

Construction Management at Risk (CMAR)

Construction Managers may function as an agent for the owner, with the owner holding separate contracts with design professionals and contractors, or they may be retained as an independent contractor with responsibilities that, in addition to professional services, may also include actual construction, functioning much like a general contractor. The agency role is known as Construction Manager Agency (CMA). In that role, the construction manager does not hold the construction contracts and subcontracts, but instead assists the owner in reviewing the design and construction processes, and even managing the owner's contractors.

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Roles and responsibilities of a CMAR

A construction manager that accepts responsibility for performing the construction is known as a Construction Manager at Risk (CMAR). The CMAR may look like a general contractor with all the same responsibilities assigned to the typical general contractor through the design-bid-build project delivery method.

Unlike a general contractor, however, a CMAR is responsible for providing pre-construction services to the project owner, including, but not limited to, reviewing project feasibility, assisting the owner in determining that the owner's design professional is providing designs that are within the owner's budget and are constructible, and that the schedule is realistic and can be met.

Once construction commences, the CMAR is responsible for constructing the project, using the plans and specifications that the owner and its design team (with some review or involvement by the CMAR) have produced. It must be noted that one of the benefits the project owner gets out of using the CMAR delivery method instead of the typical design-bid-build method is that the CMAR and its key subcontractors are generally quite involved in the design phase, reviewing and commenting on designs.

Because of the CMAR's early involvement with the design, the construction process may begin earlier – well before the design has reached final 100 percent completion. The CMAR may have a Guaranteed Maximum Price (GMP) construction contract directly with the project owner, and will subcontract to various trades' subcontractors, just as would a general contractor.

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Impact of CMAR design phase responsibilities on future construction phase claims

When it comes to determining legal responsibilities and liabilities of a CMAR, case precedent from general contractor lawsuits may be applicable depending upon the nature of the issues involved. One issue courts must consider when a case involving a CMAR is litigated is whether the CMAR's design phase services caused the case outcome to be different than if the CMAR was just a general contractor and did not also have all the roles and responsibilities that were assigned to it as a construction manager.

Interesting legal issues may arise when the CMAR's duties include providing a design review for the owner. The CMAR might have professional liability exposure for providing professional services that fail to meet the standard of care applicable to a CMAR providing such services.

A second issue is what, if any, impact does the CMAR's design phase services have upon its ability to assert claims against the project owner based on defective plans and specifications during construction phase services. Can the CMAR claim reasonable reliance on the owner's plans and specifications – making an implied warranty of specifications (Spearin doctrine) claim?

To what extent may a CMAR rely upon the partial designs or bridging design documents provided by the project owner? Does a project owner avoid or limit the implied warranty of design by using the CMAR method of contracting instead of the traditional design-bid-build method? These important questions were addressed favorably for a CMAR in the case of

Coghlin Electrical Contractors, Inc. v. Gilbane Building Company, (SJC-11778, Massachusetts 2015).

The court concluded that (1) a public owner of a CMAR project gives an implied warranty regarding the designer's plans and specifications that the owner provides to the CMAR, but the scope of liability arising from that implied warranty is more limited than in a design-bid-build project; (2) the CMAR contract in this case did not disclaim the implied warranty; and (3) the indemnification provision in the contract did not prohibit the CMAR from filing a third-party complaint against the owner, seeking reimbursement under the implied warranty for damages claimed by the subcontractor, arising from the insufficiency of, or defects in, the design.

Case background

A public owner in the state of Massachusetts was developing a project to build a psychiatric hospital. It entered into a contract with a designer to prepare the project's designs. When the designs were partially completed, the owner entered into a contract with Gilbane Building Company (Gilbane) as the CMAR. Gilbane in turn entered into a subcontract with Coghlin Electrical Contractors, Inc. (Coghlin) to perform electrical work.

Just prior to project completion, the electrical subcontractor submitted a request for equitable adjustment to Gilbane for an adjustment of the contract price. Subsequently, the subcontractor filed suit against Gilbane alleging entitlement to additional costs due in part to design errors. Gilbane then filed a third-party complaint against the owner asserting that, in the event Coghlin proves its claims against Gilbane, Gilbane is entitled to

recover from the owner due to the owner's breach of its contract in failing to pay amounts claimed by Coghlin.

