

CONSTRUCTION MANAGER AT RISK
What's in a Name?

by

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I. WHAT IS A CONSTRUCTION MANAGER AT RISK?

A. Introduction

The building of a structure of any size is usually complex, involving envisioning a concept as end result, designing that concept into a workable, understandable format so that it can be constructed, and ultimately, the construction itself. While methods of bringing a project from concept to end result have generated typical areas of responsibility (e.g. owner, designer, constructor), the method by which necessary steps are undertaken are not always static. Owners, developers, and various trade associations are always looking for better, more efficient ways to deliver the completed project.

This paper will look at one such delivery method which is currently in vogue, known as the “Construction Manager at Risk.” The objective is to gain a working understanding of this method of contracting, and to contrast it with a more conventional project delivery methods.

1. Traditional Project Delivery Method - Design/Bid/Build.

Regardless of the size of a project, designing and constructing a building is arguably one of the most complex commercial transactions conducted on a regular basis. Few commercial events involve managing the labor and expertise of as many people with competing interests, varying levels of business sophistication, and unique sets of risk as does construction. Fewer still require as much time or cost as much money. Given this, it is not surprising to find that project owners who engage in construction on a regular basis are looking for innovative ways to deliver a project more efficiently and for less money.

Many of these owners are seeking to change the traditional method of delivering a construction project called *design/bid/build*. This is a system which views the design and

construction of a project as two separate processes. Under this model, the design of the building is performed by an independent design professional, and once the design is complete, contractors offer bids for constructing the building. After evaluating the contractor's bids, the owner of the project then awards a contract for construction of the building to the contractor whose price and qualifications are acceptable. After execution of the contract, the contractor is obligated to construct the building for the bid price.

2. Weaknesses in the Design/Bid/Build Method.

Although this process continues to be the predominate project delivery method used today, a number of weaknesses in the process have caused project owners to look for alternatives. The most significant problem arises from the strict separation of design and construction. This separation deprives the owner of contractor skills during the design process, such as sensitivity to the labor and material markets, and knowledge of construction techniques. It also provides little or no opportunity for a contractor to evaluate the coherence and completeness of the design as well as the cost of any proposed design changes.¹

The separation of design and construction also reduces the efficiency by which design professionals and contractors manage a project. More often than not, the design professional only manages the design of the building and the contractor only manages its construction. Each profession is reluctant to become involved in the other's portion of the work in any manner that may increase its exposure to liability. As a result, design professionals tend to develop a casual attitude toward costs, an inability to predict costs, a general ignorance of the labor and material markets, and a lack of knowledge of the costs and efficiencies of various construction techniques.

At the same time contractors develop an inability to work with new materials and to use new construction techniques.²

Another problem that arises under the traditional design/bid/build system is that any kind of construction work is precluded until the design is complete. Rather than allowing portions of the project to begin as the design of that portion is completed, the traditional system requires that all work, including the purchase of materials, begin after the design and bidding process is complete.³ Although this method is more likely to produce quality results, it also requires the longest time period for completing the project.

Finally, with an emphasis on a fixed-price contract and competitive bidding the design/bid/build system fosters an adversarial relationship among the major participants in the system. Because of the manner in which contracts are linked together – owner/design professional – owner/contractor – contractor/ subcontractor(s) – owners find it difficult to build a team which has as its common goal accomplishing the objectives of all parties. Each contractual relationship creates a unique set of risks and economic interests.

Moreover, the lack of consultation between the various disciplines as evidenced in the separate contracts creates a high potential for distrust and conflict when the design is interpreted into a constructed building. When trouble develops under the design/bid/build system, accusatory positions emerge between the participants rather than an effort to pull together and solve the problem. All too often a bewildered project owner will find itself caught in the middle of a dispute over a defect where the design team contends the construction team failed to execute the design properly and the construction team asserts the design was defective. When this occurs, the division

between design and construction under the design/bid/build system becomes more a division of responsibility for failure, rather than an efficient method of construction.⁴

3. The Rise of Alternative Project Delivery Methods.

Various alternatives to the design/bid/build system emerged over the last four decades in an effort to draw on the expertise of all participants in the process from the inception of the project, provide for more efficient management of the project, decrease the time and costs of project delivery, and build a construction “team” rather than a construction “process.” This philosophy has also been advanced by the advent of “partnering” and “team-building,” devices used to create a collaborative approach to the process. Today, project owners may select from a number of delivery methods depending on the project budget, the project time constraints, the degree of owner control over the process, and the level of quality in the final product.

