

PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 07/02: "Understanding the Risks of Construction Management (CM)"

July, 2002

Understanding the Risks of Construction Management (CM)

Ask a roomful of designers to define "construction management" (CM) and you'll likely get a roomful of definitions. While the term generally relates to some degree of responsibility for reviewing or overseeing construction, CM services are performed in many different ways and they continue to evolve. Work scopes are tailored to meet a variety of owner needs depending on project type and delivery method.



Construction management is now being offered by more and more design professionals. Still, determining professional and contractor liabilities associated with these continuously evolving services remains difficult. In this article we'll take a look at the general types of construction management, the risks involved and ways of managing those risks.

Types of CM

A design professional can be involved in the CM process in two main ways – as a CM – Advisor or as a CM – Constructor

(CM – at Risk). A third way – as a CM – Agent – is rarely seen.

CM – Advisor

The CM – Advisor approach is often suited to public-sector projects that involve multiple prime contracts or where competitive bidding is required. As a CM – Advisor, a design professional usually:

- Serves as an advisor to the owner throughout the course of the project

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- Provides pre-construction services such as estimating, scheduling and constructibility reviews
- Coordinates the work of one general contractor or several prime contractors
Typically, though, the CM–advisor does *not*:
- Award contracts directly to the prime design professional and the general contractor
Furnish or contract for the labor or materials for the construction of the owner’s building

CM – Constructor (CM – at Risk)

With this approach, the construction team has three primary players: owner, prime design professional and construction manager. The CM–Constructor typically:

- Holds all subcontracts for construction
- Is responsible for tasks of management as well as construction
- Assumes the same warranties as the general contractor, taking responsibility for the entire construction project, from permits, to bids, and right through to the punch list
- May promise the owner a guaranteed maximum price
- Assumes the same risks as a general contractor, including safety on the jobsite

CM – Agent

The third type of construction manager is a CM – Agent. This is a little-used form of CM in which the construction manager assumes many of the powers of the owner, with decision making and financial authority under an agency agreement. Since many public agencies are prohibited by law from delegating fiscal responsibilities, CM – Agents are used almost exclusively in private sector projects.

Licensing

So far, no states or provinces license construction managers. 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 if you are not properly licensed. Therefore, check with your local contractors licensing board, professional licensing board and/or professional association to see whether a license is required.

Insurance & Bonding

Most professional liability policies will cover claims arising from the professional services a design professional renders as a construction manager. However, most PL policies don’t cover any aspect of the construction risk (i.e., faulty workmanship): fabrication, erection, installation, assembly or the supplying of products and materials. In addition, there is no coverage available for the economic risk of providing a guaranteed maximum price, as is often done by CM – Constructors.

What’s more, several professional liability policies specifically exclude claims arising out of professional services relating to safety. Some contain a general exclusion of coverage 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 CM is specifically listed, there may not be professional liability coverage for CM activities.

Finally, unless you’re acting as a CM – Constructor, surety bonding is not generally an issue. Although a few owners require CM – Advisors to provide bonding, it typically remains the responsibility of the contractor.

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General Risks to Consider

Several areas of liability occur 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. Consider the following:

- **Design** – Because some construction managers 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** – Construction managers may have exposure arising from the selection of construction materials and subsystems. Risks may also involve failure to identify long lead-time procurement items.
- **Cost estimates** – There is a higher expectation of the accuracy of a construction manager's construction cost estimates. If bids exceed a construction manager's estimates, there is substantial risk of a claim.
- **Jobsite safety** – Construction managers have substantially greater risk of being cited for jobsite safety violations by OSHA. They 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** – Scheduling and coordination of the 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, extended overhead, labor inefficiencies and overtime costs.

- **Hazardous site conditions** – The construction manager could assume liability for existing hazardous site conditions. In addition, if toxic materials on the site must be disposed of or transported, the construction manager 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 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 construction managers could increase their risk by expanding their scope. This could create exposure to claims for failure to detect defective work and may even increase responsibility for jobsite safety.

Managing Risks

Once you understand the risks of construction management, you can make an informed decision about whether or not to proceed with an assignment. If you are going to provide construction management services, keep the following in mind:

- **Select your CM projects** and clients cautiously. Because the construction manager will no doubt be brought into any significant litigation, it is especially important to avoid clients with a litigious history or projects that are likely to have problems.
- **Choose your CM role** with care. Offer only those services you are qualified to provide. You may prefer to get started in construction management in the role of CM-Advisor. This is not vastly different from the role you are accustomed to when you provide an expanded level of construction phase services.
- **Make sure that your actions** are in keeping with your role. If you are the CM-Advisor, for instance, your job is only to recommend and to advise.

