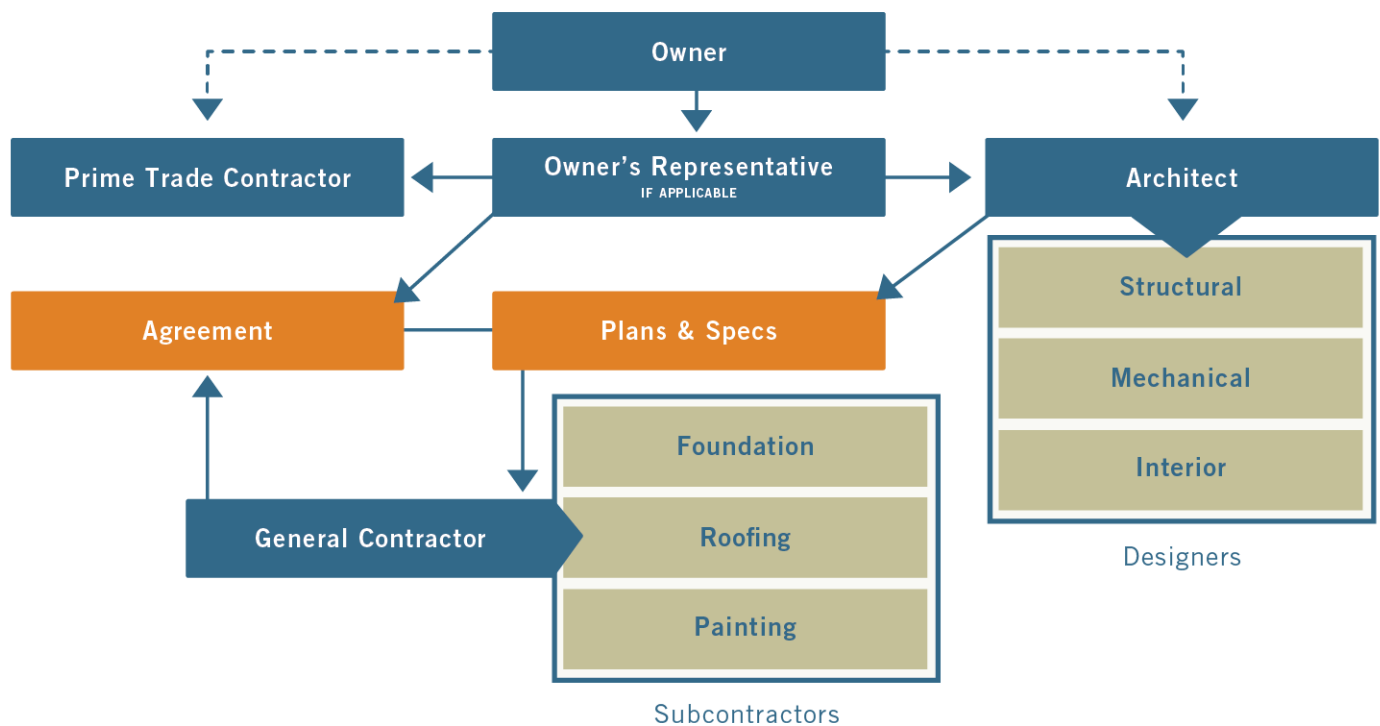


Contracting 101: Understanding the Roles & Responsibilities in Building Projects

Article by Pete Fowler



Explain it Simply

The building industry is terrible at explaining how it does what it does. And this is coming from a guy who has a Bachelor of Science in Construction Management! It's so bad that I was once working on a construction litigation matter and needed the most basic of organizational charts to explain to a jury the most common roles, relationships, and responsibilities of the various parties involved in a typical construction project; but there was none to be found. I would have loved to have had a reliable source like American Institute of Constructors, The Construction Specifications Institute, the American Institute of Architects,

or some similar organization to rely on, to tell my story to the jury. I searched and searched and there was just nothing simple enough to use for a group of people with no construction experience. Everything was overly complex, attempting to account for every possibility. So I locked myself in my office alone one weekend with a pile of flip-chart paper and made iteration after iteration, and finally I nailed it. That was more than a decade ago. Since that time almost every trial or arbitration I have testified in has included some version of this org chart to explain the roles of the parties to one another and to the physical work.

