



Bricker Construction Law

Legal developments and best practices for construction projects

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A comparison of general contracting, construction manager at risk and construction manager as agent



By Mark Evans, P.E.



Laura Bowman

With the passage of construction reform legislation, public owners now have the ability to use the general contracting and construction manager at risk (CMAR) procurement models. In addition to these two new procurement models, public owners can also use the services of a construction manager as agent (CMA) on construction projects. This article discusses the differences between CMA, general contracting and CMAR.

CMA

Similar to a design professional or an owner's representative, a CMA has a contract only with the owner. The role of the CMA is to assist the owner with scheduling and coordination, constructability review of the design, nonbinding estimating, value engineering recommendations, observation of the work for conformance with the contract, project documentation and similar activities. However, unlike the general contracting and CMAR models, a CMA does not perform any construction and does not hold and cannot directly enforce the contracts of the contractors performing the work. Also, any action on the construction contracts must be taken by the owner.

The CMA can assist the owner with complex projects when the owner opts for a multiple prime construction delivery model. Although public owners have the ability to hire a single general contractor (discussed below), public owners still have the option to hire multiple prime contractors. If a public owner selects a multiple prime contract option, the CMA can assist the owner with preparing and managing the various trade packages. However, it should be noted that the CMA's fee typically offsets some of the upfront savings associated with multiple prime contractors on a project, and the owner still has the risk of having to sue or being sued by the multiple contractors.

A CMA is selected through a qualification-based selection process (ORC 9.33-9.334). Under this process, a public owner is required to advertise for the CMA services and invite interested parties to submit proposals. Upon receipt of the proposals, the public owner selects a CMA through a qualification-based selection process. Unlike public bidding, this process gives the owner more control over the firm that provides CMA services for the project.

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There are no restrictions on when a public owner can engage a CMA for a project. Ideally, a public owner would want to engage a CMA during the design phase to benefit from the CMA's ability to provide estimating, constructability review and other prebid services.

General contracting

As noted above, public owners have the ability to use multiple prime contractors or a single prime contractor on public projects. The single prime contracting model is often referred to as general contracting. The procurement process for general contracting requires the general contractor to bid on a complete set of construction documents, incorporating all trades, provided by the owner. Because general contractors submit a bid after the contract documents are complete, there is no opportunity for the general contractor to perform constructability reviews, estimating and other preconstruction services. If there are issues with the design, they may not arise until after the award of the contract, and often result in disputes between the owner and the general contractor.

General contractors submit a lump sum, hard bid for the project based on the contract documents prepared by the owner. That price is subject to change based on some design issues, unforeseen conditions and/or delays outside the general contractor's control. Additionally, general contractors are typically not required to include a contingency in their bid for a project. As will be discussed below, the fee for a CMAR is required to include a contingency, which can be used for cost overruns on a project.

The general contractor holds all of the subcontractor contracts and is responsible for scheduling and coordinating their work and their work quality, assuming the contracts are properly drafted. This arrangement is different than a multiple prime contracting model using

a CMA in which many of the trades would be prime contractors, each with separate contracts with the owner requiring coordination and enforcement.

CMAR

CMAR has a contractual arrangement similar to general contracting. Under the CMAR model, the owner has a single prime contract with the CMAR, and the CMAR holds all of the subcontracts. By holding all of the construction contracts, the CMAR can enforce scheduling and coordination obligations directly with regard to the subcontractors.

Similar to a CMA, there are no restrictions on when an owner can engage a CMAR. However, it is preferable to engage a CMAR at the very beginning of a project. Depending on the terms of the contract, CMARs typically participate in the design process to identify constructability problems, budgetary concerns, material availability issues, schedule concerns, etc. These preconstruction services, combined with the CMAR's familiarity with the project at the time construction begins, can reduce and/or eliminate problems during a project. Although a CMAR is not responsible for design aspects that are unique to design professionals' obligations, the CMAR may be responsible for design issues that should have reasonably been identified as part of their preconstruction services.

The selection process for a CMAR is substantially different than the selection process for a CMA or general contractor. First, the selection process for a CMAR is a two-step process involving a request for qualifications phase and a request for proposals phase. Second, the award standard for a CMAR is "best value." Under this standard, the owner can award the contract for CMAR services to the firm that provides the best value to the public entity based not only on price, but also on the firm's technical proposal.

Another difference between a CMAR and a general contractor is the fee arrangement. Unlike a general contractor, a CMAR provides a guaranteed maximum price (GMP) for a project. The GMP can be provided either with the proposals or it can be provided at a predetermined time after the CMAR contract is awarded. If a public owner decides to get a CMAR involved in the early stages of a project, there is typically not enough information for the CMAR to provide an accurate GMP. Under this scenario, the parties could agree that the CMAR would then provide a GMP when the drawings are further developed, such as at 80 or 90 percent complete. All of the CMAR's costs are subject to open-book pricing, which gives the owner the ability to audit the CMAR's costs and verify that the proper costs are being charged against the GMP. If the project is completed for less than the GMP, the CMAR contract can include a provision that allows the owner and the CMAR to share the savings, although owners are permitted to retain all of the savings if they wish.