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- **Develop a comprehensive scope of services** – With so many variations of construction management, it is crucial to identify clear contractual lines of authority and liability. With the owner, put together a work scope that describes 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 CM. These model agreements are excellent starting points that can be tailored by you and your attorney to fit your specific project needs. Be sure, too, that the contracts between other project team members are integrated and coordinated with yours to eliminate gaps or duplications in responsibilities. Allocate risk to the party best able to control it, and don't assume risk by contract unless you have some control over that risk and can insure it.
- **Watch your terminology** – In your contract documents, correspondence and conversation, pay particular attention to those terms that can increase liability (for instance, inspection, supervision, certification and guarantee). If you must use these terms, define them in your agreement.
- **Check your insurance** – Talk with your insurance agent or broker to be sure you have appropriate coverage. Pay particular attention to your professional liability policy; make sure it 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** – Be sure that you 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.
- **Make certain you have qualified people to do the job** – Many design professionals have experience in cost estimating,

project scheduling, procurement services and construction administration. But when providing construction management as a specific service, responsibilities in those areas likely increase and require greater expertise.

- **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.
- **Ask to be named as an additional insured** on the contractor's liability policies and request certificates of insurance as proof that appropriate workers compensation coverage is in place.*

Disclaimer: This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.



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The Fifth Commandment: Be Wary of the Scope of Your Duties During Site Visits

*Excerpted from "Ten Commandments of Loss Prevention" by Gunther O. Carrle, Esq.
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The design professional's presence on the site, typically: to review the progress of the job; to review general compliance of the work with plans and specifications; and to respond to specific inquiries, creates two potential areas of liability. One such area is the A/E's failure to detect deviations from the plans and specifications. The second area is the failure to detect unsafe conditions that cause injury to a third party.

Safety

- Construction observers are generally not responsible for injuries to third-parties resulting from the contractor's operations. Under certain circumstances they can be liable for the failure to direct the correction of unsafe conditions.
- To minimize your potential liability:
 - Specifically disavow any right to control the work, stop the job, supervise or coordinate subcontractors, direct the contractor's means, methods, techniques, sequences or procedures of construction, and safety precautions and programs.
 - Go to the job site with a specific purpose, not to just wander around.
 - Don't attend meetings that do not impact on your scope of services – i.e., do not attend safety meetings.
 - Visit only those portions of the site at which work you must observe is taking place.
 - Issue a memorandum of your comments regarding the quality of the work.
 - Avoid preprinted "inspection" forms that may have a reference to safety.

The Design Professional's Dilemma – Ignore an Unsafe Condition or Report It

- The courts of most jurisdictions generally do not hold a design professional liable for construction site injuries that relate to a contractor's operations merely because the design professional made periodic visits to the site, ABSENT CONDUCT WHICH EVIDENCES ASSUMPTION OF SAFETY RELATED DUTIES.
- Frequently, however, courts will find that a design professional bears at least some responsibility for a construction phase injury because his conduct at the site is inconsistent with the position that he has no duties with regard to safety.
- Many courts have also held that, as a professional, an architect or engineer cannot ignore an unsafe condition of which he has knowledge and which poses a risk to third-parties.
- The best compromise is to advise the owner or construction superintendent of an observed unsafe condition in writing. The writing should not address the manner of correction. The writing should emphasize that the A/E does not have, and is not undertaking any duties with regard to safety or safety inspections. Rather, in the course of his visit to the site to check on the progress of the work and the compliance of the work with plans, a particular condition was observed.

As a project manager, you may have more responsibilities for safety. The owner may want you

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to affirmatively monitor the contractor's safety programs and/or conduct loss control surveys. This should be avoided. If the owner desires such services, they should be contracted for separately, directly by the owner, with a Safety Engineer. If some additional involvement with safety is required, the services should be limited to the following:

- Requiring contractors to submit safety programs – do not review them for adequacy.
- Requiring contractors to conduct “tool box” meetings.
- Report any conditions, actually observed and actually known to be unsafe, to the general contractor's superintendent.

Your review of the work for compliance with the plans and specifications should be limited to:

- GENERAL compliance
- With plans and specifications prepared BY YOU and with YOUR design concept.
- To determine if the work WHEN COMPLETED will be in accordance with the plans and specifications.
- Avoid language which obligates you to assure compliance with the “requirements of the contract of construction” since these typically include references to safety.
- Avoid definitions in the contract document which include temporary structures as Work.*

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