The Contracting 101 Framework

1. An **Owner** wants a project, similar to anyone who wants to buy something, such as a car, but with a construction project the product being purchased is not something that is already built.

2. The Owner goes to an **Architect** (or in some cases a non-architect designer) to translate his/her desires into a set of documents. This process is intended to “define” what the Owner wants to buy (often from a General Contractor).

3. The Architect works with **Specialty (Sub) Designers** such as structural engineers, mechanical engineers and interior designers to further detail the **Plans and Specifications** (also referred to as Construction Documents) because buildings are so complex that many specialized professionals are required.

4. The Plans and Specifications are sent to qualified and interested **General Contractors**, who submit proposals to the Owner. Ultimately the Owner and a General Contractor compose an **Agreement** (or Contract).

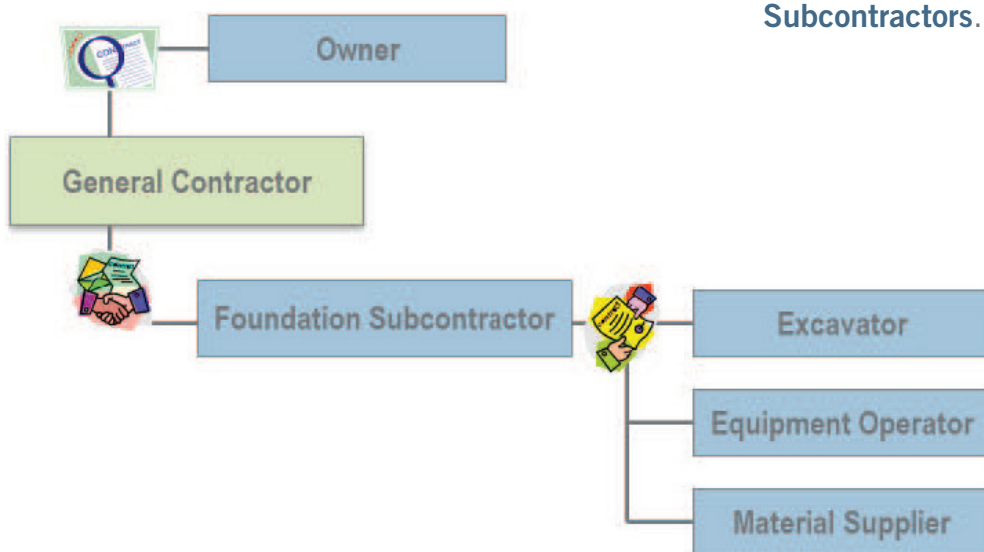
5. An Agreement for construction is simply a promise by the Contractor to deliver what is described in the Plans, Specifications, and other contract documents, and a promise by the Owner to pay for it.

6. The Agreement refers to the Plans & Specifications and should include clear definition of the Scope, Budget, and Schedule, including at Scope of Work document that includes: Inclusions and Exclusions, Allowances, a provision for handling Change Orders. The Agreement should include a Schedule of Values and Payment Milestones (for management of the Budget). And finally, the Agreement should include a Progress Schedule.

7. GCs usually hire specialty trade contractors, commonly referred to as **Subcontractors** when they are working for a prime (or general) contractor, who are specialists in their respective trades, to help deliver what has been promised in the Agreement. This is, again, because buildings are so complex that many specialized professionals are required.

8. There is nothing in this scheme that prohibits the Owner from directly hiring Specialty/Trade Contractors (that are called Subcontractors if they are working for a General Contractor) for work that is not in the Scope of Work in the Agreement with the GC. In this situation they are **Prime Trade Contractors**.

