall submit all approval drawings to the Engineer of Record, who shall have responsibility for the suitability, adequacy, and building-code conformance of the overall design.**
- Subcontractor does not assume responsibility for the suitability, adequacy, building-code conformance of the design **provided by others**, nor does it assume responsibility for determining that the Owner's requirements have been included in the Drawings and Specifications which are provided by others. Fabricator will submit all approval drawings to the designated representative for design, and such designated representative for design shall have responsibility for the suitability, adequacy, and building-code conformance of the overall design. (Similar to COSP 1.6.1 and 4.4.1 Approval Commentary)

Duty to Coordinate



- Subcontractor shall provide information to Contractor such that **Contractor can coordinate Subcontractor's Work** with the Contractor and work of other subcontractors.
- In no event shall Subcontractor be responsible to coordinate the design provided by others.

Compliance with “codes”



- Nothing contained in this Agreement shall require Subcontractor to conduct a peer review of the design to ensure its suitability, adequacy, or building code conformance.

Example Design-Assist Proposal

- SCOPE OF WORK: Steel Fabricator proposes to provide the following Design-Assist Services (also known as Pre-Construction Services) to the Project (“**Design-Assist Work**”):
- Steel Fabricator will advise Construction Manager and Owner on the:
 - constructability of the structural design;
 - availability of materials and labor for the fabrication of structural steel, and assist with the procurement of such labor and materials;
 - time requirements for procurement, fabrication, and erection of structural steel and the potential to accelerate the schedule through the delivery of structural steel; and
 - cost estimates including, preliminary budgets, costs of alternative designs, and possible cost reductions relating to the design, fabrication, and erection of structural steel.

Example Design-Assist Proposal

- Steel Fabricator shall attend meetings with Construction Manager and Owner and any other necessary parties, such as the Engineer of Record, to discuss the Design-Assist Work.
 - This Proposal Price for Steel Fabricator’s Design-Assist Work includes [] meetings, and should the number of meetings increase, Steel Fabricator shall have a right to seek an equitable adjustment in the Contract Sum.

Example Design-Assist Proposal

- Steel Fabricator will provide the following deliverables for the Design-Assist Work:
 - Advise on adjustments to the structural design to meet the Owner's Budget or Owner's Schedule;
 - Advise on a preliminary schedule, which shall include proposed design, material procurement, shop drawing review and approval, fabrication, and erection milestones for the structural design; and
 - A preliminary estimate for the fabrication and erection of structural steel.

Example Design-Assist Proposal

- After all or a portions of the structural design is sufficiently complete, such that all of the information required in Section 3.1 of the AISC Code of Standard Practice, current edition, is included in the structural drawings (or that portion thereof that is released for construction), Steel Fabricator shall prepare a Steel Fabricator’s Proposal for the (“**Fabrication Work**”): [check all that apply]
 - » fabrication of structural steel, which, after the structural design is Issued for Construction, shall include the production of shop drawings and erection drawings;
 - » fabrication of miscellaneous metals, which, after the structural design is Issued for Construction, shall include the production of shop drawings and erection drawings;
 - » erection of structural steel, which shall include erection bracing drawings;
 - » erection of miscellaneous metals.

Example Design-Assist Proposal

- The Steel Fabricator's Proposal for the Fabrication Work will include:
 - Proposed Contract Sum for fabrication and erection of structural steel, and to the extent applicable, miscellaneous metals;
 - List of structural steel drawings which form the basis of the Proposal;
 - Clarifications, Exclusions, and Assumptions;
 - Allowances;
 - The date on which the Steel Fabricator's Proposal Expires; and
 - Baseline Schedule upon which the Contract Sum is based for the preparation of shop drawings, shop drawing approval, fabrication, delivery, erection and the Substantial Completion date for the erection of structural steel, and if included above, miscellaneous metals.

Example Design-Assist Proposal

- If the Construction Manager and Steel Fabricator agree on a proposal for the Fabrication Work, the Steel Fabricator and Construction Manager shall execute a **Design-Assist Amendment** to the Design-Assist Agreement between Construction Manager and Steel Fabricator (“**Agreement**”) setting forth the terms of their agreement.

- Note that other key proposal terms should be included:
 - Payment, changes, schedule, etc.



