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Construction Management At-Risk

**CMAR Project Delivery for Public Works Projects in California:
Benefits and Risks Under Current Statutory Structure**

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**The Historical Framework for Alternative
Project Delivery**

Based in part on the significant national expansion of public works projects in the middle of the 20th century, the country's method of procuring infrastructure has historically relied on a single project delivery system, design-bid-build (DBB). Over roughly the last few decades, however, various federal and state entities have revived or created several alternative forms of project delivery systems for public works projects, including design-build (DB), public-private partnerships (PPP or P3), integrated project delivery (IPD), design-build-operate-maintain (DBOM), build-operate-transfer (BOT), lease/leaseback, and, as relevant to this article, construction management at-risk (CMAR). (CMAR is also referred to by several other names and acronyms, including, most commonly, construction manager/general contractor or CM/GC.)

These alternatives have given public owners a range of project delivery choices to address issues relating to life-cycle costs, potential reduction of claims and delays due to de-fragmentation of design and construction services, early involvement of construction entities during the pre-construction design phase, leveraging private-sector expertise and funding, and other benefits relating to project efficiencies. This article addresses the benefits and risks of the CMAR delivery method for public works

projects under California's current statutory structure. In summary, the use of CMAR may benefit certain public owners; however, where an entity or project lacks express statutory authority under California law for the use of the CMAR system, there is potential risk that the contract award process may face legal challenges, including a possible determination that the contract is void. This risk may be particularly significant where the CMAR contract fails to comply with state procurement laws, including competitive bidding requirements.

Construction Management At-Risk

CMAR is characterized by three primary features: first, the retention by the public owner of separate design and construction entities under separate contracts; second, the early involvement of the CMAR firm during the design phase; and third, an agreement by the CMAR firm to perform the construction work for a guaranteed maximum price (GMP). Although CMAR is commonly utilized in the private sector – for example, most commercial office buildings in the United States have utilized this delivery system – public owners have only recently begun using (and seeking statutory authority to use) this alternative delivery system. (For clarity, this article does not address Agency Construction Management (Agency CM), a construction management approach in which the CM solely provides professional construction management services and acts as the owner's agent.)

It appears, at least in part, that public owners are considering CMAR as a viable alternative as it allows them to benefit from a departure from the traditional



DBB system (resulting in potential cost savings, early completion, claim avoidance, reduced administrative burdens, etc.), while addressing shortcomings of DB (including significant statutory/regulatory obstacles, such as the procurement requirements identified in this article, as well as lack of independent design oversight during construction, potential loss of control of design details, and difficulty obtaining competitive bidding.) Stated another way, CMAR allows public owners to benefit from early collaboration between the design and construction teams while holding the contract with the designer, instead of using a DB process, where the collaboration often takes place within the context of a contract between the contractor and its designer.

Procurement Laws, including Competitive Bidding vs. Qualifications-Based Selection Requirements



One of the chief historical obstacles to the broad adoption of alternative delivery methodologies for public works projects is the law imposing selection criteria for design and construction firms. Unless subject to specific statutory exemptions, public agencies in California must address long-standing restrictions on their manner of awarding contracts for public works projects. In connection with the construction work for a public project, public owners generally are required to award such contracts to the lowest responsive, responsible bidder, pursuant to California's competitive bidding statutes. (See e.g., California Public Contract Code §20128, "The board shall award the contract to the lowest responsible bidder...") Under this rule, public agencies cannot award contracts solely based on qualitative factors. Further, the scope of services in the construction contract traditionally could not include any professional services, such as construction management, engineering or architectural services, pursuant to Government Code section 4526 (known as the Little Brooks Act). This Act, contrary to competitive bidding statutes, requires that contracts for professional services, including construction project management, be awarded, "...on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required..." (see Cal. Government Code § 4526), and not based solely on the lowest bid.

As a consequence, California law generally forbids a public agency from proposing or awarding a single contract for both construction and professional services, as in the case of DB projects, based on these competing and superficially irreconcilable criteria

for contract bidding and awards. Although the risks associated with these issues is significantly reduced in the CMAR context, since the public owner enters into separate contracts with different entities for design services and construction services, public owners and firms competing for CMAR contracts must continue to assess both the statutory authorization for this delivery method and, separately, whether selection criteria for the project meet the requirements of California law.

