

Specifications for Projects with a Construction Manager as Advisor

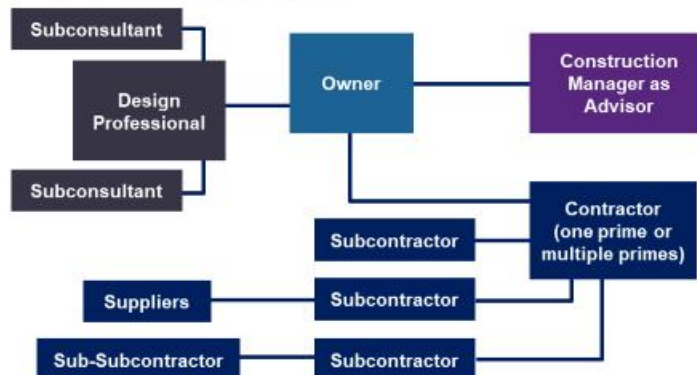
by Kevin O'Beirne

Certain project delivery methods may include an owner-hired construction manager as advisor (CMA), most often for design-bid-build (D-B-B) and construction manager at risk (CMAR) projects. In CMAR projects, a CMA is often termed an “owner’s representative” or “owner’s authorized representative” rather than “construction manager”. Sometimes, design-build (D-B) projects include an “owner’s consultant” who may, in some cases, perform services similar to those of a CMA.

This article addresses how the construction documents, especially the specifications of Divisions 01-49, should be drafted to accommodate the role and responsibilities of a CMA. The article also includes a brief discussion of the role of a separate, owner-hired program manager.

Typical participants in a D-B-B project that includes a CMA are shown below. In the figure, solid lines between boxes represent lines of contractual privity between participants. The principal participants’ roles are discussed below.

Construction Manager as Advisor Roles and Relationships



The responsibilities of the owner are unchanged from traditional D-B-B without a CMA. The responsibilities of the CMA are discussed later in this article. The design professional’s design stage responsibilities are unchanged from D-B-B without a CMA but, during procurement and construction, the design professional’s traditional responsibilities will be divided between the design professional and CMA. However, in all stages of the project, the design professional retains full responsibility for the project’s design and “technical” (i.e., engineering, architecture, geology, or other relevant design profession) nature, and full professional liability for the completed project as a functioning whole.

It Starts with Division 00

The owner should select the project delivery method early, optimally in the project's conception stage, and advise the design professional whether the owner intends to retain the services of a construction manager as advisor (CMA). The construction documents should **not** be prepared in ignorance of the project delivery method or whether a CMA will be involved. A change in these matters after the design professional has started to prepare the construction documents should typically include an associated amendment for the design professional to account for the substantial additional time and effort required for a change in delivery method and the project's principal participants.

The construction documents' Division 00—Procurement and Contracting Requirements, should be appropriate for the project delivery method and, when applicable, should address the CMA's (or "owner's representative's") involvement. Such documents will typically provide for indication of both the design professional and CMA and their respective, high-level responsibilities as they relate to the contractor.

For D-B-B projects that involve an owner-hired CMA, widely-used standard contract documents include:

- *American Institute of Architects: AIA Construction Manager as Advisor (CMA) Family 2019.*
- *Engineers Joint Contract Documents Committee: EJCDC Construction Manager as Advisor (CMA-Series) Documents 2021.*
- *Construction Management Association of America: CMAA Construction Manager as Advisor Documents 2013.*

Of the foregoing, CMAA's documents are not commonly used in projects but are an important reference for CMAA's popular professional certifications. EJCDC's CMA-Series is perhaps the most complete set of the alternative documents available, but is also the newest. AIA's CMA Family has been published for many years and is fairly widely accepted.

As will be discussed in a forthcoming post on this blog, widely-used alternative Division 00 documents for CMAR project delivery all accommodate the role of a "CMA-like" entity often termed the "owner's representative" or "owner's authorized representative".

No widely-used standard contracts for design-build (D-B) include model scopes of services for a CMA or "owner's consultant" after the owner's procurement of the design-builder's services. Thus, when an owner's consultant on a D-B project will perform selected design stage or construction stage services similar to those of a CMA, it will likely be necessary to incorporate appropriately edited language from one or more of the model CMA contracts, indicated above, for the additional elements of the owner's consultant's services.

The CMA's Responsibilities

The responsibilities of a construction manager as advisor (CMA) should be well-understood by the drafter of each project's construction documents. The CMA's responsibilities may vary from project to project. The AIA, EJCDC, and CMAA standard owner-CMA agreement forms present suggested, model language setting forth the CMA's services. The AIA, EJCDC, and CMAA owner-contractor construction documents in the standard contract families indicated above all coordinate with the CMA's services in their associated model owner-CMA agreement,

The CMA is typically retained by the owner either prior to or early in the design stage, so that the CMA may consult with the owner and design professional as the design progresses.