Schedule –Contract Time

Pre-Construction Services -Duration

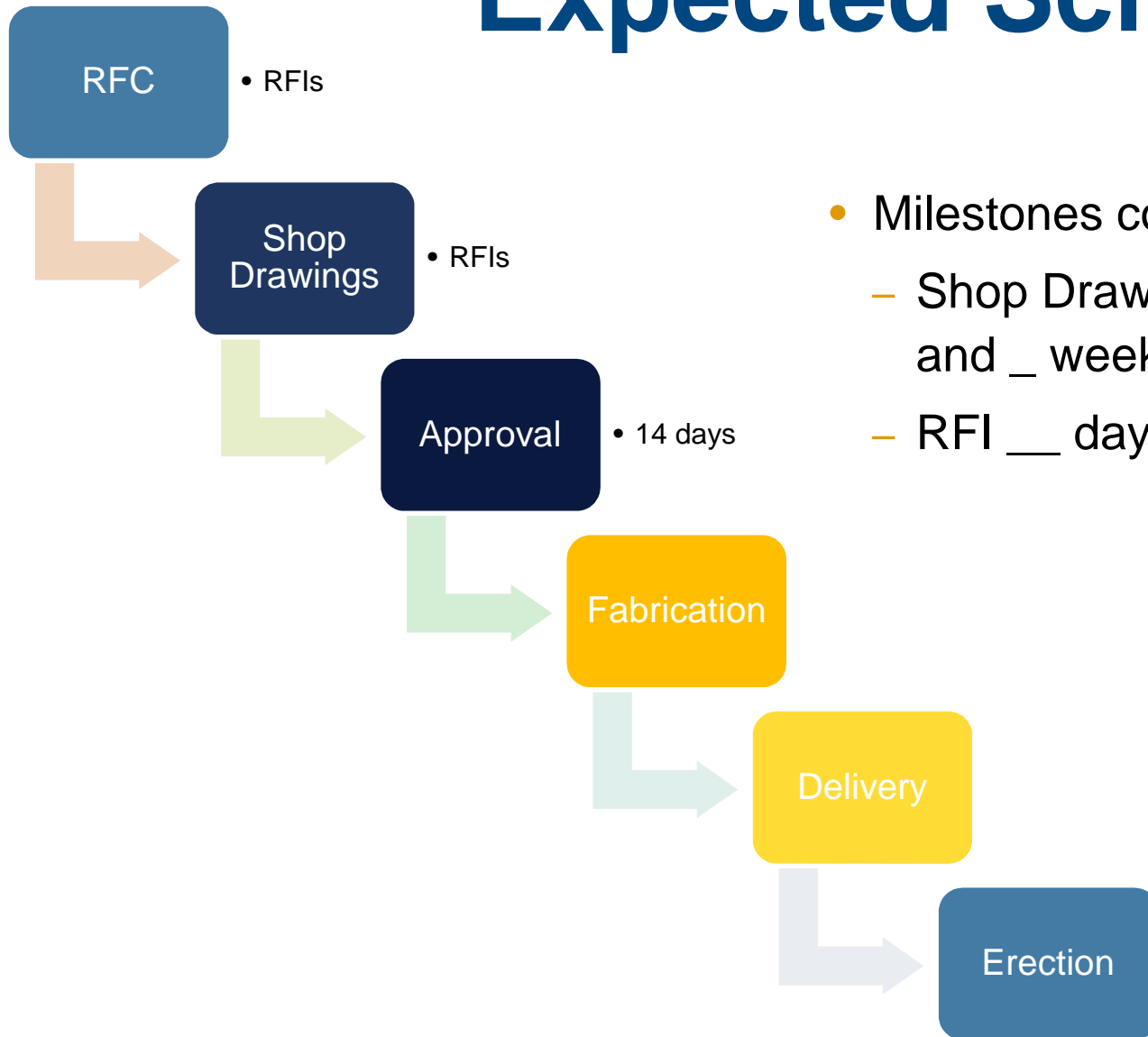
- Duration of Pre-Construction Services?
 - In person meetings?
 - Compensation for re-detailing work?
 - When will you actually get RFCs?