In addition to providing a GMP for the project, the CMAR is required to set its fees for providing CMAR services at the time the proposal is provided. The CMAR's fee is required to include a contingency for the project. The amount of the contingency, how the contingency is assessed and the approved uses of the contingency funds are not fixed by statute and must be carefully addressed in the contract.

Defective work: What to do when the roof leaks?



By Christopher L. McCloskey



Sylvia Gillis

There is water dripping through the ceiling tiles. Or there are puddles on the floor in the conference room. Something is obviously wrong. But what do you do?

Some experts estimate that 75 to 80 percent of all construction defect disputes are related to roof failures. They're unfortunately a very common occurrence, and they can occur with new building construction and renovation projects alike.

We have seen water streaming through holes in a newly installed roof and mold growing because of water infiltration through the roof system. In some cases, newly installed roofs have had to be completely torn off and replaced with a new roof system.

What should you do when a building has a leaking roof?

1. Take pictures, or even video, if the leak is ongoing. Document the situation with times and dates of when the pictures and video were taken. Keep a log of leaks (where, when, how much, outside weather conditions including temperature and precipitation) with photos and a description of damages caused by the leaks.
2. Report the leak to those in charge of building administration and maintenance. Work with them to take appropriate steps to address the situation.

As important as it seems to take immediate action to "fix" the problem and stop the water infiltration into the building, that may not be the best approach. The natural instinct is to contact the company that installed the roof and ask for help. This may result in a short-term fix; but often, when heavy rains come or snow melts, the leaks return. Since a quick fix

might also void a warranty on the roof system or destroy evidence of the cause of the problem, you must exercise caution and ensure that the real party responsible for the situation is put on notice and provided with an opportunity to fix it.

It is important for building administrators and maintenance staff to understand the process for identifying and correcting a leaky roof situation. The following information provides an overview of that process.

What is the defect?

In most cases, the underlying problem that resulted in the leak cannot be corrected with a "band-aid" approach. So, the first step is to determine the nature of the defect. Is the defect a design flaw, an installation flaw, a material flaw or some combination thereof?

Hire an expert

The most efficient way to determine the nature of the defect is to retain an independent third party expert to observe and analyze the situation. Hiring an independent expert is important, because each of the parties that helped design and construct the building, or that provided materials for the roofing system, could be responsible for the leak and might attempt to deflect responsibility by pointing to others. For example, the contractor might argue that it installed the roof in the exact manner designed by the architect and that the design caused the failure of the roof system.

The architect may argue that the contractor failed to install the roof according to the design. Another common argument is "poor maintenance," where the material supplier argues that the warranty has been voided by action taken by the owner to correct the problem without providing appropriate notice.

While there is an expense associated with retaining an expert, the value provided by the expert is a worthwhile investment. An expert will help gather all the pertinent documents, including the design services agreement, owner-contractor agreement, surety bond, product warranties, contract documents, specifications, design drawings, as-built drawings, and related documents relied upon for the roofing system installed on the building. Then the expert will investigate the problem, explain what caused it, and identify the responsible party. An expert can also help identify a scope of repair to fix the problem and provide an initial estimated cost and timeline for the remedial work.

Notify the responsible parties

Once the nature of the defect is understood, the next step is to put the responsible party (or parties) on notice of the defect consistent with the applicable agreement or warranty. The available time for giving notice of a defect will depend on the contract provisions and warranties. But keep in mind that the current statute of limitations in Ohio for breach of contract is eight years. So, the common theory in the construction industry that there is only a "one-year warranty" on defective work is not universally true. The outcome of the timing issue will depend squarely on the language in the agreements and warranty and also upon whether the defect was caused by workmanship or a material defect.

Repair the defective conditions

The next step is to consider repairing the defect. Moving towards a repair has a number of benefits. It will correct the condition so the building can operate normally (without buckets to catch water or "caution" signs). It may also motivate the responsible parties to

participate in the repair process, once they see commitment to repairing the defect. Finally, it will reduce the defect to a specific repair cost that can be requested from the responsible parties and eliminate any dispute over the value of the repairs.

Summary

Whether you notice spreading water stains on the ceiling or a “rainstorm” in the hallway, it is important to notify those responsible for facility maintenance and operations of the problem as soon as possible. By following

the steps summarized above and consulting with experts and counsel experienced with construction defects, you can weather the “internal storm” and return to a safe and dry building environment.

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