

# A/E RISK REVIEW

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Quality Service For Your Insurance Needs

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## So You Want to be a Construction Manager

*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.*

During a slow economy, design firms are often in search of additional revenue streams. Many consider offering construction management services. Providing such services cannot only generate new income, it can increase the value a design firm delivers to its clients.

Keep in mind, however, that providing construction management services brings additional liabilities along with the added income. These new liabilities are the types typically assumed by contractors and are likely not covered by your professional liability insurance. For this reason, any design firm considering providing construction management services must be fully prepared to manage those risks.

### What is Construction Management?

The term “construction management” generally relates to administrative and other services provided by a design consultant acting as a representative of the project owner. The construction manager (CM) may oversee only part of the project or the entire process. Services may involve managing or coordinating the conceptualization, planning, design, construction and/or commissioning phases of a project. Specifically, construction management services can include:

- Contract preparation, negotiation and administration
- Contractor and subcontractor bid solicitation and evaluation
- Construction document coordination
- Work schedule coordination
- Cost estimations and budgeting
- Value engineering
- Code compliance
- Constructability review.

Construction management services can be performed on a standalone basis, or by the firm that is also the lead designer on the project. Work scopes for the CM can be tailored to meet a variety of owner needs, project types and project delivery methods.

The scope of services provided, as well as the associated liabilities that result, depend greatly on the construction management role performed by the design firm. The two primary roles are CM-Advisor and CM-Constructor.

### CM-Advisor

In the CM-Advisor role, the design professional serves as a consultant to the project owner. He or she acts exclusively in the owner’s interest and more often than not is paid a fixed fee for services rendered. In most cases, the CM-Advisor’s primary responsibility is administering the construction contract through the design and construction phases of the project. Duties may also include pre-construction advisory services such as cost-estimating, budgeting, scheduling and constructability reviews.

The CM-Advisor typically has a contractual agreement with the client only, not with the contractor, subcontractors or other parties to the construction – although the CM may participate in the contractor and

subcontractor selection process. CM-Advisors do not award contracts, direct construction means and methods, arrange for materials or labor, or take responsibility for construction quality.

The CM-Advisor may or may not also be a designer on the project. When the CM only provides advisory services and does not design the project, the role is sometimes called CM-Agent.

### **CM-Constructor**

The CM-Constructor role (also called CM at Risk) entails providing advisory services during the design and development stages of the project and additional responsibilities typically associated with contractors during the construction phase. In addition to the advisory roles described above, the CM-Constructor may:

- Select, schedule, sequence and sometimes contract with all contractors and subcontractors for construction services
- Be responsible for contract management, constructability review and project inspection
- Assume some or all warranties typically assumed by the general contractor, possibly taking responsibility for the entire construction project
- Assume the same risks as a general contractor, including jobsite safety
- Promise the owner a guaranteed maximum price for the project, possibly with a contingency budget equal to roughly 3-5 percent of the project budget.

Note that some projects may involve a hybrid of the CM-Advisor and CM-Constructor role. Here, the CM acts as advisor for most of the project but may actually direct and control the work for a portion of the project.

### **Licensing Issues**

To our knowledge, no state or province licenses construction managers. However, the Construction Management Association of America (CMAA) does provide instruction and training and issues a “Certified Construction Manager” certificate. The CMAA is accredited by the American National Standards Institute. For more information, go to [www.cmaanet.org](http://www.cmaanet.org).

You could likely 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, you may be required to obtain a contractor's license, depending on your jurisdiction and duties. Regardless of your role, 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 any claims arising from the *professional services* a design professional renders as a CM. 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 PL coverage available for the economic risk of providing the project owner a guaranteed maximum price.

PL policies for CMs may specifically exclude coverage for construction-related claims including jobsite safety. (These are more appropriately covered by general liability insurance.) Some PL policies may even contain a general exclusion for any and all 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.

Design firms considering providing construction management services should get a complete insurance review. We'll be happy to help you examine your needs for PL, general liability, workers compensation and other types of coverage.

### **CM Risks to Consider**

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

**Design.** When CMs conduct design and constructability reviews, they may, along with the architect or engineer of record, be subject to claims involving design errors and omissions.

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

**Cost estimates.** Project owners typically have high expectations that a CM's construction cost estimates and the overall project budget are accurate. If costs exceed a CM's estimate, there is substantial risk of a claim.

**Jobsite safety.** CMs may contractually assume responsibility for construction means and methods, as well as the contractor's jobsite safety program and safety plans. This can result in substantial added liabilities. OSHA rulings have generally concluded that a CM-Constructor's responsibilities for jobsite safety are akin to those of a general contractor.

**Project delays.** Work not performed on schedule or not well coordinated can lead to claims for project delays, lost income, increased overhead expenses and added overtime costs.

**Hazardous site conditions.** If not careful, the CM-Constructor 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.

**Subcontractor payment.** CM-Constructors may be liable to pay subcontractors even if the project owner fails to pay the CM.

**Third-party liabilities.** CMs can be held liable to third parties who are injured, physically or monetarily, by the project.

### **Managing These CM Risks**

Once you understand the risks of construction management, you can make an informed decision as to 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 claims, it is important to avoid clients with a litigious history or unfamiliar 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.
- 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.
- Negotiate solid contracts. The risks and liabilities of the CM depend greatly on the contract signed with the owner. 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. Contract review is critical for any construction management assignment. Make sure the contract accurately reflect the responsibilities you have agreed to take on.
- Develop a clearly-defined scope of services. With the client, put together a detailed work scope that describes precisely the specific responsibilities of each party to the project, including the owner, the contractor and the CM.
- Charge adequate fees in consideration to the level of risk you assume.
- Make sure that your words and 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.
- Check your insurance. Talk with us to be sure you have appropriate coverage. We'll help you ascertain whether your professional liability policy covers the professional services you intend to provide. If you perform as a CM-Constructor, we will need to address bonding, workers compensation and general liability issues.

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- Wherever possible, limit your exposure to claims involving jobsite safety. Include appropriate “means-and-methods” disclaimers in your contract. Allocate health and safety risks through indemnities and insurance. 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 as proof that appropriate workers compensation coverage is in place.
  - Consider, with advice from legal counsel, establishing a separate corporate entity for your construction management services. This can help limit your liabilities for these riskier services.

### **Dealing with a Third-Party CM**

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, there may be a greater chance of error or omission due to confusion regarding duties, responsibilities and authorities. If you face this situation, try to maintain direct contact with the project owner and talk with your attorney about including a contract clause that addresses these risks.

### **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.*