Responsibilities typically assigned to a CMA include:

1. Prepare an overall project schedule, indicating the time-based plan for the owner's, design professional's, contractor's, and others' project activities. The stipulated construction contract times are typically derived from the CMA-prepared project schedule. The CMA will update the project schedule as the project progresses and, during construction, endeavor to ensure the contractor(s) comply with their respective contract times. CMA's often possess greater experience and expertise with scheduling than do many design professionals.
2. Prepare opinions of probable construction cost for the owner, including during design and, during construction, preparing parallel estimates of the cost of proposed contract modifications.
3. Consult with the owner and design professional regarding requirements for construction sequencing and site management matters.
4. Perform design stage constructability reviews of the draft construction documents.
5. The CMA may draft the Division 00 documents and, in some cases, may assist the design professional with preparing the specifications of Division 01—General Requirements.
6. During bidding or procurement, the CMA will often serve as the prospective bidders' principal point of contact concerning bidding. The CMA will typically receive prospective bidders' requests for interpretations and information and, where appropriate, forward them to the design professional. The CMA and design professional will jointly prepare necessary addenda for issuance by the CMA.
7. Chair any required pre-bid conference and prepare and distribute to attendees and others as appropriate a record of the conference.
8. The CMA may assist the owner during opening, tabulating, and evaluating the bids or proposals received. The CMA may assist the owner with preparing and issuing notices of award and notices to proceed, and may prepare the final contract documents for signature by the parties.
9. Receive and comment, where appropriate, on the contractor's construction progress schedule, schedule of values, and, together with the design professional, schedule of submittals. Review other relevant preconstruction submittals.
10. Chair a preconstruction conference(s) and prepare and distribute minutes of the conference(s). Also, chair and prepare minutes for construction progress meetings and other construction stage meetings, except for the contractor's meetings with its subcontractors and suppliers.
11. Coordinate with the contractor regarding site mobilization matters, site maintenance during construction, and demobilization.
12. The CMA will typically be the point of contact for all contractor-furnished requests for interpretation (RFI) and submittals, and will forward to the design professional for response those RFIs and submittals that concern the project's design, technical matters, and acceptability of the work. Where RFIs and submittals do not concern such matters, the CMA may directly respond to the contractor.

13. Remain informed, by personal observation, of the quality and progress of the work and keep the owner and design professional informed. Together with the design professional, reject work that is defective (i.e., not in accordance with the contract documents or that is damaged).
14. Review the completeness and accuracy of the contractor's payment requests, and issue to the owner the CMA's recommendation (EJCDC) or certification (AIA) for payment.
15. Assist the owner and design professional with preparing and issuing proposal requests to the contractor. Receive, evaluate, and recommend to the owner regarding change proposals submitted by the contractor. Where appropriate, on behalf of the owner, negotiate with the contractor (perhaps in cooperation with the design professional) changes in contract price and contract times.
16. Periodically evaluate the completeness and accuracy of the contractor's record documentation.
17. Assist the owner and design professional with determining when the work is (a) substantially complete, and (b) ready for final payment. Prepare and issue necessary certifications of work completion, sometimes in cooperation with the design professional.
18. Other construction stage services and post-construction services as appropriate for the project.

The CMA is typically the contractor's principal point of contact with the owner's team during construction, but does not assume any of the design professional's responsibilities for the project's design, technical matters related to the completed project as a functioning whole, nor the architect's or engineer's professional liability. The CMA must discern which matters require the design professional's involvement and forward the relevant documents and correspondence in a timely manner.

Specifications for Projects with a CMA

Perhaps the most important difference between specifications for traditional D-B-B or CMAR and a D-B-B or CMAR project involving a construction manager as advisor (CMA) is that, when a CMA is involved, the design professional's traditional construction stage responsibilities are divided between the design professional and CMA.

During preparation of the construction documents, often using template-type specifications developed for traditional D-B-B, the design professional (or their specifications consultant) must evaluate each instance where the term "Engineer", "Architect", or other similar term, is used and determine, based on detailed knowledge of the CMA's scope of services with the owner, when to replace "Architect", "Engineer" or similar term with "Construction Manager". Such evaluations and implementing the necessary revisions can be time-consuming. Accordingly, design professionals (and specifications consultants) must have appropriate budget for such effort.

When editing the specifications to clearly indicate the CMA's responsibilities, when the CMA's and design professional's respective scopes of services do not adequately address a certain activity covered by the specifications, the design professional or specifications consultant should consider the associated, statutory definition of the "practice of architecture", "practice of professional engineering", or other relevant design profession, in determining whether the design professional or CMA should be responsible.

Failure to edit the specifications to clearly and properly indicate the CMA's responsibilities, as they relate to the contractor, has potential to result in construction stage misunderstandings, misdirected communications, delays, and changes, claims, and disputes. In certain circumstances, the CMA may have inadvertently undertaken some of the responsibilities (and liability) of the design professional or contractor. Therefore, properly editing the specifications to indicate and coordinate with the CMA's construction stage responsibilities is important.

While some project teams may elect to save the design stage time and effort to edit the specifications for the CMA's role and responsibilities, perhaps leaving such matters to be decided at the preconstruction conference, this is not good management practice and may increase the potential for construction stage misunderstandings, misdirected communications, and delays.

Program Managers

Program manager is a project role separate and distinct from that of a construction manager as advisor. Most projects do **not** involve a separate, owner-hired program manager. Program managers' role, when part of a project at all, is as an extension of the owner's staff. Program managers are retained by the owner to assist the owner with organizing and implementing a series of related capital projects.

Because program managers are essentially an extension of the owner's staff, the role and responsibilities of program managers usually does not need to be expressly addressed in the specifications or other construction documents, unless the owner has delegated to the program manager explicit authority to act on the owner's behalf.

Regardless, when employed on a project, an owner-hired program manager should, like all other owner-hired consultants (e.g., design professional and CMA), be identified in the construction documents, optimally in the owner-contractor agreement, and should be expressly included: (1) in the contractor's indemnification obligations; (2) as an additional insured on contractor-furnished liability insurance (except for workers' compensation insurance and professional liability insurance, for which additional insured status is not available); and (3) in the builder's risk insurance carrier's obligation to waive its rights of subrogation.

Conclusions

When the project will involve an owner-hired, third-party CMA, it is important for the construction documents' Division 00 to be appropriate for the delivery method and CMA's involvement. Likewise, the construction specifications need to be edited to coordinate with the CMA's scope of services, based on the specifier's detailed knowledge of the CMA's responsibilities.

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