The design/bid/build system sits at one end of the line of project delivery choices available to a project owner. It is the delivery method which offers the owner the greatest degree of control over the process as well as the best potential for a high quality project. In return the project owner must accept a longer delivery time and theoretically must pay a higher price for the project. At the opposite end of the line is the process known as *phased construction*. Phased construction is a sequencing variation on the design/bid/build system commonly referred to as “fast tracking” or “design-build.” This process allows construction to begin before the design is completed. As separate systems, assemblies, or components of a new building are designed, each is bid on by the trade performing the work. The owner then evaluates the bids, awards the contract and construction begins as soon as the project is ready to receive the individual pieces of work. Theoretically, the owner who chooses a phased construction process should receive a shortened

delivery time and a reduction in management and labor costs. In return for this savings, a lower quality of project is more likely because the design and construction of the building happen simultaneously. Furthermore, an owner will have less control over the process because design decisions are turned into constructed reality shortly after they are made.

Many sophisticated project owners need a process that stands somewhere between the traditional design/bid/build system and a phased construction system. In other words, they are looking for an efficient management tool that will obtain high-quality construction at the lowest possible price and in the quickest possible time. Standing between, and sometimes interacting with, these two systems is the *construction manager*. The focus of this article is on one particular construction manager scheme, the construction manager at risk.

B. Construction Management Defined.

The concept of the construction manager was created in the 1960's in response to many of the problems discussed above as well as the unique impact of a high inflation economy on the construction industry. However, it is the decade of the 1990's that will be viewed as the period when the construction manager emerged as a frequent alternative to the design/bid/build model of project delivery. Essentially, construction management is a process where a qualified third party provides construction leadership with a defined scope throughout various phases of a construction project including planning, design and construction⁵. The primary emphasis of the process is on integrating the design and construction phases of a project.⁶ It is a team approach from project inception that strives for project delivery within the optimum time, for the most economical cost and with the required quality.⁷

The construction team is selected by the owner and consists of the owner, the construction manager and the design professional. Most importantly, the team has as its common objective how to best serve the owner's interests.⁸ Because everyone on the construction team is responsible for the planning, design and construction of the project, it is important the owner provides the team with competent personnel and the authority needed to make timely decisions concerning the budget and construction program.⁹

C. Qualities of a Construction Manager.

Usually, the construction manager is an independent third party hired by the owner on a fee basis. While the construction manager can be either a design professional, a contractor or a professional manager, the "construction manager at risk" is most often a constructor. Regardless of the background of a construction manager, the success of a project depends on the level of construction experience it possesses. When selecting a construction manager major consideration should be given to: (1) the successful completion of previous projects of comparable design, scope and complexity; (2) the demonstrated ability to work cooperatively with owners, design professionals and trade contractors throughout a project; (3) the demonstration of successful management systems for planning, organizing and monitoring a project; (4) a knowledge and experience in the use of value engineering; (5) the reputation of the individual or entity in the local construction industry; (6) the demonstrated ability to implement an effective labor relations program in compliance with local, state and federal laws; (7) the knowledge of local, state and federal laws and regulations regarding safety, health, equal opportunity, environmental and energy conservation; (8) the demonstration of financial responsibility including the ability to provide an guaranteed maximum price, if required; (9) the knowledge and ability to implement an effective

overall insurance program for the project; and (10) the ability to perform work on the project with the construction manager's own work force, if required.¹⁰

