Construction Manager-at-Risk

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What is a Construction Manager-at-Risk?

- The **Construction Manager-at-Risk Method** is a method of procuring construction under Tex. Gov't Code § 2269.251.*

- A **Construction Manager-at-Risk (CMAR)** serves as the general contractor of a project to provide consultation during the design and construction, rehabilitation, alteration, or repair of a facility.

*This was recodified from 2267 in 2013, which was recodified from 2166.2532 in 2000, and which came from TLGC 271, Subchapter H, 271.118

Who Can Be a CMAR?

Tex. Gov't Code § 2269.251 (b):

- A construction manager-at-risk must be a "sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price as a general contractor and provides consultation to the governmental entity regarding construction *during and after the design* of the facility. The contracted price may be a guaranteed maximum price." (emphasis added)

Texas Gov't Code § 2269.252:

- The architect or engineer for a project must be selected *at the time of or before* the CMAR.
- The architect or engineer or related party may *not* be the CMAR.

How is a CMAR selected?

- City must make a determination that the CMAR method is Best Value. Tex. Gov't Code §2269.056.
- CMARs are selected in either a 1-step or 2-step process.
- An RFP is used for a 1-step and an RFQ is used for a 2-step.
- Each request requires a statement as to which method applies, general information on the project site, project scope, schedule, selection criteria and the weighted value for each criterion, and estimated budget and the time and place for receipt of the proposals or qualifications.
- Selection of candidate is based on Best Value.

How is a CMAR Selected?

- In a 1-step process, the city may ask for proposed Management Fees and pricing for General Conditions.
- In a 2-step process, the City may not ask for proposed fees and pricing but must first select solely based on qualifications for up to five or less candidates. Then, the City may request the proposed fees and pricing from those candidates.
- The City must receive, publicly open, and read aloud the names of the selected candidate(s) and then after receiving the proposals at step 2, the city must also read aloud the fees and pricing as the proposal is opened.
- The City must rank proposals not later than the 45th day after the date on which the final proposals are opened under Tex. Gov't Code § 2269.253 (g).

CMAR Duties

Design/Pre-Construction:

- Constructability and Value Engineering
- Errors in Design
- Estimated Budget
- Scheduling
- Long lead procurement

Construction Phase:

- Publicly advertise for and receive bids or proposals from subcontractors for the performance of all work (2269.256). There is a duty to City not to disclose bids.
- CMAR has privity with subs.
- CMAR may self-perform the work but must bid and be approved by Council.
- Provide Performance and Payment Bonds (discussed later).

CMAR Duties

Construction Phase Cont'd:

- Cost management, finalize line-item costs for estimates
- Establish the Guaranteed Maximum Price
- Issue Project Schedules
- Progress Reports
- Safety
- Supervision and quality reports
- Secure Permits
- Coordinating with the design specialist

Does CMAR owe a Fiduciary Duty?

Is there a Fiduciary Duty between CMAR and the City?

A fiduciary duty is one arising from a relationship of trust and confidence in which one party is to act in best interests of the other party

- Unclear, no true guidance, so include it in the Contract (See AIA)
- Not a CMA whose duty is statutory (2269.204)
- Duty to keep bids confidential alone may not create a duty*
- Does not have actual or apparent authority to bind
- Because of assumption of risk, treated as Independent Contractor
- Economic self-interest presumed
- Statute precludes CMAR from being design professional
- Subs get under the Texas Trust Fund Statute (TPC ch. 162)

***BioTE Med., LLC v. Medcalf*, No. 05-20-00661-CV, 2022 WL 18007665 (Tex. App.—Dallas, Dec. 30, 2022)

CMAR v. Construction Manager Agent

Tex. Gov't Code Chapter 2269, Subchapter E:

Construction Manager Agents provide administrative services during the design and construction of a project, i.e. oversight.

- Has a statutory fiduciary duty to City.
- May not self-perform any of the construction.
- May not procure the contractors themselves.
- Does not provide performance or payment bonds.
- The architect or engineer may not serve.
- Chosen through an RFQ.
- CMA must carry professional liability insurance of $1 million (2269.208)

Guaranteed Maximum Price

The City may, but is not required, to contract with CMAR for a Guaranteed Maximum Price (GMP). Tex. Gov't Code § 2269.251(b).

The Guaranteed Maximum Price is the maximum price for a construction project. Anything exceeding the price is absorbed by the CMAR. This is why they are "at risk".

The GMP is based on the following components:

- Direct Costs of the project for Labor, Materials, and Equipment.
- CMAR Management Fee
- General Conditions Fee
- Contingency Funds
- Optional: a Contractor Controlled Insurance Plan (CCIP) recommended for projects over $100 million

If there is no GMP then the CMAR should produce a control estimate. This involves a lot more oversight by the City. May be used primarily for smaller projects. They are still "at risk" for unapproved financial items.

CMAR Fees and Prices

CMARs generally charge the following:

- Pre-construction Fee. This is a lump sum fee that is approximately 0.5% of the total estimated cost of construction and is the "planning phase". The CMAR will work with the design professional on constructability issues, value engineering, and cost estimates.