Released for Construction

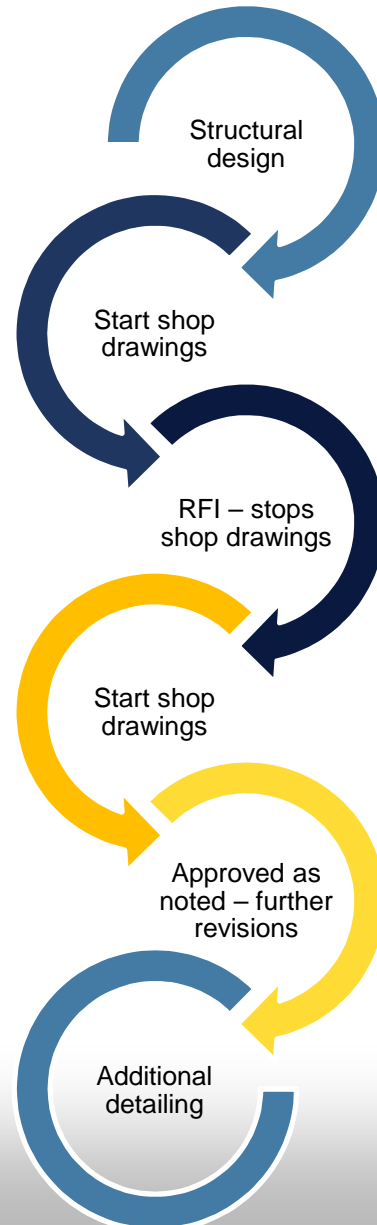
- Released for construction. The term that describes the status of contract documents that are in **such a condition that the fabricator and the erector can rely upon them for the performance of their work**, including the ordering of material and the preparation of shop and erection drawings or fabrication and erection models.
- COSP 4.1. Owner Responsibility. The owner shall furnish, in a timely manner and in accordance with the contract documents, the **complete structural design documents and specifications that have been released for construction**.
- COSP 9.5.1. The **contract schedule shall state when the design documents will be released for construction**, if the design documents are not available at the time of bidding, and when the job site, foundations, piers and abutments will be ready, free from obstructions and accessible to the erector, so that erection can start at the designated time and continue without interference or delay caused by the owner's designated representative for construction or other trades.