In addition, California's public works procurement law requires a public agency to prepare full, complete and accurate plans and specifications before entering into any construction contract. (Cal. Public Contract Code § 10120, "Before entering into any contract for a project, the department shall prepare full, complete, and accurate plans and specifications and estimates of cost, giving such directions as will enable any competent mechanic or other builder to carry them out.") As one of the primary benefits of CMAR is the early involvement of the at-risk construction manager during the preconstruction design phase (where the retention of the CMAR firm pre-dates the preparation of full, complete and accurate plans and specifications), public owners and firms bidding on CMAR contracts must also assess whether projects lacking express statutory authorization comply with this well-established procurement requirement and the potential risks related to this issue.

Use of CMAR in Public Works Projects in California



While the use of DB in the public sector continues to grow and is more common than other alternative delivery methods, CMAR is being utilized with greater frequency in this state. The discrepancy between the popularity of DB and CMAR may be explainable in part by the statutory scheme relevant to these delivery methods. In the past decade, California lawmakers (like legislators in most states) have focused primarily on passing legislation granting public entities express DB authority, which has resulted in a patchwork of entities and projects for which DB is authorized. Nationally, however, many states are still determining how to approach CMAR, including California. Specifically, several western states, including Arizona, Oregon, and Utah, allow the relatively liberal use of CMAR; the majority of states allow some form of CMAR for public owners; and a small number of states are silent on whether CMAR is permitted or not.

CMAR legislation in California

Currently, California law expressly permits CMAR contracting for only a small number of public owners. In particular, the California Department of Transportation is authorized to utilize CMAR for up to six pilot projects (see Public Contract Code §6951, et seq.,) and CMAR is authorized for the San Diego Association of Governments for public transit projects (see SB 1549), for the University of California (see Public Contract Code § 10510.4, et seq.), and the California State University system (see Public Contract Code § 7139, et seq.) In addition, several other public agencies have recently sought express statutory authorization to utilize CMAR. For example, AB 797, which was heard in the Assembly Committee on Transportation on April 22, 2013, would authorize the Santa Clara Valley Transportation Authority and the San Mateo County Transit District to each use CMAR for public transit projects within their jurisdiction, on the condition the entities demonstrate an expectation of improved project results under CMAR when compared with the expected project performance under the traditional DBB process.

Further, there are also broad exemptions from many state-imposed procurement restrictions for certain public entities, which may also dispense with the need for express authorization for CMAR. For example, charter cities and counties generally are subject to “home rule,” which means that procurement is governed by the agency’s charter and implementing codes and ordinances instead of by state legislation. A separate exemption allows the Administrative Office of the Courts, Office of Court Construction and Management to construct new trial courts in the state, the majority of which are constructed using CMAR delivery, under that entity’s own procurement rules. Finally, a number of local agencies, including utility and transportation districts, have argued that they have the authority to use alternative delivery methodologies based on their broad enabling legislation, which may be compatible with CMAR procurement.

Risks Presented by CMAR Projects Lacking Express Statutory Authority



Although exceptions and exemption may allow certain public owners to utilize CMAR without risk, based on the conflicting standards for awarding traditional construction management contracts (awarded based on qualifications-based selection) versus construction contracts (awarded based on lowest responsive bid by a responsible bidder) and other unrelated procurement restrictions discussed above, CMAR contracts or projects lacking

express statutory authority or exemptions may face increased risk of a legal challenge to those remaining projects and public owners for at least four reasons. First, unless each trade contract is competitively bid and awarded by the public agency, a CMAR contract may not satisfy the requirement that construction contracts for public works projects must be awarded to the lowest responsive, responsible bidder. Second, if the CMAR firm acts as a general contractor, which applies in every instance when the firm is not acting as an Agency CM, the CMAR contract would also need to be awarded to the lowest responsive, responsible bidder. Third, awarding a contract to an entity prior to knowing which trade contractors will perform the work poses potential problems with the subcontractor listing law, which requires that a general contractor identify all subcontractors at the time it submits its bid. (See Public Contract Code § 4100, et seq.) Finally, as identified above, California law generally prohibits construction contracts from being awarded by public owners until full, complete and accurate plans and specifications have been prepared by the public entity.