The subcontractor's factual allegations of design defects and changes included assertions that the design defects were that the ceilings in the project were designed to leave two feet of space between the ceilings and the bottom of the structural steel, but "*[w]hen project work began, it was revealed that the design required approximately five feet of mechanical and electrical work to be placed in the ceiling area.*"

After six weeks of attempting to resolve the discrepancy, Coghlin was directed to place the electrical work as high as possible in the ceiling, and was told that the designer and Gilbane would address the issue later.

The appellate court stated that in his decision, the trial judge acknowledged that traditionally, "*where a party provides a contractor with a set of plans and specifications for construction to follow, there is an implied warranty that those plans and specifications are adequate and sufficient.*" The judge concluded, however, that the implied warranty of the owner applies only where the construction project uses the traditional design-bid-build construction method, in which the owner retains a designer to design the project, construction bids are submitted based on that design, and the general contractor who wins the contract is expected to build the project in accordance with the plans and specifications of the design.

The trial judge determined that this implied warranty does not apply where, as here, the construction project uses the CMAR method, given the "*material changes in the roles and responsibilities*

voluntarily undertaken by the parties" to such contracts.

Making matters challenging for Gilbane, the judge determined that the indemnification provision in the prime contract required Gilbane to indemnify, defend and hold harmless the owner from all claims, damages, losses and expenses "*arising out of or resulting from the performance of the Work,*" imposed liability on Gilbane for any damages it might win in its third-party claims against the owner. As explained by the Supreme Court, "*The judge concluded that, because Gilbane effectively is suing itself in its third-party complaint, Gilbane's third-party claims create 'an impermissible' circuitry of obligation.*"

CMAR defined by statute

The Massachusetts code (G. L. c. 149A, § 2) defines CMAR as follows:

"A construction method wherein a CMAR firm provides a range of preconstruction services and construction management services which may include cost estimation and consultation regarding the design of the building project, the preparation and coordination of bid packages, scheduling, cost control, and value engineering, acting as the general contractor during the construction, detailing the trade contractor scope of work, holding the trade contracts and other subcontracts, prequalifying and evaluating trade contractors and subcontractors, and providing management and construction services, all at a [GMP], which shall represent the maximum amount to be paid by the public agency for the building project, including the cost of the work, the general conditions and the fee payable to the construction management at risk firm."



Court's description of construction project delivery methods

The Supreme Court began its review of the case with an explanation of the procurement code of Massachusetts and the different forms of contracting authorized by the code. The court noted that the code specifically authorizes the CMAR method of contracting, and that in CMAR the owner may contract with the CMAR before the design has been completed. The court then quoted from several learned treatises explaining that by contracting during the design phase, the owner may "involve the [CMAR] in project planning and . . . benefit from the [CMAR's] expertise" and that the CMAR "provides preconstruction services tailored to introduce construction expertise into the design phase."

Citing See G. L. c. 149A, § 2; id. at § 7, the court also noted, "The CMAR provides its services in exchange for a guaranteed maximum price (GMP), representing the maximum amount that the owner will pay."

Implied warranty of specifications on a traditional design-bid-build project

The court began its analysis by first reiterating that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purpose intended. *United States v. Spearin*, 248 U.S. 132, 136 (1918). The court quoted Bruner & O'Connor, "This implied warranty

between the owner and the contractor 'is a representation that the design is defect-free,' and the contractor 'need only show that the defect exists and that he suffered damages as a result thereof' in order to recover."

Quoting from Spearin, the court further explained that in design-bid-build projects, the implied warranty of the owner "is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work." Rather, the question is to what extent is reliance in good faith. The court states, "The implied warranty in the traditional project delivery method does not absolve a contractor of all liability related to design; where the contractor does not rely in good faith on the designer's plans and specifications, the contractor is responsible for the increased costs arising from design defects."

Consequently, concluded the court, where a contractor encounters an "obvious omission, inconsistency, or discrepancy [in the design], he should take steps, by way of his own investigation, or by putting questions to the owner (or owner's representatives), to bridge gaps in the documents."

