



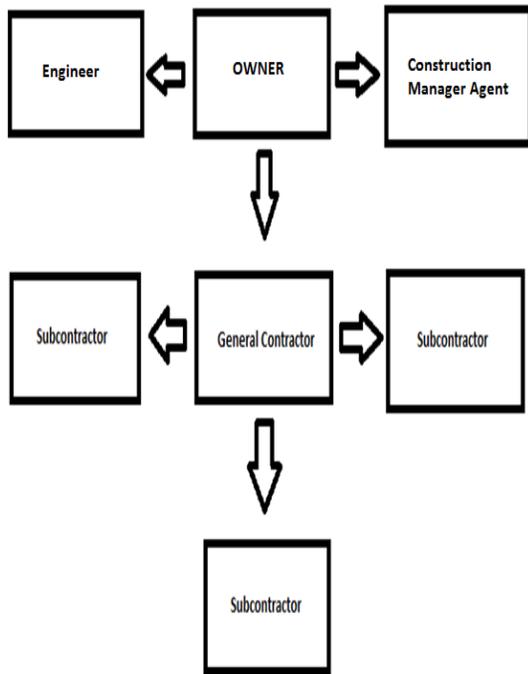
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Construction Management: Maneuvering Liability Pitfalls in Modern Construction

Construction management as a stand-alone service is now being offered by greater numbers of design professionals. As a consequence, however, the determination of professional and contractor liabilities associated with the continuously evolving construction management industry has proven to be difficult and inconsistent amongst professionals and courts. In this panel, we will discuss general principals of construction management, the risks involved and ways of managing those risks. Oftentimes, construction management services are presumed to involve some degree of responsibility for reviewing and/or overseeing construction. In reality, construction management services are performed in many different ways. Work scopes are tailored to meet the particular owner's requirements and objectives depending on the project type and because of the services of construction managers vary by significant degrees, the duties of construction managers are defined by the express terms of their retention agreements and principles of contract interpretation. The two principal types of construction management categories are Construction Management – Agent and Construction Manager – At Risk.

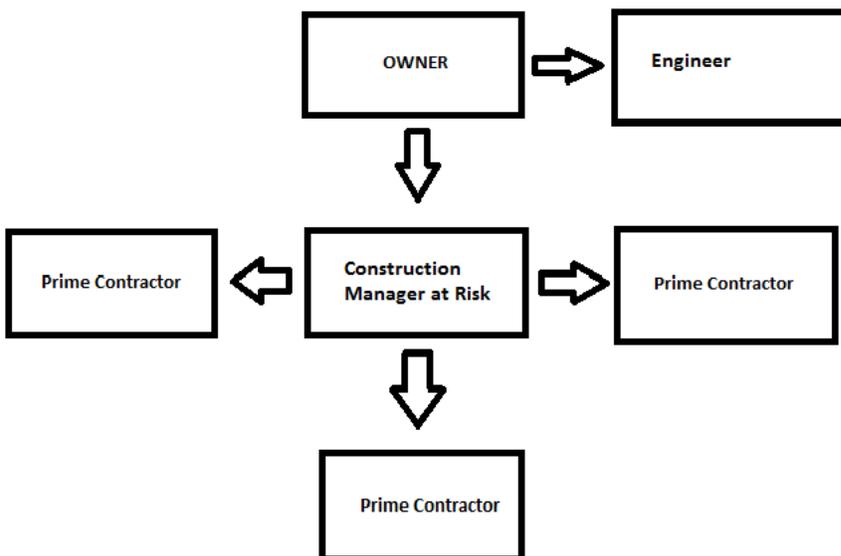
Construction Manager – Agent

A Construction Manager – Agent ("CMA") contracts with the owner and therefore, its principal risk is to the owner and it has direct liability to the owner for failure to perform contractual obligations. The CMA does not contract with other parties for labor or materials for the construction project and acts as the owner's "agent" to assist the owner during design and construction phases of a project. A CMA can assist the owner with obtaining permits, estimating, scheduling, design/constructability reviews, construction bidding, negotiation with contractors, administration and overall construction management. During the construction phase, the obligations of a CMA may include the following: maintain project files; schedule/conduct project meetings; manage submittals and RFI process; monitor work progress and draft daily reports.



