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It's All in a Name: PM, CM – What Do You Do?

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SYNOPSIS

This paper discusses U.S. and Canadian perspectives on the evolving roles of the professionals, both people and organizations, that assist the owner with design and construction and often referred to as "project managers" or "construction managers." The conceptual framework for this analysis is organized according to five (5) stages of a typical project: pre-design, design, procurement, construction, and post-construction - including discussion of risks and legal issues throughout, and it is followed by a discussion of contract forms. A core element of this analysis attempts to answer the following questions:

1. Who really manages a complex construction project?
2. How should an owner decide how to allocate management?
3. Is there a tension between the desire to manage/control and responsibility/liability that goes with it?

An initial challenge in discussing and analyzing the role of the "project manager" and "construction manager" is terminology. These terms, along with "project management" and "construction management" are ubiquitous in the construction industry; yet they may mean different things to the owner, the contractor, and design professional. It is common for all of these terms to be used imprecisely; sometimes they are used as generic descriptors and other times they refer to specific people or tasks. Fundamentally, these terms beg the question of who is managing what and for whom. A general contractor or construction manager usually employs a project manager to oversee the project as part of its chain of command. Yet that role is distinct from the owner's agent which is increasingly referred to by other titles such as owner's representative, program manager, outside project manager (a.k.a OMP), construction manager agent or adviser (a.k.a. CMA), or project manager. Although many construction attorneys may see these roles as synonymous, they are not. The distinction–the name–is of import because it is meant to define the

agent's scope of work, authority, and the risks associated with the role. However, as the roles of these agents have expanded, the distinctions have blurred.

INTRODUCTION

Today's construction projects have become more complex than ever before. There are a myriad of codes and construction contract delivery systems (design-bid-build, design-build, multiple trade, integrated project delivery, construction manager at risk, construction manager advisor, and more) that an owner may consider in delivering a project successfully. Inevitably, effective management is divided between different parties, limited by contractual checks and balances. Certain elements of management require specialized skills (e.g., critical path scheduling, Building Information Modeling (BIM), knowledge of codes/standards, and knowledge of complex control systems), which tend to compartmentalize management tasks. This increasingly specialized environment makes it almost impossible for a single manager to comprehend all the decisions that need to be made. On large multi-faceted projects, it follows that there is no longer any one individual who directly manages the entire project.

It is critical that an owner have the right team in place to ensure that it achieves the desired budget, schedule and quality outcomes. The owner needs a skilled leader, either within its own organization or outsourced to a third party. The owner's project manager should have sufficient experience to, at a minimum, understand that high-level coordination of participating design professionals, contract managers, and construction oversight is integral to a successful project. On complex projects, many owners lack in-house professionals with the requisite knowledge, and they need to look outside for a qualified project manager ("PM") to lead the effort that protects the owner's interests.

The owner's management scope will generally be defined by a contract that establishes various levels of risk. Attorneys can help owners identify likely areas of risk and help decide how best to allocate those risks among the various project participants. Owners will also select an appropriate delivery process for the project, keeping in mind the general principle that owners should expect to pay more if they desire to transfer more risk to others. It is often said that owners should allocate each major risk to the party who can best control it. This is done through the terms and conditions of various contracts. Risks of financing and latent site conditions are generally assigned to owners, design risk is typically assigned to the design team, and construction risk is assigned to the contractor. Again the general principle applies such that assignments of risk should come with an understanding that an entity accepting and managing a risk will expect to be paid for it. There are situations, however, where one party enjoys sufficiently strong bargaining power so that it can impose risks on another party without a meaningful opportunity to include that risk in its price. Those are the kinds of projects that can often result in the financial ruin of the weaker contract party, which is ultimately not beneficial to either party.

In the early stages of a project, it is important that the owner has a budget and schedule that provide a framework for competitive bids. The owner's PM is often charged with putting this framework in place. A reliable budget is of course needed so the owner has confidence in its financial ability to complete the work. To the extent that design is substantially incomplete when contractors are asked to submit bids for the work, the owner's PM should offer advice as to a budget contingency large enough to cover the foreseeable increase in the contractor's price that will result when a more detailed design is issued for construction. The PM should also help the owner develop a schedule that allows reasonable contingencies for adverse weather and other factors likely to affect progress of the project. Although some schedules may be dictated by

emergency requirements or fixed dates when a facility must be substantially complete, a prudent PM will generally recommend a schedule that allows sufficient time to obtain the required materials and perform the required construction services in an orderly and cost-efficient manner.

The importance of timely project completion is likely to depend on the nature of the project. When constructing an operating facility that will generate substantial revenue, timely completion is of course very important; on other jobs (including many rehabilitations of existing facilities), there may be much less importance attached to a strict schedule. A skilled PM can help advise the project owner on how to protect itself against the risk of delay–this is often done by imposing contractual liquidated delay damages on the contractors and/or by purchasing insurance covering loss of use. There are a number of tensions that tend to be inherent in complex construction projects. Owners are usually looking for rapid completion, low cost, and high quality, but as the old saying goes, they may only be allowed to achieve two of those three goals. A PM who acts as an owner's agent and without liability for cost overruns is likely to be closely aligned with the owner's interests. A PM who must guarantee the maximum cost of the work is incentivized to minimize costs, even if that priority sacrifices some of the owner's other priorities.