D. Construction Manager at Risk Distinguished From Other Construction Managers.

1. The Construction Manager/Agent.

Although there are numerous variations on how a construction manager relationship is organized, each is structured around one of two typical models. The first model is the construction manager "agent" or "advisor." As the name implies, the construction manager is an agent of the owner and does not design or construct the project. Instead, the construction manager administers the project throughout the planning, design and construction phases. For the most part, a pure construction manager/agent is empowered to: (1) act on behalf of the owner regarding contract matters, including overseeing the design and construction phases of the project; and (2) transact specified business on behalf of the owner.¹¹

Under a construction manager/agent scenario, the owner contracts separately with the construction manager, design professional and either a general contractor or a number of separate prime contractors. The construction manager has only an administrative relationship with the design professional and the general contractor or prime contractor(s). The only contractual relationship held by the construction manager/agent is with the owner. Consequently, this type of construction manager is not responsible for the means or methods of construction and does not guarantee construction cost, time or quality aspects of the work.¹² Use of the "advisor" construction manager is common on larger projects or by institutional owners in conjunction with the design/bid/build scenario.

2. The Construction Manager at Risk.

The second model of construction manager, as well as the focus of the remainder of this article, is the “*construction manager at risk*” (CMAR). Contrasted to the construction manager/agent, the CMAR provides advice and construction leadership during the planning and design phases of the project and construction leadership, contract management, direction, supervision, coordination, and control of the work during the construction phase.¹³ When structuring a CMAR relationship, the owner will usually contract directly with the design professional and separately with the CMAR. During construction, presupposing that the CMAR will be selected as the constructor (more on this point later), the CMAR will contract directly with the trade contractors. Similar to the traditional contractor, the CMAR has control over the means and methods of construction, the management of the safety of the workers and the delivery of the completed project according to the time, cost and quality requirements of the owner.¹⁴

Construction managers are considered “at risk” whenever they contract with the owner to complete the project for a guaranteed maximum price (GMP). Simply put, a GMP is a cost plus a fee contract with a “cap.” If the cost of the project should exceed the GMP, the CMAR is “at risk” of absorbing the overrun. When the CMAR gives a GMP, it usually offers the number after the design is about 75% complete. To offer a GMP that is the best estimate possible, the CMAR obtains as many fixed-price contracts from the specialty trades as possible. In addition, the CMAR may “build” into the number enough money to take into account its fees as well as any contingencies that may arise from design changes and unforeseen circumstances, not unlike standard GMP contracts. Similar to standard GMP contracts, one risk inherent to owners is that the

specialty trades or the CMAR may claim that design scope changes have eliminated any contractual price commitment.¹⁵

II. HOW DOES A CONSTRUCTION MANGER AT RISK DELIVER A PROJECT?

As stated above, the primary objective of the construction management delivery method is to integrate the design process with the construction process. To accomplish this goal the typical construction manager provides a wide range of services during both phases of the construction project. Thus, the construction manager becomes a leader in the execution of the project from the initial planning stages. Becoming such a leader requires the construction manager to assume tasks and responsibilities formerly assigned exclusively to the design professional, such as project scheduling, cost projection and carrying the mantle leadership in shepherding the owner through the process.

The CMAR is distinguished from other construction managers at the moment the project transitions from design to construction. It is at that point when the CMAR offers the owner a guaranteed maximum price for the delivery of the project and essentially takes on the role of traditional contractor, including the incumbent risk of constructing the project for a “not to exceed” price. As a result, the typical CMAR relationship usually involves expanding the control and influence of the construction professional over the delivery process. To understand how this is achieved, one must take a close look at the CMAR’s responsibilities in the preconstruction phase, when establishing the GMP, and during construction.

A. Preconstruction Phase.

The success of a CMAR project depends upon the development of the best and most economical construction program. In theory, such a program arises from the team work between

the design professional and the CMAR with the common goal of serving the owner's interests. Such collaboration usually requires the design professional to relinquish some of its traditional responsibilities to the CMAR, including "point man" responsibility toward the owner. Notwithstanding any duties the CMAR may assume, the design professional remains responsible for ensuring the drawings, specifications or other contract documents comply with applicable laws, statutes, ordinances, building codes or other rules and regulations.¹⁶ It is important to remember that in most cases the CMAR is not licensed or qualified to perform the design function and would not want to, from a liability standpoint.