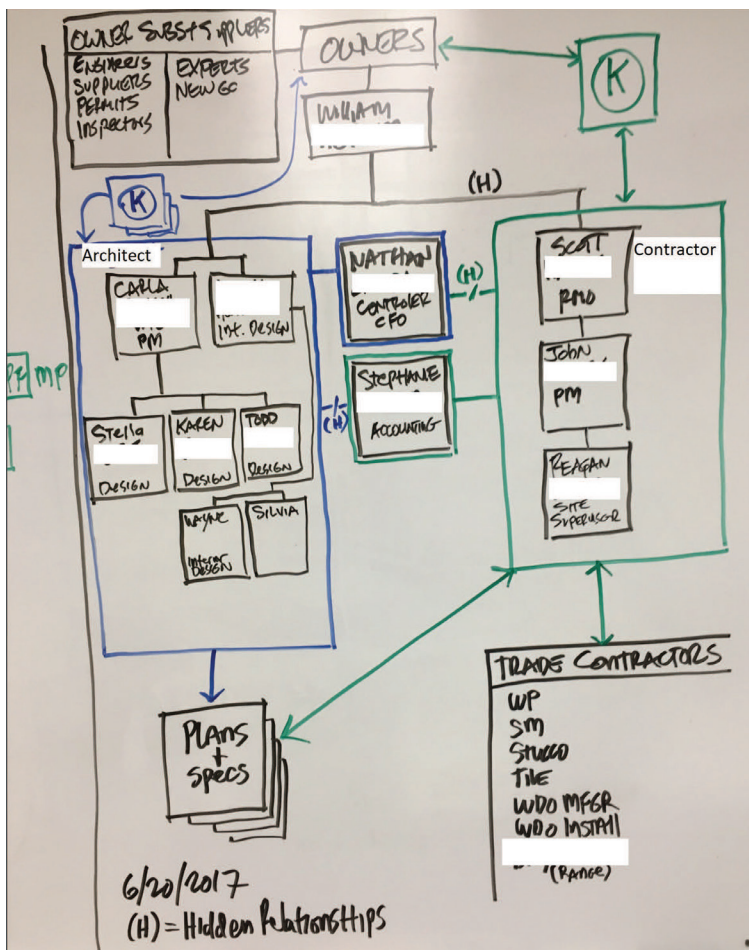
9. Most of the Subcontractors, and Prime Trade Contractors, have their own suppliers and subcontractors: these are called **Sub-Subcontractors**. (See diagram below)



Using the Contracting 101 Framework

So the point of the Contracting 101 Framework is to foster understanding of the project at hand. Begin by printing the diagrams above and writing the names of the project players over the generic descriptions. Virtually every project will be different than the Contracting 101 Framework, so you might have to compose multiple iterations, moving the boxes around to fit the peculiarities of your project. I often do this in my office where we have multiple whiteboards and I move back and forth from one to the next until I get my organizational chart to accurately reflect the complexity of the roles and relationships of the current situation. The “compare and contrast,” from the simple “Contracting 101 Framework,” to the complexity of the real world, is often incredibly instructive.