Expected Schedule

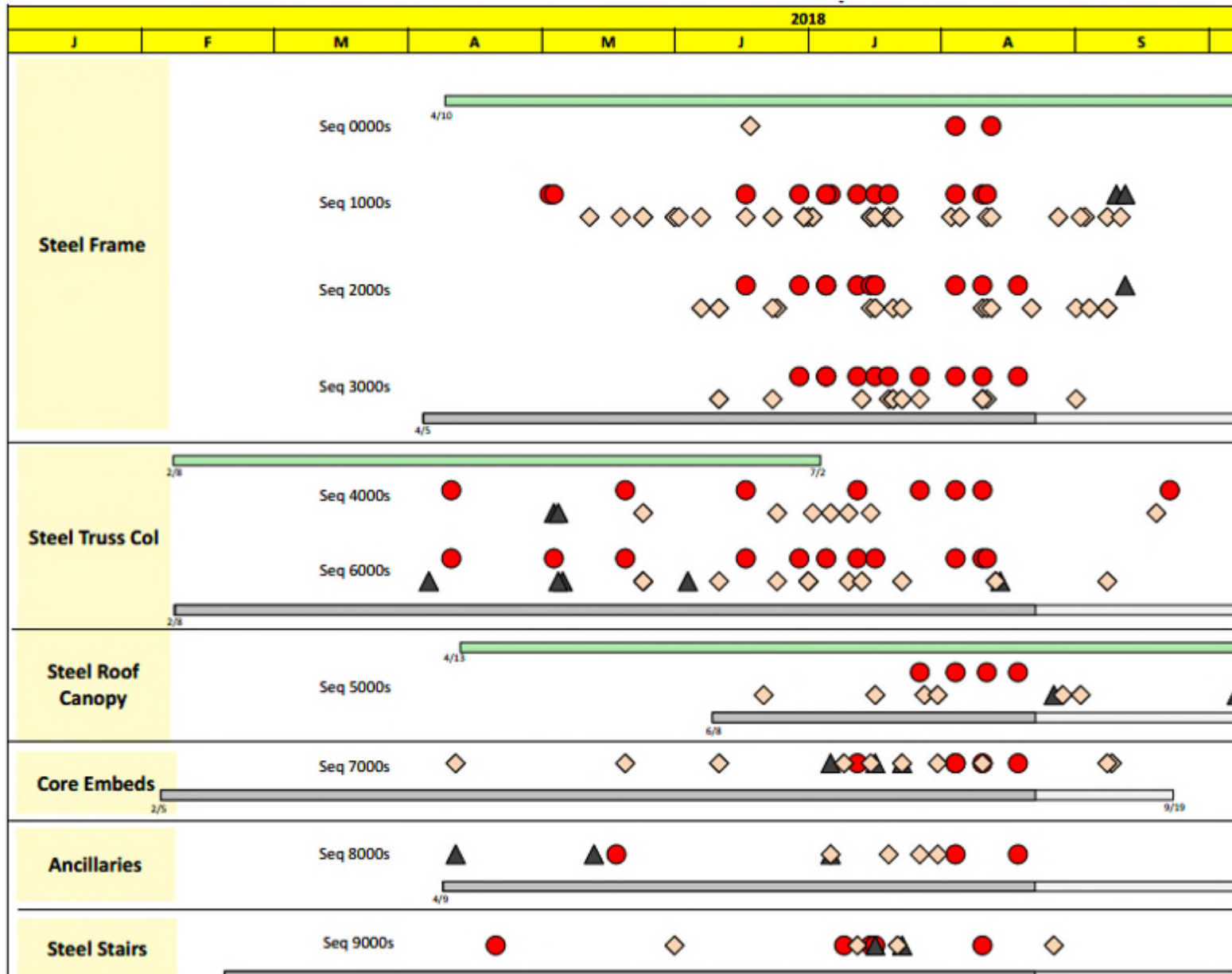


- Milestones contingent on:
 - Shop Drawing Return _ days and _ weeks prior to fabrication
 - RFI __ days/hrs