Generally, during preconstruction the CMAR provides the owner with reliable information about probable costs and scheduling of the work. To further this goal, the CMAR generates a preliminary cost estimate at the end of each phase of design¹⁷. If new cost estimates exceed those previously made, the CMAR may recommend to the design professional and owner possible ways to bring the estimate back in line with the project budget.¹⁸ For this reason, it is imperative that the CMAR have both experience in construction techniques and current knowledge of the labor and materials markets.

Involvement in the project before construction begins allows the CMAR to know what materials or equipment require a long delivery time, and to focus design work on these areas in order to place an order for them if necessary. Forward ordering of long-lead time materials and equipment allows the CMAR to prevent delays in the project due to slow delivery and protects the owner from the rising costs due to any inflation in the market.¹⁹ To impress upon the CMAR the importance of this task, the expeditious procurement of long-lead materials or equipment is one

of its affirmative obligations during preconstruction.²⁰ These efficiencies are all but impossible in the traditional design/bid/build method.

The CMAR also works with the design professional in value analysis of alternative design and construction procedures throughout design development, also commonly known as “value engineering.” Such analyses will enable the design professional, owner and CMAR to make major design decisions more quickly and based on information that is accurate as to cost, time and functional/aesthetic purpose.²¹

Any dispute or claim that arises during the preconstruction phase or which relates solely to the preconstruction services of the CMAR are resolved first through mediation and then through arbitration.²² The party seeking resolution of the claim must do so within a reasonable time after the events giving rise to the claim occur.²³ Under the standard agreement between the owner and the CMAR, the parties entitled to seek arbitration are capable of being joined in an arbitrated dispute are the owner, the CMAR and the owner’s separate contractors, if any. No other person or entity, including the design professional, may be joined in a arbitrated dispute without its written consent, evidencing once again the architect’s and engineer’s reticence to engage in an arbitration with the constructor.²⁴ Any award or decision concerning a preconstruction claim or dispute and rendered by an arbitrator is considered final.²⁵

B. Establishing the Guaranteed Maximum Price.

The GMP number, which is composed of the estimated cost of the project, the contractor’s profit, plus all applicable taxes and fees, is proposed by the CMAR as project design nears completion, which is typically no sooner than when the design is 75% complete.²⁶ Although the drawings and specifications for the project may not be completed at the time the estimate is made,

the CMAR is required to allow for further development of the design by the owner and design professional in its number. When planning for further development of the design, the CMAR is not required to make contingencies for changes in scope of the project, changes in the systems used or changes in the kinds and quality of materials, finishes or equipment.²⁷

A construction manager becomes “at risk” when the owner accepts his or her offer of a guaranteed maximum price for delivery of the project.

The CMAR will submit the GMP proposal to the owner in the form of a written statement outlining the basis for the offer. Such statement includes: (1) a list of the drawings and specifications used to generate the GMP; (2) a list of all allowances; (3) a list of clarifications and assumptions made by the CMAR in preparation of the GMP proposal; (4) the proposed GMP amount broken down by trade categories, allowances, contingency, taxes and fees; (5) the date of substantial completion of the project upon which the GMP is based;²⁸ and (6) the latest date by which the owner may accept the GMP.

After proposing the GMP the CMAR meets with the owner and the design professional to review its completeness. Any errors or inconsistencies between the fees and the intended design are adjusted for at this time. Additionally, the parties may negotiate other changes in the proposal’s fee or cost structure.²⁹ When all agree that the proposal reflects the intended scope of the project, the owner, in writing, accepts the offer. If the owner fails to do this by the date stated in the proposal, the contract is ineffective without the written acceptance of the CMAR.³⁰ Thus, the failure of the owner to timely accept the proposed GMP relieves the CMAR, at its option, of any further obligation for delivery of the project. It is not uncommon for further value engineering and further negotiations to take place at this juncture.