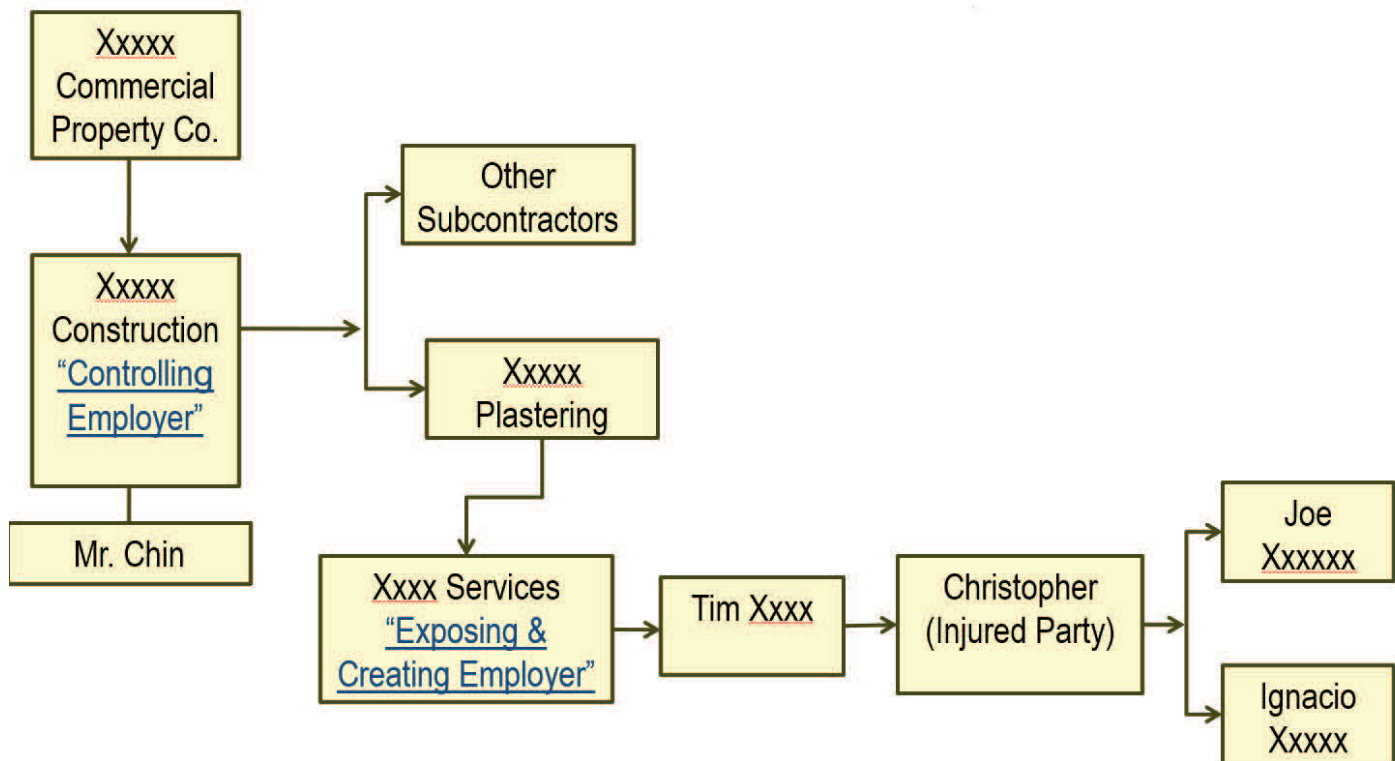
Sample Project: Custom Single Family Residence



This project was a train wreck.

The Architecture firm and the General Contracting firm were both owned by the same person, but the Owner did not know that (which is unethical and illegal without following strict consent laws). By the time the Owner tried to get control of the project, the two firms had taken \$3.5 million dollars to turn a \$2.9 million home (initial purchase cost) into a lumber pile. The contract called for distinct design phases but the design was never finished, and it called for the Architect to serve as the Construction Administrator (Owner Representative), but that was a sham since the entities are so closely related and have employees who work for both businesses. The construction work, based on an incomplete design, was executed negligently at inflated prices. The construction work onsite should have been halted long before it was. When the Owners finally asked for a legitimate halt to the construction work, to sort out a plan to go forward, both entities terminated the agreements (using the same lawyer) and engaged in a scorched-earth litigation policy that ensured the maximum economic damage possible from this terrible situation.

