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RISK MANAGEMENT PARTNERS FOR THE DESIGN AND BUILD INDUSTRY

Is Construction Management Right for You?

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

In search of additional revenue streams, more and more design firms are offering construction management services. While providing such services can indeed bring more income into the front door, it also brings along a host of additional liabilities that need to be carefully managed.

What is Construction Management?

The term “construction management” generally relates to services provided by an advisor acting as a representative of the project owner. These services typically involve responsibility for administering the design and construction contracts as well as managing or overseeing the planning, design and construction. Construction management services can be performed by an independent party on a standalone basis, or by an architect or engineer who also provides design services on the project. Work scopes for the construction manager (CM) can be tailored to meet a variety of owner needs, project types and project delivery methods.

Because construction management is an evolving field, determining professional liabilities associated with such services can be difficult. Nevertheless, there are specific risks that need to be considered and addressed before taking on a CM role. What’s more, if you provide services on a project that involves a third-party CM, your chances of being brought into a claim may also increase.

Designer as Construction Manager

There are two primary roles design professionals can take on when serving as a construction manager: CM-advisor and CM-constructor (also referred to as CM-at risk).

CM-Advisor. The CM-advisor role is often used in public projects that involve multiple contracts and/or competitive bidding. As a CM-advisor, a design professional usually:

- Serves as an advisor to the owner regarding contract matters throughout a project’s planning, design and construction phases
- Provides pre-construction services such as estimating, scheduling and constructibility reviews
- Manages one general contractor or several prime contractors.

Typically, though, the CM-advisor does not:

- Award contracts directly to the prime design professional or the general contractor

- Furnish or contract for construction labor or materials.

CM-Constructor (CM-at risk). With this approach, the design and build team has three primary players: the owner, the prime design professional and the construction manager. The CM-constructor typically:

- Holds all subcontracts for construction
- Is responsible for tasks of contract management and construction
- Assumes the same warranties as the general contractor, taking responsibility for the entire construction project
- Assumes the same risks as a general contractor, including jobsite safety
- May promise the owner a guaranteed maximum price.

Note: There is a third type of construction manager: a CM-agent. This is a less common form of CM in which the construction manager takes on through an agreement with the owner many of the powers of the owner, including decision-making and financial authority.

Licensing Issues

So far, no state or province licenses construction managers, although the Construction Management Association of America (CMAA) does issue a “Certified Construction Manager” certificate.

Depending on your role and the duties described in your contract, you could provide most, if not all, of the services of a CM-advisor under your architecture or engineering license or registration.

If, however, you’re acting as a CM-constructor, things change. Many (but not all) jurisdictions require a contractor’s license for anyone who performs the duties of a contractor. And performing any service without a required license is a violation of statute subject to sanctions. Plus, your client may be under no legal obligation to pay you for your services. Check with your local contractors’ licensing board, professional licensing board and/or professional association to see whether a license is required.

Insurance Issues

Most professional liability (PL) policies will cover claims arising from the *professional services* a design professional renders as a construction manager. However, most PL policies won’t cover construction risk — i.e., faulty workmanship. This would include problems with fabrication, erection, installation, assembly and the supplying of products and materials. In addition, there is no coverage available for the economic risk of providing a guaranteed maximum price.

PL policies may also specifically exclude claims relating to jobsite safety. Some may even contain a general exclusion for claims arising out of services not “usual and customary” to the practice of architecture or engineering — or they may cover only those professional disciplines specified in the policy. Unless these exclusions can be modified or construction management is specifically listed as a covered service, there may not be professional liability coverage in force for such services.

General Risks to Consider

There are several areas of liability to watch for when providing CM services. The degree to which you assume any of these risks depends on your role and your responsibilities as stated in your contract and as demonstrated by your actions. Consider the following:

Design. When CMs conduct design and constructibility reviews, they may, along with the architect or engineer of record, be subject to suits involving design error.

Selection of materials. CMs may have exposure arising from the selection and timely delivery of construction materials and subsystems.

Cost estimates. There is a higher expectation of the accuracy of a CM’s construction cost estimates. If costs exceed a CM’s estimate, there is substantial risk of a claim.