Upon acceptance of the GMP proposal, the owner and CMAR execute an amendment to their agreement which establishes the price as part of the contract. At this point in time, the construction manager becomes a contractor, for all practical purposes. After execution of the amendment, any changes in the work or extensions in the time for completion of the project, which are not contemplated by the GMP, are adjusted through the established change order process.³¹ Simultaneous to executing the amendment, the owner will instruct the design professional to incorporate into the drawings and specifications all clarifications and assumptions upon which the accepted GMP is based.³²

C. Construction Phase.

During the construction phase of the project, the role of the CMAR essentially is that of the contractor under the traditional design/bid/build system. The phase begins upon acceptance of the GMP by all parties coupled with a notice to proceed or upon special authorization by the owner.³³ The CMAR may, if capable, perform any portion of the work with its own forces. Those portions of the work not performed by the CMAR are executed by qualified subcontractors. The CMAR selects the subcontractors either by obtaining bids from a list of subcontractors previously reviewed by the owner and design professional or by obtaining bids from subcontractors with the appropriate qualifications.³⁴

As stated above, during the execution of the work the CMAR controls the means and methods of construction, the subcontractors and suppliers, the management of the safety of the workers and the delivery of the completed project, as would any contractor under traditional contractual methods. In addition, the CMAR supplies the owner and design professional with

monthly written reports detailing the progress of the work and variances between actual and estimated costs.³⁵

Dispute resolution during the construction phase mirrors that of the traditional design/bid/build system. Claims by either party must be initiated by written notice to the design professional prior to twenty-one (21) days after the condition giving rise to the claim is first recognized.³⁶ An initial decision by the design professional is a condition precedent to mediation, arbitration, and litigation of all claims arising between the parties prior to the date the final payment is due.³⁷

III. THE STRUCTURE OF THE STANDARD OWNER/ CMAR AGREEMENT.

A. Standard Contracts.

1. The Various Documents.

The American Institute of Architects (AIA) produces five construction manager standard contracts and a variety of support documents which are commonly used to structure the construction manager relationship. Each document establishes a substantially different construction manager relationship. Although only one document is needed to create the CMAR relationship, it is helpful to know a little bit about all five in order to avoid confusion.

The first document is numbered AIA 101/CMa (1992 edition) and is titled “Standard Form of Agreement Between the Owner and Contractor, Stipulated Sum, Construction Manager-Advisor Edition.” This document is used on projects where the basis for payment is a fixed price. Also, in addition to the design professional and contractor, a construction manager assists the owner in an advisory capacity during design and construction. Under this agreement, the construction manager is an agent of the owner and does not serve as a contractor or provided a guaranteed price

for construction of the project. Because of this, it is likely the owner will contract directly with the trade contractors. The A101/CMa is primarily used when the contractor serves as a construction manager-advisor. In addition, the document requires the parties use a special set of general conditions numbered A201/CMa (1992 edition) and titled “General Conditions of the Contract for Construction, Construction Manager-Adviser Edition.”³⁸

When the owner chooses to have the design professional serve as a construction manager - advisor two structures of the relationship are possible. In the first scenario, the owner may choose to expand upon, blend with or supplement the design professional’s traditional design and construction administration services with construction management services. If the parties are using the AIA document numbered B141 (1997 edition) to form the basis of the contract for design services, they will amend it with the document numbered B144/ARCH-CM (1992 edition) and titled “Standard Form of Amendment for the Agreement Between Owner and Architect Where the Architect Provides Construction Management Services as an Advisor to the Owner.” When executed, this amendment obligates the design professional to perform similar duties as the contractor under the A101/CMa. Furthermore, this amendment references the standard A201 general conditions and is drafted to integrate with both the A201 and B141 documents.³⁹

The second scenario arises when the owner decides to have the design professional serve as construction manager-advisor from the beginning of the project. Should this occur, the parties must execute the AIA document numbered B141/CMa (1992 edition) and titled “Standard Form of Agreement Between the Owner and the Architect Where the Architect Provides Construction Management Services to the Owner.” This document varies from the one above in that it references the standard A201/CMa general conditions and establishes the design professional as

an independent construction manager-advisor to the owner. Moreover, the design services contract remains distinctly separate from the construction manager-advisor contract. When executed, however, it obligates the construction manager-advisor to perform the same obligations as the A101/CMa discussed above.⁴⁰