Sample Project: Construction Site Accident

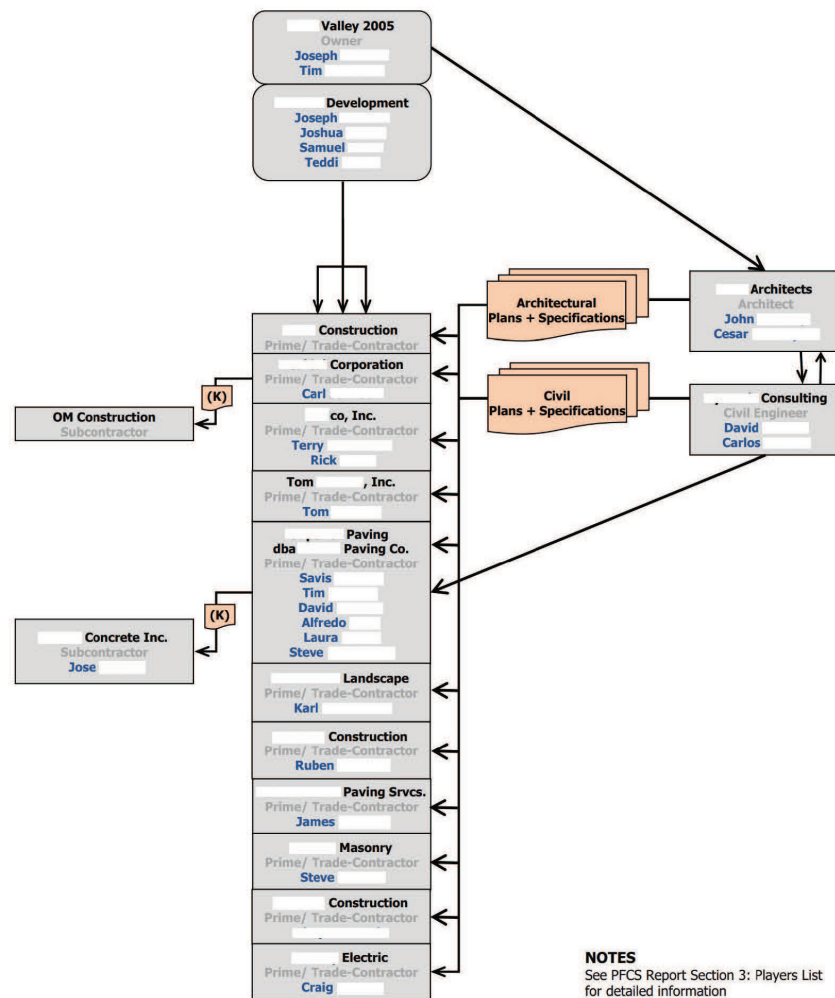


Above is a slide from a 2010 trial presentation. This case came precariously close to trial.

The project was a four story 445-unit apartment community. The property Owner was also the developer. The General Contractor entered into a cost-plus prime contract with Owner. The General Contractor entered into an agreement with the Plastering Contractor for \$6.5 million. When asked by the General Contractor to perform scaffolding work outside their scope, the Plastering Contractor contracted with a specialty Scaffolding Contractor to furnish a system to access the interior walls of the air shafts at the project. So the key parties included the Owner, General Contractor, Subcontractor (plaster), Sub-Subcontractor (scaffolding), and all of their respective staff.

The injured individual was the crew lead for the Sub-Subcontractor. That day he was part of a three-man crew setting up scaffolding in an air shaft of one of the buildings. The crew was removing the temporary wood flooring previously installed by another subcontractor and the injured employee fell approximately 35 feet to the concrete floor below.

Sample Project: Claim for Nonpayment / Counter Claims for Defects & Delays



This project was the complete renovation of a commercial retail center. The Owner entered into a direct contract with our client, a Paving Company, as well as many other contracts with prime and trade contractors. The Owner had an independent contractor, who was a formerly licensed general contractor, on-site as a supervisor. Our client's initial complaint and mechanics lien were filed to collect \$282,400 in work performed. The Owner cross-complained that the work was not completed in the 30-day agreed time limit, that some items were not completed ever, that some work was performed that was outside the contract scope of work (all of which had very sensible explanations).

The primary argument the Owner / Developer was trying to make was that they were NOT playing the role traditionally played by a general contractor or construction manager (which was RIDICULOUS). The Contracting 101 / Roles & Responsibilities Analysis PFCS performed in this matter, particularly the organizational chart above, made their argument seem silly (because it was).

