

# A/E RISK REVIEW

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For More Information Contact:

Karen Hong

Tel: 522-2095

Fax: 522-2082

email: [khong@financeinsurance.com](mailto:khong@financeinsurance.com)

## The Risks and Rewards of Construction Management

*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.*

No need to convince you that project design and construction has grown more complex over the last decade. And clients feel the same way. No wonder, then, that more clients are turning to outside assistance in managing the design and construction process. Specifically, more clients are hiring construction managers to help them achieve their project goals.

What is a construction manager (CM)? At it's simplest, a CM is an individual knowledgeable of the design and construction industry who serves as project manager for the owner. (This goes beyond the construction observation services that most design consultants are familiar with; such as gauging whether construction conforms with design, assisting with change orders and RFIs, etc.) The scope of services offered by a CM vary project to project but can include:

- Design contract preparation, negotiation and administration
- Designer, subconsultant, contractor and subcontractor bid solicitation/negotiation/selection
- Construction document coordination
- Constructability review
- Work scheduling
- Budgeting/cost estimating/cost control
- Value engineering
- Code compliance

The CM is hired by and reports directly to the project owner. In some cases construction management covers the entire project, start to finish. In others, it may only cover a limited phase – such as construction. Construction management is suitable for virtually any project delivery method and can be particularly useful for design-build and fast-track projects, where speed and coordination pay big dividends.

For design consultants, serving in the capacity of CM presents new and lucrative income opportunities. Their experience working with project owners and already performing some of the basic duties of a CM, such as construction observation services, make them ideal candidates for expanding their scope of services into the realm of construction management.

Along with the added income opportunities come added risks. For design firms, serving as a CM begins to blur the line between design and construction, and exposes them to construction-means-and-methods liabilities that have traditionally been limited to contractors. How much liability risk is assumed depends on which of the two basic types of CM roles as defined by the Construction Management Association of America (CMAA) – CM-Advisor or CM-Constructor – the designer assumes.

### The CM-Advisor

A CM-Advisor is typically hired by the project owner on a fee basis. The CM-Advisor is responsible to represent the owner's interest by providing project management advice regarding the construction contract and issues such as costing and scheduling. The CM-Advisor does not have the power to select or manage the contractor or other design firms, although they may make recommendations to the owner. Likewise, the CM-Advisor does not enter into contracts with parties to the project, other than the owner. They do not participate in awarding contracts, arranging for material or labor, or taking responsibility for construction quality. As the name implies, the CM's role is limited to being an advisor to the project owner. The owner maintains contractual relations with all other project participants and retains all decision-making authority regarding design and construction activities.

### CM-Constructor

A CM-Constructor is also called CM-at Risk, and for good reason. The CM-Constructor takes on jobsite responsibilities typically assumed by the contractor. These responsibilities often include committing to deliver the project within a guaranteed maximum price and specific deadline. The CM-Constructor's scope of services can include scheduling and sequencing all design and construction activities. It can also include being involved in the selection of the lead designer, contractor and subcontractors and possibly entering into contracts directly with these entities. The CM-Constructor may be responsible for contract management, constructability reviews, project inspections, jobsite safety, materials review and selection, cost estimations, and virtually all activities from project inception through substantial completion.

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## Consider the Risks

Interested in entering into the realm of construction management? Before doing so, identify the specific risks you would encounter and how they apply to your current firm and situation. Consider: **Design responsibilities.** When a CM partakes in design and constructability reviews, it can become subject to the design liabilities of the architect or engineer of record. Their errors and omissions become your errors and omissions.

**Material and system selection.** When you are involved in selecting or recommending specific materials, systems and subsystems, you, along with the lead designer and contractor, become subject to claims should those materials or systems fail, or if unavailability of your recommended materials results in project delays.

**Cost estimates and guarantees.** As a CM-Contractor, you will be held to your construction cost estimates and guaranteed maximum price and may be liable for any cost overruns, regardless of cause.

**Scheduling timelines.** Most CM-Contractors will be required to provide specific deadlines for project completion and ensure coordination of activities to meet them. Any delays can result in a claim from the owner alleging incurred extra costs and/or the loss of income due to missed deadlines.

**Jobsite safety.** It is virtually impossible to avoid liability for construction means and methods and therefore jobsite safety when serving as a CM-Contractor. This is a major new liability traditionally assumed in whole by the contractor, and one that will not be covered by your professional liability policy. Claims from injured parties or citations from OSHA or state safety agencies can result in substantial penalties.

**Hazardous or toxic site conditions.** Should the CM-Contractor be involved in site investigation and selection, including underground sampling or testing, it can be liable for any hazardous site conditions missed during the site inspection but discovered during or after construction. This is especially true if the CM hired or recommended the geotechnical engineer conducting the sampling. Worse yet, the CM could be deemed a site "operator" or "arranger" of disposals of hazardous waste and become criminally liable should toxic materials be improperly handled or disposed of.