There is, however, a more fundamental tension that gives rise to many disputes on complex construction projects. On the one hand, owners often favor contracts that transfer risks of unknown factors (e.g., price escalation, future government taxes and tariffs, slow agency permit approvals, and even subsurface conditions) to construction contractors. Under design-build contracts, owners may also shift design responsibility to other parties. On the other hand, many of the same owners are reluctant to relinquish control, requiring detailed submittals, mockups, inspections, and testing to assure that the final work product meets the owner's various expectations. Where contractors quote a lump sum price for a contract under which they assume substantial risk, they reasonably

expect that the owner will cooperate by allowing substantial latitude to the contractors in managing their risks and achieving cost-effective results. For example, owners who insist on work being complete in a short period of time must anticipate that their own reviews of submittals and answers to contractor inquiries will be expedited so that the contractor's work can be completed on time. Similarly, owners with multiple prime contractors must expect that they will owe a duty to coordinate those contracts so that they don't negatively impact each other's progress. An owner's reserved powers of management are likely to give rise to a corresponding duty to exercise those powers in a way that does not hinder or delay the contractors who are being managed. To the extent an owner will permit, a PM can step into the shoes of the owner. Alternatively, a PM can serve a more secondary role by merely assisting in managing and achieving the owner's expectations, reviewing contractor submittals, and answering contractor inquiries.

Owners, even with good pre-qualification processes, still tend to prefer the lowest responsible bidder. The owner walks what can be a delicate line between controlling work and giving deference to each contractor's "means and methods." The owner's PM is typically retained to ensure that each party performing services before, during, and after construction will meet its respective obligations.

PRE-DESIGN

The core activities and management considerations in the pre-design phase include:

1. Setting overall scope of work
2. Considering overall schedule
3. Developing a budget
4. Obtaining financing

The pre-design phase of the project is probably where a good PM can assist an owner the most and where a PM with high-level coordination is needed to work with project stakeholders to set the scope, schedule, budget, and obtain financing. It is critical in this phase that the PM work with the owner to develop a clear scope for the project. This will help ensure that the designer can meet the owner's various aesthetic and performance requirements while also providing contractors with documents suitable for estimating and construction. The clearer the scope of work, the smoother the entire project becomes. A skillful PM will help the owner understand what is required for a full scope of work. A full and effective scope of work details project objectives, schedules, milestones, deliverables, owner's expected outcomes, contracting methods, payment schedules, standards, regulations, and special contract requirements, and all related tasks, duties, and limitations required to obtain expected results in accordance with the project. A skillful PM will also offer suggestions for project delivery options that meet the owner's budget and schedule considerations.

In the pre-design phase, the PM should develop a Master Schedule (i.e. schedule that incorporates all phases of the project from pre-design to commissioning/turnover). This will enable the owner to understand the key segments and timeline to deliver the project. A poorly developed schedule in this phase can easily cause cost overruns and quality issues in the delivery of the project. Inadequate time on design typically results in an incomplete design. This leads to cost and time impacts, especially after construction starts. If the owner allows inadequate time for construction, it typically reduces the field of interested bidders and increases the prices submitted by those who bid. There can be good reasons for an aggressive schedule, but it should not be required without good reason—especially since it tends to discourage bidders and increase claims. Further, a Master Schedule needs to include some allowance for typical contingencies. A skillful

PM should be able to develop a Master Schedule that includes such allowances. The owner needs a realistic Master Schedule to properly predict its return on investment, which should be based upon a realistic delivery date.

Since project budgeting is based in part on identifying key owner risk exposures, it is important to consider, at minimum, the owner's general plan for risk allocation when the budget is developed. The budget should include appropriate contingencies based upon the selected project delivery system and its associated risks. A qualified PM consultant often has in-house estimating that can assess those values. If not, a skillful third-party cost consultant should be brought on to work with the PM to develop a full budget. This budget along with the Master Schedule will be used to obtain financing.

An owner's PM can also play a key role in obtaining project financing. Experienced lenders will want assurances that the project is feasible. They will want to see at least a preliminary Master Schedule and probably also some form of the engineer's cost estimate. A skilled PM can provide lenders with assurance that the owner's team will have the experience needed to complete the project. The PM can also reassure lenders that the project can reasonably be completed within the budget and schedule that have been developed. Lenders will often require at least a conceptual design before approving project financing, and an experienced PM could help define the key performance criteria for such a design.

DESIGN

As night follows day, design phase management services follow a successful pre-design effort. The key management functions include:

5. Determining standards of design (useful life, LEED, etc.)
6. Selection of the owner's design consultants

7. Site investigation

In North America and Europe, the construction industry has developed what can sometimes be a bewildering array of building codes and standard practices. A few words in a contract may incorporate volumes of published standards by reference, and those standards continue to evolve from year to year. It should come as no surprise that codes and published standards can sometimes be inconsistent, and a question then arises as to which standards should govern. And what about changes in standards that are issued over the life of a long multi-year project? Obviously, those with the force of law must be followed, but the "prevailing standards" for design and construction may sometimes be less clear.