Sample Project: Condominium Conversion

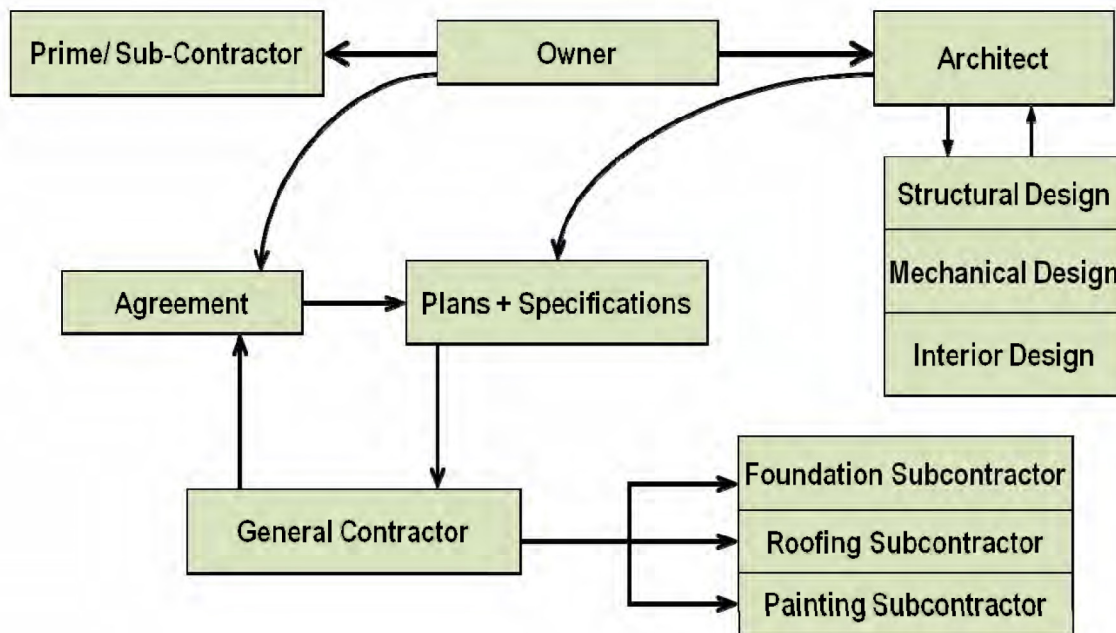


This project arose from construction defect allegations related to the conversion of a 32 unit apartment complex originally built in 1975 into condominiums. The Developer/Converter purchased the 32 unit apartment complex and almost immediately began the conversion to a condominium complex utilizing a Specialty General Contractor (our client) and many other contractors. Plaintiff alleged that the Specialty General Contractor's scope included defective work. Our client was a general contractor who, according to invoices, performed property maintenance, repair and improvement work related to the conversion including demolition, work in garages, on balconies, stucco, fences/gates, finish carpentry, doors, and electrical totalling \$186,165.00.

One of the key allegations was that our client was THE General Contractor, which was not the case. You will see from reading two and a half pages from the 56 page report that our Roles & Responsibilities analysis made clear that the Owner/Developer was in the drivers seat for all important decisions on this project.

7. Roles and Responsibilities

Contracting 101 Framework



This is a simplified framework to show the fundamental relationships of the parties in construction. Since virtually no two projects are exactly alike, the framework serves as a comparison to illustrate the differences in various project delivery schemes. In a “traditional” (Design-Bid-Build) contracting situation, the Owner wants a project, similar to anyone who wants to buy something, such as a car, but with a construction project the product being purchased is not something that is already built. The Owner hires an Architect to translate his/her desires into a set of documents. The Architect works with Specialty (Sub) Designers such as structural engineers, mechanical engineers and interior designers to place the details in the Plans and Specifications (Construction Documents) of what the Owner wants to buy from a General Contractor (GC).

The Plans and Specifications are sent to qualified and interested GCs, who submit proposals to the Owner. Ultimately the Owner and a GC compose an Agreement (or Contract). This Agreement is a promise by the Contractor to deliver what is described in the Plans and Specifications and a promise by the Owner to pay for it. The Agreement refers to the Plans & Specifications and should include the Scope of Work including Inclusions and Exclusions, Allowances, a provision for handling Change Orders, and Payment Milestones or a Schedule of Values. GCs usually hire Subcontractors, who are specialists in their respective trades, to help deliver what has been promised in the Agreement.

There is nothing in this scheme that prohibits the Owner from hiring Prime Contractors (Specialty / Trade / Subcontractor) directly for work that is not in the Scope of Work in the Agreement with the GC.

This Project

This project is NOT a “traditional” (Design-Bid-Build) contracting situation. The association and unit owners are purchasers who had nothing to do with the construction process. The actual Owner was a single purpose (we assume) entity controlled by [REDACTED] Investments who was the Developer, Designer, Owner-Builder / General Contractor, Converter, Seller. [REDACTED] hired many parties to repair and improve the project prior to selling to unit owners. Prior to construction, [REDACTED], LLC hired [REDACTED] Condition Assessment, LLC for the purpose of property analysis, scope of work for the conversion, and to confirm that all items were completed to typical industry standards.