Another variation on the construction manager-advisor relationship is created by the document numbered A131/CMc (1994 edition) and titled “Standard Form of Agreement Between Owner and Construction Manager Where the Construction Manager is also the Constructor and Where the Basis of Payment is Cost of the Work Plus a Fee and There is No Guarantee of Cost.” This document is used to create a construction manager/ contractor that is not at risk. This type of construction manager is similar to the CMAR in that it assumes financial responsibility for delivery of the project. However, the basis of payment for the work is the cost of the work plus a fee and *no guaranteed maximum price*.

2. The Standard Construction Manager At Risk Document.

The document which establishes the typical CMAR relationship is numbered A121/CMc (1991 edition) or AGC Document 565 and is titled “Standard form of Agreement Between Owner and Construction Manager Where the Construction Manager is also the Constructor.” A copy of this contract is attached as Appendix 1 hereon. This form represents the collaborative effort of the AIA and the Associated General Contractors (AGC) which is discussed more extensively below. More importantly, it is the *only* standardized document used to create an “at risk” construction manager, and it is the most commonly used form by far in this type of contract scenario.

The A121/CMc consists of at least two separate documents, and possibly three, depending on which edition of general conditions is desired. Because the current form of the “base” contract is a 1991 version, it automatically incorporates the 1987 version of the A201 general conditions. Document number A121/CMc-a is titled “Amendment to the Standard Form of Agreement Between Owner and Construction Manager Where the Construction Manager is also the Constructor;” and its primary role is to amend the A121/CMc so that it references the 1997 edition of the general conditions for construction, A201-1997. If the 1997 version of the AIA-A201 is desired, this amendment must be executed simultaneously with the body of the A121/CMc document.

The second part of the A121/CMc is the actual contract document, and its execution structures the CMAR relationship as described herein above. Finally, the third part of the A121/CMc is simply an amendment to the agreement between the owner and construction manager which establishes the GMP obligation and the time within which the construction will be completed. The contents and timing for execution of this amendment is also discussed extensively in Section II(B), above.

Because the A121/CMc is the product of the collaboration between the AIA and AGC, amending the document has proven to be difficult. Typically, AIA updates and/or revises their documents every ten years. Under this practice, the A121/CMc is due for to be revised sometime this year. However, because of the difficulty in reaching agreement on the initial document in 1991, there are no plans to extensively rewrite this document this year or in the foreseeable future.

B. Key Provisions in AIA-A121/CMc.

The following, in an abbreviated format, are the significant provisions of the AIA-A121/CMc contract form. Familiarity with these provisions will give the reviewer of this contract a general idea of the intent of the document.

- Use of 1987 edition of AIA document A201 (Section 1.2 – A121/CMc).
- Responsibility for project scheduling and cost projections. (Sections 2.1.2, 2.1.3, 2.1.5 – A121/CMc);
- Procurement of long lead time items – owner originally contracts for same, but if construction manager becomes constructor, these contracts will be assigned to construction manager. (Section 2.1.7 – A121/CMc);
- Construction manager’s recommendations as to design or design alternatives will be reviewed by the owner and the architect. It is not construction manager’s duty to see that design complies with codes, ordinances, etc. (Section 2.1.8 – A121/CMc)
- Construction manager shall not provide services which constitute the practice of architecture or engineering. (Section 2.4 – A121/CMc);
- Guaranteed maximum price given by construction manager to owner when drawings and specifications are “sufficiently complete.” (Section 2.2.1 – A121/CMc);
- Establishment of construction manager’s “contingency” for construction manager’s exclusive use. (Section 2.2.3 – A121/CMc);
- Compensation for “pre-construction” services. (Section 4.1 – A121/CMc).

- Compensation for “construction phase” services (Section 5.1 – A121/CMc).
- Definitions of cost of the work (Article 6 – A121/CMc).
- Alternative dispute resolution – disputes resolved by “mediation or arbitration.”
(Section 9.1 – A121/CMc).