The standards of design should be considered carefully when developing the scope of work for a project. As an example, if the project is required to achieve LEED certification, then the required level should be clearly specified and evaluated in terms of its cost impacts. The higher the level, the higher the budget. A qualified owner's PM should help to guide that process.

Design also depends on the desired useful life of the completed structure, which in turn may be based on the owner's desired return on investment. If those expectations are detailed in the initial scope of work, then it will help guide the design team. While the design team will be responsible for developing a design to meet these standards as well as all required codes, it should ultimately be the owner (with the input of its PM) who sets the standards. It is risky to leave the standards of design to the discretion of the design team. The designer should of course have input, but practical considerations may temper a designer's tendency to overdesign in the interest of minimizing future risk.

One benefit of construction manager participation during the design phase is to provide engineers with constructability input from an experienced builder.[1] Although some have raised concerns that a construction manager might have a conflict of interest (e.g., selecting materials more for profit rather than for durability), the U.S. Federal Highway Administration found no evidence of contracting agencies being misled in this way.[2]

Selection of the design consultants should be an organized process to ensure that the most qualified firms will be considered. A skillful PM should canvas the field of designers and perform a pre-qualification process to help select the firms that are best qualified for the owner's project. This should be done before asking designers to submit proposals on a project. The use of an unqualified design firm is likely to impact a project substantially.

Some owners attempt to avoid responsibility for latent conditions on their own properties by disclaiming liability for the geotechnical information provided to bidders in their construction contracts. Some owners even believe that by not investigating the subsurface or by saying nothing about it to bidders, they can avoid liability for unexpected problems that may be discovered later during construction. These strategies are not standard industry practice and tend to be short-sighted. Many public agencies are required by law to use contract clauses promising equitable compensation for differing site conditions, and lenders generally want some assurance that the site has been investigated before funding a major construction project. Under the "superior knowledge" doctrine, wherein a contracting party that has superior knowledge of a condition that

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[1] Federal Highway Administration Rules and Regulations for Construction Manager/General Contractor Contracting, 81 FR 86928-02, 2016, at p. 2 (WL 7013726 (F.R.)).

[2] *Id.*, p. 2.

may impact the other party's performance has a legal duty to disclose[i], courts are likely to require owners to disclose what they know about latent site problems that are likely to affect work on a construction project that is being advertised for bids as the doctrine sets aside the duty to inquire[ii]

In Canada, the judicial exercise surrounding unexpected site conditions is a matter of contractual interpretation. The court will try and determine the intent of the contracting parties on the issue of reading the contract as a whole, giving words used their ordinary meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. If the parties' intention on unexpected site conditions is not clear from a plain reading of the contract, then the court will consider the surrounding factual matrix in order to try and determine that intention: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 S.C.C. 53. As such, staying silent on the issue of unexpected site conditions is not good risk management in Canada (or arguably anywhere). Who knows if a judge or arbitrator will ultimately get it right?

An experienced PM should help the owner conduct appropriate site investigations during the due diligence phase prior to selection of a site. This may include environmental surveys, test borings, and other forms of investigation. If the site is already selected, then the PM should coordinate site investigations to ensure that the design team has sufficient information to design the project. To avoid future disagreements as to what the contractor should reasonably expect, a prudent PM will help focus the owner's design team on creating a geotechnical baseline report that lays out the probable conditions. Such a report can later provide the baseline for determining whether Differing Site Conditions have been encountered. A similar approach can be used to define baseline conditions when an existing building or industrial facility is being remodeled and the extent of hazardous materials at the site has not been clearly determined.

A skillful PM should work with the owner's designer to select consultants who can perform the required site investigations and feasibility studies. Such consultants are typically retained by the owner, although on some projects they are retained as sub-consultants to the principal design firm.

Under traditional design-bid-build construction, owners are typically held to have given an implied warranty as to the sufficiency of the designs that they provide to contractors. This leads to a question whether the owners can avoid or transfer this warranty by hiring a PM at risk. That issue was considered in some detail by the Supreme Judicial Court of Massachusetts in *Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co.*, 472 Mass 549, 36 N.E.3d 505 (2015). In that case, a public owner (DCAM) hired a designer (Ellenzweig) to prepare project plans, but the owner also hired Gilbane as a construction manager at risk. When an electrical subcontractor (Coghlin) sued Gilbane based on defective design, Gilbane argued that it owed no implied warranty because it was not the project designer, and the owner defended by arguing that Gilbane had agreed to defend and indemnify the owner. The owner also apparently argued that it owed no liability because it had no privity with the subcontractor and had transferred design liability to Gilbane. The court noted that the owner never clearly disclaimed its implied warranty of design and that the owner ultimately retained control over that design under its contract with Ellenzweig. In those circumstances, the appellate court held that the construction manager at risk should not bear liability for the owner's design deficiencies and was not required to indemnify the owner for contractor claims arising from breach of the implied design warranty. The owner would remain responsible for the design over which it retained control.