Actual Schedule

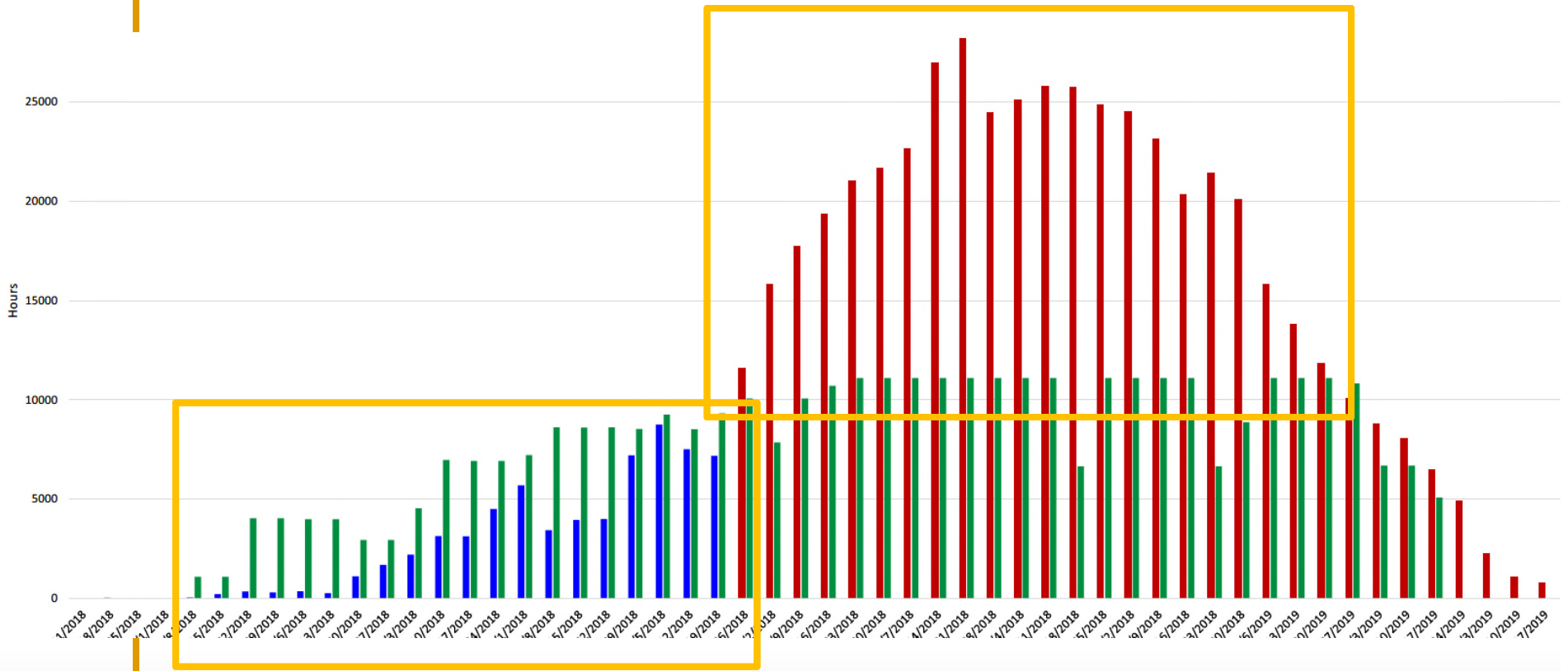


Death by 1000 cuts



Shop Production Schedule Impacts

- Not enough v. too much



Acceleration



- Subcontractor shall be entitled to an equitable adjustment resulting from any change of schedule, acceleration, out of sequence work, or delay **caused by others for whom Subcontractor is not responsible.**
- Delay – think of idle crane
- Acceleration – think of sub-fab

Contract Language

- Subcontractor's Baseline Schedule is attached hereto as Exhibit ____.
- The Subcontract Time and the achievement of Milestones in this Agreement are contingent upon:
 - (1) Issued for Construction Drawings, which comply with Section 3.1 of the AISC Code of Standard Practice, current edition, obtained on or before ____;
 - (2) return of approved shop drawings within ____ business days of submission to Contractor,
 - (3) prompt return of RFI responses to Subcontractor, but in any event, no later than ____ hours after submission by Subcontractor, and
 - (4) Subcontractor being given approved shop drawings ____ weeks prior to the necessary delivery date for that sequence of work (“Predecessor Work Milestones”).
- Schedule is conditioned upon the attainment of the Predecessor Work Milestones



Changes

NEDD

- N = Notice
 - E =Entitlement
 - D = Damages
 - D = Don't Waive Your Claims
-
- For Changes to Scope & Time

NEDD

- **N = Notice**
 - Notice: Time (5 days?)
 - How given - certified mail return receipt
 - To whom?
 - What must be included?
 - Who can authorize a CO?
- E = Entitlement
- D = Damages
- D = Don't Waive Your Claims



NEDD

- N = Notice
 - Original Drawing
 - Revised Drawing or RFI
 - Relevant Contract Provisions
- D = Damages
- D = Don't Waive Your Claims



NEDD

- N = Notice
- E = Entitlement
- D = Damages
 - Unit Price adjustment – contract provide for adjustment?
 - T&M
 - Lump Sum
- D = Don't Waive Your Claims



Damages - Change Order Pricing

Pricing without an agreement (A201 Article 7.3.6)

- Contractor must keep and present itemized accounting of all costs, including:
 - **Labor costs**
 - **Material costs** (including transportation)
 - **Rental costs** (exclusive of hand tools)
 - Bond and insurance premiums
 - Sales or use taxes
 - Additional supervision and field costs directly attributable to the change

Damages –watch limitations to only recovery from the Owner

- Ok if Owner provided the design
- Not ok if you have a contract with the Design-Builder
 - "Except where such extra work is caused by Contractor or its subcontractors, Contractor's receipt of compensation from Owner for extra work, changed work or changed circumstance shall be a condition precedent to Subcontractor's right to payment for the same."

NEDD

- N = Notice
- E =Entitlement
- D = Damages
- D = Don't Waive Your Claims
 - Accept payment = waiver?
 - Fail to modify lien waivers = waived claims?
 - Missed deadlines for lien and bond claims
 - Failed to timely start dispute resolution procedures

Duty to Proceed with Disputed Work

- Provided Contractor has
 1. Paid all amounts owed under the original scope of Work in accordance with the Contract,
 2. Paid for all Contractor-caused changes, and
 3. For Owner-caused changes Contractor has diligently submitted and requested timely payment of all applicable Change Order Requests,
- Subcontractor shall proceed diligently with performance of the original Work and changed work which has been directed prior to agreement, and Contractor shall continue to make payments in accordance with the Contract Documents.

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