IV. REAL WORLD APPLICATION.

A. Owner’s Perspective.

Ask any number of developers, architect/engineers, and contractors how they view the practical workings of the CMAR process and, predictably, you get as many answers. From a general standpoint, however, owners seem to be pleased with the process to the extent that it brings together the designer and constructor in a relatively collaborative effort early on, somewhat negating the traditional struggles between designers and contractors. Owners seem to take comfort in the fact that constructors are on board during the design process and have a chance to “weigh in” with comments during this phase.

Interestingly, owners are not unanimous as to their views of the CMAR as a cost savings device. While most agree the process can save time, and therefore money, some owners are of the opinion that the process gives the ultimate constructor significant time to study the project drawings to such an extent that the contractor rarely “busts” any portion of the estimate which, some would say, enures to the benefit of the owner. For the most part, however, owners are generally satisfied with the process.

1. School Districts.

In 1997, the Texas Education Code was amended to allow Texas’ independent school districts to experiment with alternatives to the design/bid/build project delivery process and

mandated competitive bidding. TEX. EDUC. CODE, § 44.037-.038, (Vernon 2001). Both construction manager-agent and CMAR methods of delivery were made available to school administrators, and, by all accounts, they have taken advantage of this new legislation. Essentially, this change has allowed contractors, dressed as construction managers at risk, to negotiate the projects directly with school districts, a concept never before allowed. The Code was extensively amended in 1999 to more definitively address how the school districts may choose the construction manager as well as who may serve as a construction manager. The recent amendments also gave the districts the power to *negotiate* the CMAR contract with the offeror who submitted a proposal that reflected the *best value* for the school district. EDUC. CODE, § 44.038(g). A copy of this statute is attached in Appendix 2.

Negotiation is the hallmark of the CMAR scheme outlined in the Education Code. After the contract between the district and the CMAR is negotiated and agreed to, the CMAR will publically advertise for bids from subcontractors. If the CMAR is performing portions of the work, it must also submit a bid proposal. EDUC. CODE, § 44.038(h). The CMAR and the district then review all proposals in a manner that does not disclose the contents of the bid during the selection process. (All proposals are made public seven days after the selections are made.) EDUC. CODE, § 44.038(i). Each subcontractor is selected based on whether it provides the best value for the school district. EDUC. CODE, § 44.038(g).

For the most part, the public owners have enjoyed using the system outlined above, stating that it has resulted in less problematic jobs and less claims. However some contractors have found that they can no longer achieve certain public work simply by being the low bidder. Rather, the relationships contractors have with owners and architects have become critical to selling and

procuring projects. Under current practices, if the construction manager has no prior relationship with the owner or architect, it will probably find it difficult to secure a project as a construction manager at risk.

The successes experienced by the public schools with the use of alternative delivery methods has prompted other government entities to ask the Texas Legislature for permission to do the same. Currently, two bills are pending before the Texas House of Representatives and Senate that would give the Department of Criminal Justice (TEX. S.B. 110, 77th Legis. (2001)) and municipalities (TEX. S.B. 155, 77th Legis. (2001)) the option of using design build, a variation of construction management, when performing construction or repairs.

B. Designer's Perspective.

From the designers' and contractors' perspectives, it is fair to say that old habits die hard. While some progressive designers and contractors view the process as it was truly intended, that as a collaborative effort, others are wary. The traditional barriers of "designers design and constructors build" is still very prevalent in both camps.

However, designers who truly have the owner's best interests at heart recognize that while they can design in a vacuum, it is much better to have their design "checked" for practical usage, and costs, as the design is being formulated. In many instances it is easier to change and adapt a particular element of the design, during the process, as opposed to after other elements are superimposed and used in conjunction therewith. Further, under CMAR, the designer is no longer saddled with responsibility of cost projections, as this duty is assumed by the construction manager.