PROCUREMENT

The procurement phase is vital to the success of the project as this is where necessary goods and services are acquired and where making the wrong choices has long term effects on the project. The procurement phase management functions include:

8. Selecting project delivery system
9. Prequalifying bidders
10. Drafting a Request for Proposals (or Bid Invitation) package
11. Review and evaluation of proposals
12. Bid questions and protests

The selection of a project delivery system should be considered during the pre-design phase, and normally selected in the procurement phase. The owner has an important choice at this stage between design-bid-build and design-build and also with regard to the proper role, if any, of an owner's PM. If the project is schedule critical, it may make sense to begin construction before the full design has been issued for construction (e.g., using "fast track" or phased design-build). If price is the most critical factor, it often makes more sense to wait until the design is completed and award contracts on the traditional design-bid-build basis. The PM should be able to help the owner assess the project delivery method that will work best for the project.

Pre-qualifying bidders can be critical to project success. The selection of an unqualified or uncooperative contractor can lead to major impacts on a project. An experienced PM should lead a systematic pre-qualification effort that canvases the market to finalize a list of qualified bidders. This pre-qualification process should include evaluation of financial stability, firm capability of delivering the project in the chosen type of delivery system, available workload, available project management, and sufficient bonding capacity. The PM should present to the owner a detailed

recommendation of the pre-qualified bidders, together with backup as to the reasons for their selection.

A well-qualified PM can also assist an owner with drafting an appropriate Request for Proposals (RFP) or Bid Invitation. An experienced construction attorney can help develop an appropriate form of prime contract and should bear in mind that an excessively one-sided agreement is likely to discourage qualified bidders or to increase bid prices by adding needless price contingencies. The owner's PM should work with the designer to assemble a bid package that includes a full set of drawings and specifications (hopefully coordinated between design disciplines), a bid form (to facilitate comparing bids), a clear scope of work, a specified time of performance, and any other documentation reasonably required to minimize bid protests (e.g., certifications that bidders understand the scope and are familiar with performing work in the area of the site). The owner's PM and designer should collaborate throughout the bid process to ensure that addenda are issued well before the bid date and that bidder questions are properly answered. Issuance of addenda should be done systematically and with clear detail so that all bidders are on a level playing field (especially on public contracts subject to laws requiring competitive bidding).

The PM can assist the owner to analyze the bids that are received. The PM can work with a cost estimator to prepare an independent estimate of the project scope and offer comments on pricing received from bidders. The various bids are typically assembled into a bid matrix, which can be reviewed in detail in the context of each bidder's qualifications, assumptions, and exclusions (if any). The PM should develop a detailed recommendation and summary of bids for the owner (potentially with the assistance of the Designer, and sometimes also with the Owner's attorney) to make a final selection. The PM working with the owner and its attorney should then assist in negotiating an agreement on the contract with the successful bidder.

Bidder questions should be addressed in a systematic way during the bidding process through addenda that detail the questions asked and responses given. The PM should ensure that the questions and answers are appropriately addressed with the owner, its design professionals, and (where appropriate) with the owner's attorney. These then should be incorporated into the final contract documents.

If the PM has properly documented the RFQ and RFP process, the resulting file should be ready if needed to respond to any bid protests. If the owner is subject to legal or procedural requirements governing its bid process, the PM (with input as needed from the owner's attorney) should ensure that these requirements are disclosed in the RFQ/RFP process and followed thereafter.

The liability exposure of a CM at risk (CMAR) during procurement is illustrated by the decision of the Georgia Court of Appeals in *Holder Constr. Grp., LLC v. Georgia Tech. Facilities, Inc.*, 282 Ga. App. 796, 640 S.E.2d 296 (2006). On a fast track project for constructing apartments, the owner's CMAR held the trade contracts. It appears that the project experienced unexpected increases in steel prices and late delivery of steel materials. Since these problems did not fall within the contractual definition of a Force Majeure event, the court held that the CMAR "bore the risk of the late delivery of the steel." 640 S.E.2d at 298. Although the CMAR's contract allowed a time extension for "causes beyond the construction manager's control," the court found that the CMAR did not timely request extensions of time and failed to prove that escalation in steel prices would have been avoided but for the potentially excusable delay. *Id.* The CMAR's claim for *quantum meruit* damages was rejected.

CONSTRUCTION

At the construction phase, the devil is in the details with an eye on the contract. The key management functions associated with the construction phase include:

13. Construction managers (at risk vs. not at risk)
14. Owner-furnished materials and equipment
15. Creating and reviewing construction schedules
16. Reviewing and approving technical submittals
17. Reviewing and approving pay applications
18. Safety
19. Inspection and quality assurance
20. Change orders and claims

Owners generally retain a construction manager (CM) in one of two ways. Either they serve primarily as the owner's representative (so-called "agency CM") or they play a role more like a general contractor (often called CMAR)[iii]. The owner's decision as to which type of CM (if any) to hire should ideally be made in the pre-design phase of a project.

The selection of a CMAR should follow an RFQ/RFP process that is run systematically to contract with a qualified firm. The same will be true of an agency CM who does not assume the risk of project price and schedule. While in the past agency CM's (not at risk) were used in many areas, this has become less prevalent today. The PM's role described earlier in this paper is in many ways similar to the original agency CM (not at risk) role, because both focus on being advisors to the owner throughout the project. The CM at risk typically focuses on being an advisor to an owner prior to accepting responsibility for a guaranteed maximum price (GMP).