There are significant risks to CMAR firms (and potentially to public owners) for participating in and awarding public works projects lacking express CMAR authorization, particularly if the contract fails to comply with applicable competitive bidding statutes or other procurement restrictions. Simply stated, an illegally-awarded contract is void, leaving the contractor with no legal right to complete the project. The public agency may also be subject to a lawsuit from a disgruntled bidder or taxpayer, which may compel the agency to rescind the contract award.

It should be noted, however, that the dynamics involved in earlier legal challenges to other alternative project delivery systems, including DB and P3 – specifically, challenges by either publicly-employed design professions whose work was being awarded to private design-build firms, or low bidders who were not awarded contracts in favor of better-qualified firms – appear to be absent in the case of CMAR. In particular, assuming a public owner complies with competitive bidding laws, there does not appear to be any incentive for an entity to challenge the legality of a CMAR contract as lacking express statutory authorization or exemption, because the sole result of such a challenge would be a finding that the contract is void, which does not appear to benefit competing firms.

Alternatives to Express Statutory Authority for CMAR



Public owners have utilized several approaches when attempting to mitigate the risks outlined above, where the CMAR delivery method is selected despite a lack of express statutory authority for the methodology. First, as described generally above, several public owners have attempted to authorize CMAR via administrative or regulatory means. For example, it appears that the use of CM/GC for several of the San Francisco Department of Public Works-related projects, including the Pier 27 Cruise Ship Terminal and others, was authorized under Chapter 6 of the San Francisco Administrative Code, which expressly references and permits the use of CMAR in connection with IPD projects. (The City and County of San Francisco is also a charter city, which is exempt from state-imposed competitive bidding requirements.)

Second, some public owners have drafted project documents, including Requests for Qualifications and Requests for Proposals to carefully delineate the selection criteria for the CMAR firm. These include the use of pre-qualification criteria (which most public agencies have the authority to utilize pursuant to Public Contract Code § 20101(c) and (d)) and the utilization of specific CMAR contract provisions requiring awards of individual contracts to specific trade contractors on a low-bid basis to satisfy competitive bidding requirements.

Third, public owners may attempt to rely on federal procurement standards, which vary from state procurement standards in several significant respects. For example, for projects utilizing funds provided by the Department of Transportation's Federal Transit Administration (FTA), FTA regulations require that price be considered a factor (rather than qualifications) in all contracts, other than for architect/engineering services. As such, similar to federal design-build contracting, a CMAR firm bidding on a project utilizing FTA funds will be considered a construction contractor, rather than a "construction manager" (as in the case of a CM-Agent contract), where the preponderance of the work falls in the construction area, rather than construction management. In such a scenario, the FTA treats the contract as one for construction, rather than construction management services, avoiding a conflict between low-bid and qualifications-based selection standards.

Conclusion

Project delivery selection is driven not only by project goals, including those related to time and costs, but also the legislative environment and the practical realities of the project and the construction marketplace. CMAR allows public owners and construction firms to benefit from combining preconstruction and construction services into a single contract, which has the potential to result in efficiencies benefitting both stakeholders. Where the owner or project lacks express statutory authorization to utilize CMAR, however, both entities may be exposed to risk under the current statutory scheme in this state. While there may be alternatives to express authorization for CMAR, which may address or mitigate the risks associated with a public owner's lack of statutory authorization, and the potential for legal challenge may be minimal, the only method to eliminate risk for both public owners and potential CMAR firms is to seek legislative approval for the use of this delivery system.

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Damon M. Fisk practices in the areas of construction, professional liability, commercial and real estate law. His practice focuses on litigation in federal and state courts, including all forms of alternative dispute resolution, in which he represents property owners, developers, general contractors, architects and engineers. Mr. Fisk has broad experience in the construction industry, including licensing, bidding, contract negotiation, contract administration, and litigation involving both public and private works ranging from single-family homes to large-scale commercial, industrial, and government projects. His practice also incorporates transactional work, including contract drafting, mechanic's lien and stop notice issues, and real property transfers. Mr. Fisk is a member of the Forum on the Construction Industry of the American Bar Association and the Real Property Section of the State Bar of California and Bar Association of San Francisco.

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