C. Contractor's Perspective.

The contractor's viewpoint is somewhat different. The contractor does not want to be in the design business and must be careful in allowing too much of its thoughts and opinions to go into the process for fear of somehow taking on unwanted design liabilities. After all, constructors are not designers. However, for the most part, constructors welcome the chance to be involved in the up-front design process from a means, methods, and practicality standpoint. As a general viewpoint, constructors opine that they are most successful under this system when a healthy, and respectful relationship is developed with the design professional early in the process, with each acknowledging the various strengths of the other. Many have said their early involvement in the process undoubtedly resulted in fewer claims and complaints of "bad design" down the road.

To further this thought, a contractor's typical claim against an owner usually contains the following component . . . "The design was bad, it's an architectural problem." Because of the early involvement of the constructor in the CMAR process, this typical argument is somewhat weakened. Therefore, contractors tend to put more emphasis on clarity of design in the initial design phase. This can only be a help to everyone involved.

V. CONCLUSION.

In conclusion, while there are certain factions who prefer traditional project delivery methods and traditional, comfortable, boundaries of responsibility, the widespread use of the construction manager at risk project delivery system evidences its acceptability in the workplace and its assurance of being used effectively in the future. Construction lawyers faced with issues involved in the Construction Manager at Risk scenario will have an easier time of it if they

understand the three phases of the process: pre-construction, establishment of the Guaranteed Maximum Price, and construction at the onset.

VI. ENDNOTES.

1. JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS 312-313 (Brooks/Cole Pub. Co., 6th ed. 2000).
2. *Id.* at 322.
3. *Id.* at 313.
4. *Id.*
5. Steven G.M. Stein, Esq. & Marc E. Odier, Esq., *New Frontiers: Undertaking Construction Management*, *1 (last modified January 8, 2001) <<http://www.ramco-ins.com/resource-library/risk-management/09-sstein-modier.htm>> .
6. THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AGC PUBLICATION No. 540, CONSTRUCTION MANAGEMENT GUIDELINES, 2 (1979).
7. THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AGC PUBLICATION No. 550, OWNER GUIDELINES FOR SELECTION OF A CONSTRUCTION MANAGER, *1 (1982).
8. AGC Publication No. 540, *supra* note 6, at 2.
9. *Id.* at 3.
10. AGC Publication No. 550, *supra* note 7, at *2.
11. Stein & Odier, *supra* note 5, at *1.
12. *Id.* at *2.
13. *Id.*
14. *Id.*
15. Justin Sweet, *supra* note 1, at 323-324.
16. THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A121/CMc AND AGC DOCUMENT 565, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONSTRUCTION MANAGER WHERE THE CONSTRUCTION MANAGER IS ALSO THE CONSTRUCTOR, ¶ 2.1.8 (1991).
17. *Id.* at ¶ 2.1.5.1 to 2.1.5.3.
18. *Id.* at ¶ 2.1.5.4.
19. AGC Publication No. 540, *supra* note 6, at 4.

20. AIA Document A121/CMc, *supra* note 16, at ¶ 2.1.7.
21. AGC Publication No. 540, *supra* note 6, at 4.
22. AIA Document A121/CMc, *supra* note 16, at ¶ 9.1.1.
23. *Id.* at ¶ 9.1.2.
24. *Id.* at ¶ 9.1.5.
25. *Id.* at ¶ 9.1.6.
26. *Id.* at ¶ 2.2.1.
27. *Id.* at ¶ 2.2.2.
28. *Id.* at ¶ 2.2.4.
29. *Id.* at ¶ 2.2.5.
30. *Id.* at ¶ 2.2.6.
31. *Id.* at ¶ 2.2.8.
32. *Id.* at ¶ 2.2.9.
33. *Id.* at ¶ 2.3.1.1.
34. *Id.* at ¶ 2.3.2.1.
35. *Id.* at ¶ 2.3.2.7.
36. *Id.* at ¶ 9.2.1; THE AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, ¶ 4.3.2 (1997).
37. AIA DOCUMENT A201, *supra* at note 38, at ¶ 4.4.1.
38. American Institute of Architects, Contract Document Home Page, Products and Prices, *CM-Advisor Family of Documents*, <<http://www.e-architect.com/resources/contractdocs/cmadvise.asp>> .
39. *Id.*
40. *Id.*