During the design process, the PM or CM should work with the owner and designer to review the project's potential need for long-lead materials and equipment. The owner can then decide whether to furnish those items itself or to schedule the project in a way that allows sufficient time to facilitate their supply when needed. The PM will generally lead the effort to properly solicit for owner-furnished materials and equipment to meet the project quality requirements and schedule for completion.

The creation of detailed construction schedules should be done by the entity that was chosen to manage the construction during the procurement phase. The owner's PM, through the contract specifications, should ensure that the contract will require submission of schedules in a format and level of detail sufficient for review by the owner and its lenders. Some PM's have the in-house capability to review critical path schedules, while others reasonably depend on third-party consultants to perform this function on behalf of the owner. A reasonably detailed narrative of issues should accompany each contractor's schedule submission.

The contractor's technical submittals should generally be reviewed and approved by the owner's design professionals. The PM can help implement a process that tracks such submittals and also any Requests for Information (RFIs) that the contractors may submit during a project. Currently the industry often uses cloud-based systems to track status. The contract should set maximum review times for RFIs and submittals so they can properly be anticipated by contractors and suppliers on the project. The PM should also ensure that the Owner's design professional stays within those review times. The PM should also perform a general review of RFIs and submittals to ensure that both the designer and contractor are working together toward the goals of the project.

Reviewing and approving pay applications is typically detailed in the contract documents. If the PM is the reviewer, that fact should be detailed in the PM's contract with the owner. If the

design professional will review and approve pay applications, the PM should generally provide oversight to ensure the contractors submit appropriate detail in a timely manner and that approvals (or disapprovals) are occurring in an appropriate manner. Prompt written notice should be sent if either party fails to meet its obligations with regard to timely payments.

Safety on a project site is a shared obligation, but it is generally overseen by the entity that controls the construction site. This is typically a prime contractor. The PM should verify that the contractor has a safety plan and confirm that plan is being followed in addition to the safety obligations imposed by law or in the contract.

The PM should also ensure that some type of inspection and quality assurance program is put in place on the project. The contractor should have the responsibility for quality control. This could require a third-party inspection firm as well as PM staff and designers that review the quality of the installations. Documentation of those reviews must be maintained, and the PM should ensure this is occurring. Some designers may contract to provide onsite inspection services, in which case the PM should ensure that this function is occurring and is being documented.

Owners often rely on internal or external PM's to receive and review all Change Order requests and claims. The PM should establish a review process to gather relevant information to negotiate a settlement (if possible) and document the situation. This process many include independent cost estimates and/or requesting further detail from the contractor to justify pricing. Whenever a Change Order implicates design changes, the owner's designer normally should be brought in to review the scope of the change to ensure that it aligns with the overall design intent. The PM will typically lead this process and the negotiations.

The PM's involvement in contract administration can raise issues as to whether it carries corresponding liability. These issues were discussed at some length by the Ohio Court of Appeals

in *Manley Architecture Group, LLC v. Santanello*, 114 N.E.3d 697 (2018). There, a construction manager (Manley) entered into trade contracts on behalf of the owner (Santanello), who later sought to hold the manager responsible when the roof of its new building leaked. Reversing the trial court, the appellate court noted that the owner saved money by acting as its own general contractor and held that the construction manager did not guarantee the work of individual trade contractors. On the other hand, the same court held that the construction manager had no right to recover payments made to keep trade contractors on the job, because no such reimbursement was authorized or promised in the owner's management agreement.

Another useful case is the Louisiana Court of Appeal decision in *Lathan Co. v. State*, 16-0913 (La. App. 1 Cir. 12/6/17); 272 So. 3d 1. There, the Recovery School District (RSD) retained Jacobs as the owner's agency construction manager (not at risk). The prime contractor (Lathan) brought an action for damages and included the CM as a defendant. Allegations against the CM included, without limitation, failure to perform proper inspections, failure to properly process contractor pay applications, refusal to acknowledge substantial completion, and failure to "properly manage" the project. The trial court granted summary judgment for Jacobs, noting that it had no privity with the prime contractor and owed it no duty. The appellate court reversed, however, based on the principle that all professionals owe a duty to perform their services in accordance with the generally accepted standards and that such duty is owed to all third parties who must rely upon them. 272 So. 3d 1 at 6.

Another case where the owner raised lack of privity as a defense was decided by the Kentucky Supreme Court in *Superior Steel, Inc. v. The Ascent at Roebling's Bridge, LLC*, 540 S.W.3d 770 (2017). There, the owner (Ascent) hired D&M as a construction manager/general contractor (at risk), who in turn subcontracted for structural steel (Superior) and steel erection (Ben

Hur). When the subcontractors claimed extra compensation for design changes, the construction manager cited "pay if paid" language in the subcontracts and noted that the owner had declined to issue additional compensation. The Supreme Court held that the "pay if paid" language essentially left the subcontractors without a remedy and therefore upheld their right to assert equitable claims for unjust enrichment against the owner. In other words, the owner could not fully insulate itself from claims by hiring a CMAR.