Construction Manager – At Risk

A Construction Manager at Risk (“CMAR”) contracts with the owner to build the project and deliver a final and finished product. As a result, all prime contractors enter into contracts with the CMAR directly. Most often, a CMAR is involved early-on with the architect and engineer in the design and development phase of construction. The CMAR, as the name suggests, is at risk for the performance of its prime contractors and thus has coordination responsibilities to avoid delays and to complete the project on time and within the projected budget.



Licensing

Currently, no jurisdictions have formalized licensure programs applicable specifically to the construction management industry and its professionals. Depending on the role and the duties described in the relevant contract, most, if not all of the services of a construction manager can be provided through other professional or contractor licenses. Many, but not all, jurisdictions require a contractor's license for any construction managers who perform the duties of a contractor.

- California: For public works projects, Government Code sections 425, et seq. provides that only licensed architects, registered engineers, or licensed general contractors can perform "construction project management" services, which is in turn defined as including construction project design review and evaluation, project scheduling, cost-benefit analysis, claims review and negotiation, and general management and administration of a construction project. For home improvement projects, AB 2237 requires construction managers to be licensed by the California State License Board in order to provide services in connection with a home improvement contract. For residential or commercial projects, Business and Professions Code section 7026.1(a)(2)(A) requires a license if the construction manager "undertakes, offers to undertake, purposes to have the capacity to undertake, or submits a bid to construct a building or home improvement project, or part thereof."
- Florida: An architectural license may be required because many construction services are encompassed by the definition of "architecture" in Florida Statute 481.203(6), which includes planning, job-site inspection, and administration of construction contracts. A construction manager who is required to obtain building permits under an agency contract with the owner, or construction managers who directly contract with subcontractors, are subject to contractor licensing requirements per Florida Statute 489.105(3).
- Texas does not require commercial general contractors to be licensed in order to perform public or private construction work, but there are certain regulatory bodies that oversee such work. For example, the Texas Building and Procurement Commission oversees construction and remodeling of buildings for state purposes. See Tex. Gov't Code Ann. §§ 2165.001(b)(2), 2165.052, 2166.060 to 2166.061, 2166.002 (2015).

Insurance

Most professional liability policies, a/k/a errors and omissions policies will cover claims arising from the professional services a design professional renders as a construction manager. However, most professional liability policies will not cover liabilities arising out of an insured's control of the "means and methods" of construction resulting in faulty workmanship. In addition, there is no coverage available for the economic risk of providing a guaranteed maximum price, as is often an element of a CMAR agreement with an owner.

Professional liability policies may also exclude 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.

Based on these exclusions, construction managers at risk obtain commercial general liability policies. Additionally, construction managers should obtain at the earliest opportunity copies of relevant, authorized endorsements confirming their status as an additional insured.

Risks Associated with Construction Management

Several areas of tort liability may arise when providing construction management services. The degrees to which construction managers are subjected to risks are primarily dependent on the role and the

responsibilities as defined in the contract. Construction managers may face liability exposure in many phases and aspects of construction of a project.

Design: Construction managers can conduct design and constructability reviews with architects and engineers during the design phase and can be subject to suits involving design errors.

Material: Construction managers may have exposure arising from the selection of construction materials especially when “value engineering” choices are involved.

Cost estimates: Construction manager has a significant role in ensuring that the construction is built on budget and on time.

Jobsite safety: Construction managers generally assume responsibility for developing or reviewing jobsite safety programs or procedures of contractors, monitoring safety plans, training or other safety requirements. Recent rulings by OSHA concerning responsibilities of architects, engineers and construction managers have generally concluded that a construction manager’s responsibilities for jobsite safety are akin to those of a general contractor.

Scheduling and coordination: Construction managers are responsible for the scheduling and coordination of the construction. Work not performed on schedule or not well coordinated can lead to claims for project delays, extended overhead, labor inefficiencies and overtime costs.

Supervision and inspection: Under the standard form construction management agreements, construction manager - agents have no more liability for inspection and supervision of the contractor’s work than do design professionals under American Institute of Architects contracts. However, there is the danger construction managers could increase their risk by expanding their scope through their own description of its “scope of work” or by conduct.