**Payments to designers and contractors.** Should the project owner fail to pay project participants on time, the CM could be held liable for nonpayment if it has a contractual relationship with those parties.

**Third-party liabilities.** If a third-party becomes injured on the jobsite, or files a claim against the owner or designer due to failure to meet ADA or other building requirements, the CM will likely be brought into the suit.

## Mitigating These Risks

After reviewing the potential liabilities associated with construction management, you may conclude that the best course of action is to steer clear of any role as CM. However, these liabilities can be mitigated to the point that serving as a CM becomes a viable option for design consultants who apply basic principles of loss prevention and risk management. Some rules of the road:

**Start slowly.** It's usually best to have a few projects under your belt as a CM-Advisor before taking on the responsibilities of a CM-Contractor.

**Select clients carefully.** CMs who have a good history working with the project owner have a much greater chance of managing a successful construction project. Beware of clients with a litigious history, or who present onerous contract terms, including unrealistic schedules. Check the owner's financials to ensure the project is adequately funded.

**Stick with what you know.** Select project types, jurisdictions and project delivery methods you are very familiar with and qualified to manage.

**Commit to continued learning.** Provide your staff with extensive training programs addressing cost estimating, bidding, construction administration and other skills key to successful construction management. (The CMAA offers a "Certified Construction Manager" education program.)

**Price your services appropriately.** Your fee should reflect the added duties and liability exposures you take on in the CM role.

**Commit ample resources.** Make sure you have adequate, experienced staff assigned to your CM project. The CM role can be extremely time-consuming.

**Draft an ironclad contract.** If you serve as a CM-Advisor, do your best to avoid responsibility for construction means and methods and jobsite safety. Your contract should include a disclaimer that specifically spells out that these liabilities are those of the contractor, you have no contract with the contractor, and your role is limited to serving as an advisor to the owner. Likewise, disclaim liability for existing site conditions. Avoid words like "inspect," "supervise," "certify" and "guarantee."

If you serve as CM-Contractor it can be virtually impossible to avoid responsibility for construction and jobsite safety. Still, protective contract language is essential. Recommended language that you and your attorney can use as a starting point is available from the Construction Management Association of America (CMAA), the American Institute of Architects (AIA), the Associated General Contractors (AGC), and the Canadian Construction Association (CCA).

**Pay strict attention to your scope of services.** Your written scope must be clear and comprehensive regarding your role as CM. Likewise, there should be comprehensive scopes for the contractor, the lead designers and all subs who are parties to the project. It is highly recommended that you include in your contract a list of those services to be performed by other parties, noting that these duties are outside of your scope of services.

**Carefully manage your jobsite duties.** Even when you secure a solid contract that limits your liabilities for construction means and methods, jobsite safety, etc., you have to avoid actions that supersede what your contract says. Ensure employees stay within your written scope of services – don't sign on as a CM-Advisor but then direct and supervise work like a CM-Contractor.

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**Consider forming a separate CM entity.** Ask your attorney whether forming a limited-liability entity that legally separates your CM activities from your design business would be worthwhile in your locale and for your particular situation.

**Insurance, Licensing, Etc.**

Your current PL insurance policy should continue to cover your professional liability risks while serving as a CM-Advisor or CM-Contractor. However, it will likely not cover risks inherent in activities such as fabrication, erection, installation, assembly, and all other services related to construction means and methods and jobsite safety. Nor will PL insurance cover economic risks, such as the failure to deliver a project under a guaranteed maximum price, or risks not "usual and customary" for an architect, engineer or other design professional. In fact, there's a good chance these liabilities will be specifically excluded in your PL policy language. It is critical, therefore, to have a thorough insurance review before delivering services as a CM. We can help you examine current and needed coverages provided by professional liability, general liability (GL), workers compensation, and other types of insurance policies. CM-Contractors will likely require a Contractor's GL policy, which can be significantly more expensive than a typical business owner's policy (BOP). You should also request that you be covered as an additional insured on the contractor's general liability policy and collect certificates of insurance from all relevant project participants.

**Working With A CM**

Finally, in the event you work on a project as a designer and the owner has hired a CM, be aware that your PL risks may increase slightly. You now have another set of eyes judging your services. If possible, negotiate a contract with the project owner that acknowledges the hiring of a CM. Include a scope of services that details your responsibilities and have the owner provide a detailed written list of the CM's duties, responsibilities and authorities. State in your contract that you are entitled to rely upon the CM's proper performance, decisions and directions as well as an equitable adjustment of your fee if the CM requests additional services beyond those included in the original scope.

**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.*