In the Canadian context, *Heikkila v Apex Land Corp*., 2014 ABQB 589 (Can.), demonstrates how the liability of owners and PMs can be affected by the PM's role in contract administration. In this case, the plaintiff was a construction worker who sought to hold the owner liable in negligence for injuries he incurred on the project site. The plaintiff argued that the owner owed a duty of care to workers on its site to take reasonable care for their safety, including supervising and controlling the work done by the PM. The court found that no such duty existed, as it was not standard industry practice at the time of the accident (in 1994) for owners to take responsibility for the safety of workers. In the alternative, the plaintiff argued that the PM acted as agent for the owner, making the owner vicariously liable for the plaintiff's injuries. The Court found that, on the facts of the case, the parties intended to create an independent contractor rather than an agency relationship. In reaching this conclusion, the court noted that although the PM hired the subcontractors, it was the owner who ultimately signed the contracts, indicating that the court would have been more likely to impose an agency relationship had the PM been responsible for the entire contracting process.

POST-CONSTRUCTION

Managing a project does not stop once substantial completion is achieved. The key management functions at this phase include:

21. Certificates of occupancy

22. Owner move-in and training

23. Punchlists

24. Warranty issues

The process of obtaining a Certificate of Occupancy typically involves multiple parties. Designers and contractors submit one or more applications to an authority having jurisdiction in accordance with that jurisdiction's guidelines. The owner's PM can help the parties understand and facilitate this process.

Owner move-in and training should be discussed in the pre-design phase to ensure that proper requirements for training and documentation are included in the drawings and specifications as well as the construction contract(s). The PM can help ensure that the contractor meets those obligations. The Master Schedule and then the construction schedules should detail the owner's move-in timing. The owner's PM generally helps track schedule submissions to make sure that the various activities stay on track. The PM can also help ensure that the contractor completes its preliminary punchlist as required per the contract. The PM then should distribute the contractor's list and coordinate any supplemental punchlists to be furnished by the owner or ultimate users of the constructed facility. The PM then can help manage the process with the contractors to complete their punch lists in coordination with owner operations and move-in.

The PM can provide assistance by performing an initial review of the Operations and Maintenance manuals as well as all warranty submissions. This information should then be sent to design professionals for their review. Once that review is complete, the PM should close out any outstanding documentation with the contractor and put together a detailed file (electronic and hard copy) of all Operations and Maintenance manuals as well as warranties. It is also helpful for the

PM to develop a list of contacts for warranty follow ups that can be used by the owner after the Project is done. During this process, the PM should ensure that the owner's operations team receives proper systems training from the contractor in accordance with all applicable specification requirements.

STANDARD CONTRACT FORMS

Construction contracts are of great import throughout the entire cycle of a project. It details who, what, when, where, and why, and should never leave room for interpretation.

American Institute of Architects:

In the United States, the most widely used set of forms on private contracts are those published by the American Institute of Architects (AIA).

AIA has a "Program Management Family" of AIA contract for use on projects with more than one owner's agent or consultant. AIA Document C172-2014 sets forth a standard form of agreement between and owner and program manager on a single project (C171-2013 is for use in a multiple project program). It provides for a program manager to serve as the owner's adviser from throughout the project. It focuses on a program manager supervising aspects of the project on behalf of the owner, including the budget, schedule, developing a management plan, and more.

AIA Document C132-2019 (formerly B801-1992) sets forth a standard form of agreement between an owner and an agency CM (not at risk). It describes a range of responsibilities, beginning with the "Preconstruction Phase" and continuing through the "Construction Phase". The CM is not responsible for subcontracting with the various construction trades, although the CM helps coordinate their selection and oversight. Article 11.7 contemplates that the CM will be paid on a cost reimbursable basis, with a "minimum payment" due upon execution of the agreement.

AIA Document A133-2019 (formerly A121-2003) sets forth a standard form of agreement between an owner and CM (at risk) who effectively serves as a general contractor. Under this form of contract, the CM submits a Guaranteed Maximum Price to the owner and takes responsibility for subcontracts with the required trades. The owner remains responsible, however, for costs associated with errors, omissions or changes in the design that it provides for the project. The A133 form also incorporates by reference the A201 General Conditions published by the AIA. This form makes the most sense if the design is reasonably well advanced when the CM is asked to propose a Guaranteed Maximum Price.

AIA Document A134-2019 (formerly A131-2003) sets forth another standard form of agreement between an owner and a CM who effectively serves as a general contractor. It differs from the A133 principally because the CM is compensated on the basis of "Cost of the Work Plus a Fee" rather than a Guaranteed Maximum Price. This form tends to make more sense than the A133 if the owner's design is still substantially incomplete when the CM is retained.

Some commentators have noted that "[t]he exact nature of the CM's services is not entirely clear under the AIA scheme."[iv] Section 2.2 of the C132 requires the CM to use "the skill and care ordinarily provided by construction managers practicing in the same or similar locality under the same or similar circumstances", adding that the CM shall perform "as expeditiously as is consistent with such skill and care and the orderly progress of the Project". By comparison, earlier editions required the CM to act consistently with "the interests of the owner".