Association and Unit Owners

The association was formed by the developer and turned over to the owners, once enough units were sold, and enough homeowners were acting as members on the board. Danette [REDACTED] and another board member created a punch list for the developer in early 2005. Both board members walked the site at separate times in order to create the punch list. Per depositions reviewed, it appears that most items were completed by the developer; however miscellaneous items were not completed, mostly associated with paint. The HOA eventually hired numerous consultants and [REDACTED] & Associates in order to pursue a remedy for the defects, identified by their experts.

Owner: [REDACTED], LLC

[REDACTED], LLC was set-up as an individual entity, owned by numerous investors. Per the deposition of [REDACTED], all [REDACTED] projects were set-up as an individual LLC, and all projects had a different group of investors.

Developer – Designer – Owner-Builder/General Contractor: [REDACTED] Investments

[REDACTED] Investments acted in multiple roles as the developer of the project (they did not hire a designer and took on this role) and as the Owner-Builder / General Contractor. [REDACTED]’s role was to entitle and prepare the property for the purpose of conversion from apartments to condominiums. Based on additional projects mentioned throughout various testimonies, this appeared to be a common project type for [REDACTED] Investments. [REDACTED] was responsible for all jurisdictional documents to purchase the property and to convert it to private residential condominiums. [REDACTED] also acted as the general contractor, as they hired and executed contracts with trade-contractors, and established a scope of repair, while the conversion work was being executed.

Per the depositions of [REDACTED] Development established Burl Foster as the lead project manager, responsible for scope of work development, contracting, and site supervision.

Consultant / Designer: [REDACTED] Condition Assessment, LLC

[REDACTED] Condition Assessment, LLC was hired by [REDACTED], LLC to prepare a property condition assessment report, including a scope of repair for the property. On June 25, 2004, Robert

Brademann, published a final job walk confirmation report, indicating that all repair line items are satisfactorily completed to typical industry standards.

Specialty Contractor: Bruce [REDACTED] Construction

[REDACTED] hired numerous specialty contractors to maintain, repair and improve the project prior to selling to unit owners. Bruce [REDACTED] Construction (BTC) was a specialty property maintenance, improvement and repair contractor who delivered proposals for specific work, but ultimately performed different work at the explicit direction of Davlyn staff who specified the scope and methods. BTC delivered invoices and was paid based on the work that was specified, overseen and approved by [REDACTED] and [REDACTED].

In particular [REDACTED], [REDACTED] lead project manager directed the scope for work for the maintenance, repair and improvement projects that were performed by BTC. The overall value of the scope of work related to BTC was approximately \$200,000. This is in contrast to an original proposal for \$40,000. Per Bruce [REDACTED] testimony, all work was directed by Mr. [REDACTED] and all field design decisions were also executed by Mr. [REDACTED].

8. Deposition Summaries

Deposition of [REDACTED]

Company: [REDACTED] Detection Services

Title: Owner

Trade: Leak detection contractor (plumbing)

- Alleges that he has been to the property 2-4 times per year, time-frame 2007-2013
- Has identified broken pipes below slab-on-grade
- Alleges that leaks likely exist in all units
- Never performed any repairs, detection only
- Alleges that there is no vapor barrier below slab-on-grade

Deposition of [REDACTED], Vol 1 & 2

Company: [REDACTED] Architects – [REDACTED]

Title: Principal

Trade: Forensic Architectural Expert

General

- [REDACTED], employed by [REDACTED] was the project manager
- States that BTC pulled the stucco permit
- States that BTC may have been the general contractor
- States that BTC covered up damaged building components
- States that the conversion scope was developed / directed by [REDACTED]

Concrete Flatwork

- Concrete flatwork issues related to delamination of surface coating
- Concrete flatwork between units 9 and 10 is original construction

Breezeway Construction

- Breezeway construction has exposed sheetrock and has caused leaks into unit 15