- Management Fee. This is a percentage of the total value of construction and is expressed as a percentage in the contract. This is part of the CMAR markup and can range from 2-15% of the total value of construction.

CMAR Fees and Prices

- General Conditions. These are defined by Tex. Loc. Gov't Code 2269.001 (4) but may be expanded via contract. GCs include costs for on-site management, administrative personnel, insurance, bonds, equipment, utilities, and incidental work, including minor field labor and materials. These are generally overhead costs that are expressed as a percentage of the total estimated amount to construct the project, from approximately 6-12%.* This is also part of the CMAR Markup. These tend to be higher than the management fee because of onsite supervisor costs.

- Reimbursed Direct Costs. The actual, total cost of the construction based on competitive bids received for the supply of all labor, materials, equipment, and all other items of cost required to complete the construction of the Project. Direct costs should include the correction of work only if the defect was not the fault of the CMAR. Direct costs do not generally include any General Conditions costs or any costs that exceed the Guaranteed Maximum Price.

* Source: The Construction Executive. https://www.constructionexec.com/article/lump-sum-general-conditions-in-cost-plus-commercial-construction-contracting

CMAR Fees and Prices

Contingency Fees:

A City Contingency Fund may be established to cover the costs of unforeseen items such as changes in scope initiated by the City (change order). It is best to ensure that value engineering savings and savings received through buyout* go back into this fund.

A CMAR Contingency Fund helps reduce the risk in providing a GMP and covers items like scope gaps, sub defaults, unforeseen conditions, cost of corrective work or design omissions that should have been known. This fund is generally not increased, and the CMAR is personally responsible for everything over this.

*A buyout is any savings that result from procurement of subcontractors during the transition from pre-construction to construction. Technically should not exist once GMP is established because sub pricing is best and final.

Bonds Required

Tex. Gov't Code § 2269.258. PERFORMANCE OR PAYMENT BOND.

(a) If a fixed contract amount or guaranteed maximum price has not been determined at the time the contract is awarded, the penal sums of the performance and payment bonds delivered to the governmental entity must each be in an amount equal to the construction budget, as specified in the request for proposals or qualifications.

(b) The construction manager-at-risk shall deliver the bonds not later than the 10th day after the date the construction manager-at-risk executes **the contract** *unless the construction manager-at-risk furnishes a bid bond or other financial security acceptable to the governmental entity* to ensure that the construction manager will furnish the required performance and payment bonds when a guaranteed maximum price is established.

Bonds Required

- The word “contract” in this section appears to be referencing § 2269.251, which includes both the design consultation and the construction. However, some jurisdictions divide their CMAR contracts into separate contracts for pre-construction and construction to avoid requiring the full amount of the bond at pre-construction.*

- It is a more conservative approach to require the full amount of the bonds at the time of any contract with the CMAR, or the alternative financial security authorized in the statute.

- There is some risk in using two contracts, especially if any part of the construction starts prior to the construction contract being entered, the City would not have the regular construction protections. Other states have analyzed this under quantum meruit. Also design defects intentionally not disclosed (See Tex. Bus. & Comm. Code §§59.002,59.051) need to be included under the bond.

*A CMAR complaint is that the cost of the bonds is not reimbursable until the Construction Phase, and fees can be costly.

Bonds Required

What is a “bid bond or other financial security acceptable to the governmental entity”?

- An acceptable Financial Security can be used pending establishment of the GMP which would then require the full amount of the GMP as bonds in an amendment of the contract.

- A bid bond guarantees the estimated GMP and that the CMAR will post a payment bond if CMAR continues the work.

- Financial Security in this context is more than likely either a security bond, performance bond, letter of credit, or cash deposit. For example, requiring a 5-10% Security Bond and a Letter of Bonding Capacity pending GMP).

- These instruments may cover the gap between the GMP estimate and the actual GMP submitted by a cover contractor.

Advantages

- Allows for expertise in value engineering and constructability.
- Same legal position as a contractor.
- Checks and balances with the design professionals.
- Allows multiple projects to be in construction simultaneously.
- Closer watch of scheduling and supervision of subs.
- Expertise in complex projects and ability to have specifications tightened prior to bids.
- Cost Certainty. CMARs have significant cost and schedule advantages.*
- Transfer of Risk. CMARs reduce the City's risk for material cost volatility, accelerated schedules, project sophistication, implementation of LEED requirements.**

*See Konchar & Sanvido, *Comparison of U.S. Project Delivery Systems*, 124 J. Constr. Eng'g & Mgt. 435 (November/December 1998).
**See, Ng and Conrad, *Is the Construction Manager Holding Any of the Cards? A Critical Look at Construction Management at Risk Today*, Construction Lawyer (Fall 2012).

Disadvantages

- Cost inflation
- Issues regarding project quality, budget, and schedule
- Disputes regarding what is included in the GMP
- Sub markups
- No privity with contractors completing main work
- No interactions with subcontractors

Questions?