AIA also has contract administration and project management forms. These forms span the entire gamut of what is needed for managing a project. The forms include qualification statements, bid bonds, performance bond and bond payment, project checklist, request for proposal, change order, application and certificate for payment, certificate of substantial completion, and more[v].

ConsensusDocs:

In the U.S., another respected set of contract forms is the suite published under the trade name "ConsensusDocs".

ConsensusDocs 830 is a standard form of agreement between an owner and a CM serving as the owner's agent (not at risk). Like the corresponding AIA forms, the 830 form covers both preconstruction and construction phase services. It calls for trade contracts to be entered directly between the owner and the trade contractors. At the end of the 830 form is an "Exhibit E" which lists various "General Conditions" services that can potentially be provided by the CM. It allows the owner and CM a convenient place to check off the services and facilities for which the CM will be responsible. Services range from project management to cost estimating, scheduling, procurement and other indirect services. The optional facilities include a range of temporary office resources and utilities often needed at construction sites, and the owner can choose which ones it wants to obtain from its CM. The 830 form calls for the CM to be paid on a cost reimbursement basis plus a Fee that is either fixed or applied as a percentage markup on Reimbursable Costs.

ConsensusDocs 831 is similar to the 830 form, except that that it excludes General Conditions services from the CM's scope. The 831 form also contemplates that the CM will be paid based on Reimbursable Costs plus a specified Fee (or Fee percentage).

ConsensusDocs 541 is an Addendum that can be used if an owner wants to add design-assist services to the scope of its construction manager. Section 2.3 sets forth that the owner, owner's designer, and CM "will proceed in a collaborative manner, informed by a free-flow of accurate information concerning program, quality, cost, constructability, and schedule from all Parties." Section 4.3 clarifies that although the CM will "carefully study" the Design Documents,

the CM is "not acting in the capacity of licensed design professionals or assuming any design liability".

ConsensusDocs 305 is an Addendum under which an owner and its project team can adopt a system known as "Lean Project Delivery". Section 3.1 defines that process as including:

> (a) collaborating throughout the Project with all members of the design and construction team…; (b) planning and managing the Project as a network of commitments; (c) optimizing the Project as a whole, rather than any particular piece; and (d) tightly coupling learning with action (promoting continuous improvement throughout the life of the Project).

The document offers a series of approaches designed to help the owner's project team function on a coordinated basis.

Canadian Construction Documents Committee:

The Canadian Construction Documents Committee (CCDC) publishes the only set of widely used standard form construction contracts in Canada. CCDC is a national joint committee comprised of representatives from four national construction industry organizations–the Association of Consulting Engineering Companies, the Canadian Construction Association, Construction Specifications Canada, and the Royal Architectural Institute of Canada–as well as a lawyer from the Canadian Bar Association, Construction Law Section.

Prior to 2010, CCDC only had one standard form contract for construction management relationships (CCA 5). The CCA 5 provided for a traditional CM (not at risk) relationship. This posed problems, as owners and CMs would frequently amend the standard terms to create contractual relationships that more closely resembled general contractor or CM at risk scenarios. In doing so, it was often unclear what role the CM was meant to play in a project. Thus, it was unclear whether the CM could be held liable as agent for the owner.

In 2010, CCDC replaced the CCA 5 with the CCDC 5A and CCDC 5B contracts, which distinguish between the traditional CM not at risk and CM at risk relationships. Both contracts have schedules which provide a long list of services that may or may not be provided by the CM. This extensive list of services forces parties to consider whether each service is to be provided by the CM and if so, what payment method is applicable.

The CCDC 5A contract creates a traditional CM relationship. The CM contracts with the owner, while the owner contracts with subcontractors directly. Here, the CM acts as agent for the owner to the extent of the services contemplated by the contract. The services to be provided by the CM, ranging from pre-construction to post-construction activities, are set out in Schedule A1. For each listed service, the parties can select whether it will be performed by the CM or someone other than the CM, or they can note that it is not applicable.

For each service that is to be provided by the CM, three payment options are available under section 5.2 of the contract. Parties can elect to pay by fixed price, a percentage amount of the *Construction Cost*, [vi]or an amount based on time-based rates for the CM's employees. Parties may select one method of payment for the entire contract, or use different types of payment for different services.

The CCDC 5B contract provides for a CM at risk model, as the CM contracts for both management and construction services. These two types of services are distinguished under the contract as *Services* and *Work*. Here, the CM does not act as agent for the owner. The CM contracts directly with subcontractors similar to a general contractor model, and similar to the AIA and ConsensusDocs CM at risk models. Payment options for management services under the CCDC 5B contract are similar to the options under the CCDC 5A: the owner can pay by fixed price, a percentage amount of the *Construction Cost Estimate*, or an amount based on time-based rates for

the CM's employees. The difference between the CCDC 5A and CCDC 5B is that the percentage option in the CCDC 5B is based on a cost estimate, whereas the CCDC 5A provides for payment based on a percentage of the actual costs incurred. Thus, as would be expected in a CM at risk scenario, the CM generally takes on more risk for cost over-runs under the CCDC 5B model, depending on which method(s) of payment is/are selected. Payment for the *Work* is comprised of either a percentage fee of the *Cost of Work* or a fixed fee, or some combination of the two.