Jobsite safety. CMs may assume responsibility for developing or reviewing the contractor’s jobsite safety program and monitoring all safety plans and

training. Recent OSHA rulings have generally concluded that a CM's responsibilities for jobsite safety are akin to those of a general contractor.

Scheduling and coordination. Scheduling and coordination of project activities are significant aspects of the CM's construction-phase obligations. Work not performed on schedule or not well coordinated can lead to claims for project delays, increased overhead expenses and added overtime costs.

Hazardous site conditions. The CM can assume liability for existing hazardous site conditions. In addition, if toxic materials on the site must be disposed of or transported, the CM can be deemed an "operator" of the site or an "arranger" of the disposal and thus subject to severe (and sometimes criminal) sanctions in the event of an illegal dumping or accident.

Supervision and inspection. Under the standard form CM agreements, CM-advisors have no more liability for inspection and supervision of the contractor's work than do design professionals under AIA (American Institute of Architects) contracts. However, there is the danger CMs could increase their risk by expanding their scope of services. This could create exposure to claims for failure to detect defective work and may even increase responsibility for jobsite safety.

Managing These Risks

Once you understand the risks of construction management, you can make an informed decision about whether or not to offer such services. If you decide to offer construction management services, keep the following in mind:

- Select your projects and clients cautiously. Because the CM will no doubt be brought into any significant litigation, it is especially important to avoid clients with a litigious history or project types that are likely to have problems.
- Choose your CM role with care. Offer only those services you and your staff are qualified to provide.
- Make sure that your actions, particularly on the jobsite, are in keeping with your role. If you are

the CM-advisor, for instance, your job is to recommend and advise, not to direct or supervise.

- Develop a well-defined scope of services. With the owner, put together a detailed work scope that describes precisely the specific responsibilities of each party to the project, including the owner.
- Negotiate solid contracts. The AIA, AGC (Associated General Contractors), CCA (Canadian Construction Association) and CMAA have all published standard form agreements for CMs that can be tailored by you and your attorney to fit your specific project needs.
- Watch your language. In your contract documents, correspondence and conversations, pay particular attention to terminology that can increase liability. Avoid words such as *inspection*, *supervision*, *certification* and *guarantee*.
- Check your insurance. Talk with your insurance agent or broker to be sure you have appropriate coverage. Make sure your professional liability policy covers the CM-advisor services you intend to provide. If you perform as a CM-constructor, you will need to address bonding, workers-compensation and general-liability issues.
- Be aware of your jurisdiction's licensing requirements. Obtain all licenses required by your state or province to provide the services you intend to offer — and then operate within the scope of your licenses.
- Limit your exposure to claims involving jobsite safety. Be certain you include appropriate "means-and-methods" disclaimers in your contract and allocate health and safety risks through indemnities and insurance. If your duties include some aspect of safety, such as recommending, reviewing or coordinating the contractor's safety program, make sure your responsibilities (and those of the contractor) are carefully defined. Train your field people so their actions don't undermine these protections. Finally, ask to be named as an additional insured on the contractor's liability policies and request certificates as proof that appropriate workers compensation coverage is in place.
- Make sure you receive adequate fees in consideration to the level of risk you must assume.

Dealing with a Third-Party CM

Interestingly enough, if you are a designer on a project for which the owner has hired a third-party CM, your chances of facing a claim may increase. Not only do you have another pair of eyes critiquing your design services, but also there may be a greater chance of error or omission due to confusion regarding duties, responsibilities and authorities. We recommend that you include a clause in your contract similar to the one provided here by professional liability insurer DPIC Companies:

Construction Management

If the Client elects to employ a construction manager, the Client will promptly notify the Consultant of the duties, responsibilities and authority of the construction manager and their relationship to the duties, responsibilities and authority of the Consultant.

If the employment of such construction manager by the Client results in additional time or expense to the Consultant to prepare for, coordinate with or respond to the construction manager, the Consultant shall be entitled to an equitable adjustment in fees and time for performance of these services.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.