Managing Risks

With so many variations of construction management, it is critical to identify contractual lines of authority and liability of the construction manager as well as the roles of the owner, architect and other contractors, to delineate the specific responsibilities of each party in the construction of the project. Further, once the roles are defined, the construction manager should pay attention to ensure that his/her actions are in keeping with the scope defined in the contract. A construction manager should act as the owner’s representative and recommend and advise. A construction manager agent should not advise about the design or construction means and methods.

In order to develop a comprehensive scope of services, a construction manager should negotiate a detailed, specific and unambiguous contract. The American Institute of Architects, Associated General Contractors, and the Certified Construction Manager Association have standard form agreements that can be tailored to meet the specific need for the owner and the project and to minimize the construction manager’s risk. The contracts of other participants in the construction of the project should also be coordinated before the project begins to eliminate duplications or gaps in responsibilities. Allocation of risk to the entity best suited to control the risk is recommended, and do not assume any risk or liability exposure by contract.

Liability to Third Parties

- California

California courts have yet to definitively establish the contours of a construction manager's legal duty to individuals who suffered personal injuries or wrongful death arising from construction defects in residential or commercial properties. Liability is evaluated by drawing from case law.

- *Weseloh Family Ltd. Partnership* held that a retaining wall architect who earned \$2,200 for his "role in a project can be so minor and so subordinate to the role and judgment of other design professionals as to foreclose on the architect's liability in negligence to third parties." *Weseloh Family Ltd. Partnership v. K.K. Wessel Constr. Co.* (2004) 125 Cal.App.4th 152, 169.
- On the other extreme, *Beacon Residential Community Assn.* held that "an architect owes a duty of care to future homeowners in the design of a residential building where . . . the architect is a *principal architect* on the project—that is, the architect, in providing professional design services, is not subordinate to other design professionals." *Beacon Residential Community Assn. v. Skidmore, Owings & Merrill, LLP* (2014) 59 Cal. 4th 568, 571.
- *The Fifth Day, LLC v. Bolotin* (2009) 172 Cal.App.4th 939 the appellate court observed that construction managers are retained to: " Assist, on behalf of the Owner, in coordinating the activities of the various workers to enable them to complete their assigned tasks in an organized and efficient manner, on time and on budget; to maintain records such as insurance certificates, as well as the financial books and records for the project; to keep the Owner apprised of the status of the project; to be the on-site "point person" to respond to issues as they arose; and generally to act as the Owner's agent with respect to the various parties connected with the development of the project. [The construction manager] had no responsibility or authority to perform any construction work on the project, or to enter into any contract or subcontract for the performance of such work" *Id.* at p. 948. The court further noted that the Legislature provided in Government Code section 4525 that construction managers on public works projects must be licensed architects, engineers or general contractors, yet the Legislature declined to extend the statute to privately owned real estate development projects. *Id.* at p. 949-950.

Texas courts have also not clearly established the contours of a construction manager's legal duty to individuals as stated above, however, one case has provided guidance:

- In *3D/I + Perspectiva v. Castner Palms, Ltd.*, 310 S.W.3d 27 (Tex. App. El Paso 2010) the El Paso Court of Appeals held that in an action for negligence, if the applicable standard of care is unknown to the layman, both the standard and any violation thereof must be established by expert testimony.

Florida's case law has provided numerous ways in which to evaluate a Construction Manager's liability:

- Regardless of any contractual duties, construction managers must exercise reasonable care toward workers if their affirmative conduct operates as a voluntary assumption of safety supervision. See *Cannon v. Fournier*, 57 So.3d 875 (Fla. 2d DCA 2011). [F]or a construction manager not otherwise obligated by contract to provide job-site safety to assume a legal duty

- of care for job-site employee safety, the construction manager must undertake specific supervisory responsibilities beyond those set forth in the original construction documents"). Florida decisions regarding the liability of supervising architects toward injured workers indicate that the legal principles discussed in § FLCLE 4.27 will apply to construction managers in Florida. See Fournier; Crawford v. Florida Steel Corp., 478 So.2d 855 (Fla. 1st DCA 1985).
- Further, in *Juno Industries, Inc. v. Heery International*, 646 So.2d 818 (Fla. 5th DCA 1994), the construction manager was not liable for injuries sustained by contractor's employees because construction manager had no contractual authority to control construction means, methods, or safety procedures and injury was caused by contractor's means and methods.