CCDC does not have a standard form PM contract. This can lead to problems in clarifying roles amongst the various parties to a construction project when a PM is employed.

When negotiating and carrying out contractual relationships, owners and CMs or PMs must clearly establish which party will control and contract with sub-contractors and ensure that each party's duties remain consistent with the contractual relationship set out in the contract. Formal contractual relationships are often over-ridden by parties' behavior either before or after execution of the contract.

For instance, in Labourers' International Union of North America (*LIUNA*)*, Ontario Provincial Dist. Council v. Chamberlain Mgmt. Servs., Ltd.*, 2019 CarswellOnt 8114 (Ontario Labour Relations Board)[vii], the issue was whether the owner or CM was the true employer of a construction worker for the purposes of the worker's union's application for bargaining rights. In *LIUNA*, the respondent Chamberlain provided construction management services to the owner, including administering contracts, coordinating subcontractors on-site, and inspecting the work of subcontractors. Chamberlain entered into a CCDC 5A contract with the owner. Chamberlain hired an independent site supervisor, who in turn hired a labourer to provide cleanup services, telling the labourer that he would be an independent contractor. The Board found that the site supervisor acted as agent for Chamberlain, and that Chamberlain was the labourer's employer based on the

amount of control Chamberlain exercised over him. In coming to its decision, the Board noted that it placed little on weight on the form of relationship created by the contract or the fact that Chamberlain described itself as a construction management company. Rather, it was the parties' actions in relation to the labourer which ultimately decided the issue.

PM/CM Liability in Canada

The law around project management and construction management in Canada is developing slowly. As projects become more complex, roles amongst parties frequently become blurred. Particularly where there are various professionals (i.e. architects and engineers) involved on the same project, the particular duties and extent of liability of each party is often unclear, as none of these parties have standard form contracts with the owner.

Engineers and architects often put themselves at risk of being liable for cost overruns and timeliness by taking on PM or CM-like roles. In the British Columbia case of *Integrated Contractors Ltd. v Leduc Developments Ltd.*, 2016 BCSC 1984, an owner was sued by its general contractor after a failed residential project. The owner filed a counterclaim against its engineer, claiming the engineer had taken on the role of a PM or CM, making him liable to the contractor for cost overruns and timeliness. The court provided that if the engineer were to be held liable as a PM, the owner would need to establish the following:

(a) The engineer became a PM by expanding or agreeing to expand his role in the project beyond providing initial design and engineering inspection services;
(b) PMs have a duty of care to ensure that construction is proceeding expeditiously, to prevent cost overruns, and to compel subcontractors to carry out their contractual duties;
(c) The engineer's contract with the owner was broadened to impose additional duties on the engineer to monitor construction work to meet the duties set out in item (a);
(d) The engineer failed to fulfill the duty of care set out in item (b);
(e) The engineer's failures delayed construction; and
(f) The delay caused the project to fail, resulting in financial losses to the Owner.

On the facts of the case, it was clear that the engineer had not stepped outside of its capacity as an engineer. Nonetheless, the decision highlights how courts will treat parties where a party's role on a project expands beyond what is contemplated by the contract or expected by standard industry practice.

Where a CM relationship is set out under either a CCDC 5A or CCDC 5B contract, parties often assume that liability will be apportioned in essentially the same way with each contract. However, more often than not, parties make amendments and add their own terms to these standard contracts such that the liability picture of each party can look very different from contract to contract.

As compared to the US, Canada has significantly less case law to work with. This makes it difficult to get an accurate picture of a PM's or CM's potential liability on a given project. For CMs in particular, the lack of case law, combined with the fact that the CCDC 5A and CCDC 5B contracts are relatively new creations, makes it difficult to determine how a court will interpret a particular amendment or addition to a contract. Based on our searches of Canadian case law databases, fewer than five cases have explicitly dealt with either the CCDC 5A or CCDC 5B contracts.

All this uncertainty creates risk for owners, PMs, CMs, and professionals alike. In order to manage the risk created by an uncertain liability picture, parties are well-served to keep contractual relationships in line with standard industry practices (to the extent that it is commercially practical) and to follow the terms of the contract closely. In particular, parties should set out clearly who will be administering each sub-contract and stick to the procedures outlined in the contract. Where parties begin to take on increased roles in contract administration beyond the role contemplated by

the contract, they might find themselves on a slippery slope towards more liability than they thought they had bargained for.

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[i] *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cl. 2000)

[ii] *Id.* at 877.

[iii] *See* discussion in Bruner & O'Connor on Construction Law, § 6:58 & 6:59.

[iv] Bruner & O'Connor on Construction Law, § 6:62

[v] AIA Contract Documents, Contract Administration and Project Management Forms, https://www.aiacontracts.org/contract-doc-pages/27516-contract-administration-and-project-management-forms (last visited Aug. 11, 2021).

[vi] Capitalized and italicized terms are written as they appear in the CCDC set of contracts.

[vii] Canadian Legal Information Institute, https://www.canlii.org/en/on/onlrb/doc/2019/2019canlii45480/2019canlii45480.html?autocompleteStr=chamberlain&autocompletePos=11 (last visited Aug. 11, 2021).