Implied warranty of specifications on a CMAR project

Unlike design-bid-build projects where the designer designs and the contractor builds, the CMAR may provide consultation regarding the design of the project and may influence the project's final plans and specifications. Additionally, the CMAR agrees to a GMP and has the opportunity when negotiating the contract to consider



the risk of incurring additional costs. Despite the significant differences in the relationship, the court stated, “we are not persuaded that the relationships are so different that no implied warranty of the designer’s plans and specifications should apply in construction management at risk contracts made ... and that the CMAR should bear all the additional costs caused by design defects.”

The court further stated:

“The CMAR may consult regarding the design of the project, but the owner, through the designer, ultimately controls the design and is the final arbiter of it; unless the contract states otherwise, the owner is generally under no obligation to accept the CMAR’s suggestions regarding the plans and specifications. The implied warranty derives in part from the basic principle that ‘responsibility for a defect rests on the party to the construction contract who essentially controls and represents that it possesses skill in that phase of the overall construction process that substantially caused the defect.’ Although the CMAR may be more likely to bear some responsibility for a design defect than a general contractor in a design-bid-build project, we adhere to this basic principle by applying the implied warranty to public construction management at risk contracts, where the owner maintains control of the design by contracting a separate designer and may be able to transfer liability to the designer responsible for the defect.”

“The possibility that the CMAR may consult regarding the building design does not suggest that the CMAR should be the guarantor against all design defects, even those that a reasonable CMAR would not have been able to detect.” Even where a CMAR is given substantial consultative

responsibilities regarding the design, the owner remains free to reject the CMAR’s advice and suggestions. *“[W]e understand that the legislative intent in providing the construction management at risk alternative was to permit the CMAR a greater consultative role regarding the project’s design, not to eliminate the owner’s responsibility for design defects.”*

Scope of the implied warranty may be affected by CMAR method

According to the court, *“the differences between the responsibilities of a general contractor in a design-bid-build project and those of a CMAR affect the scope of the implied warranty.”* The CMAR may benefit from the implied warranty only where it has acted in good faith reliance on the design and acted reasonably in light of the CMAR’s own design responsibilities.

Whether the CMAR’s reliance was reasonable may be impacted by the level of participation in the design phase of the project and the extent to which the contract delegates design responsibility to the CMAR. As concluded by the court,

“The greater the CMAR’s design responsibilities in the contract, the greater the CMAR’s burden will be to show, when it seeks to establish the owner’s liability under the implied warranty, that its reliance on the defective design was both reasonable and in good faith. ... Therefore, the CMAR may recover damages caused by the breach of the implied warranty, but only if it satisfies its burden of proving that its reliance on the defective plans and specifications was reasonable and in good faith.”

No express contractual disclaimers of implied warranty

The next question for the court to decide was whether the language of the contract expressly disclaimed the contractor's right to rely on design specifications provided by the owner. It is a fundamental principle of law that only express and specific disclaimers suffice to overcome the implied warranty that accompanies design specifications.

The contract delegated extensive responsibilities to Gilbane to "carefully study" and "carefully compare" all design-related documents; "take field measurements and verify field conditions," compare them to the designs, and "report to the Designer any questions, errors, inconsistencies, or omissions." The contract also stated that Gilbane must "review" the designs "on a continuous basis" with a group of architects or engineers in order to "discover inconsistencies, errors and omissions," and "review the design documents for clarity, consistency, constructability, maintainability/operability and coordination among the trades."

In addition, the contract stated that Gilbane must attend project meetings with the owner and the designer and "consult with [Owner] and the designer concerning planning for construction of the Project."

The Supreme Court concluded that none of those provisions constituted an express disclaimer of the implied warranty of the designer's plans and specifications in the contract between the owner and Gilbane. "Although Gilbane undertakes significant design-related obligations, there is no

express abrogation of the implied warranty." The contract instead stated that the "recommendations and advice of [Gilbane] concerning design modifications and alternatives shall be subject to the review and approval of [Project Owner] ," and, the Designer "shall decide all questions which may arise as to the interpretation of the [designs] and as to the fulfillment of this Contract on the part of [Gilbane]."

As stated by the court, "Such provisions show that the Designer and [Owner] maintain authority and control over the project's design." In addition, the court quoted from the contract, which stated Gilbane would recommend alternative design-related solutions, without assuming the Designer's responsibility for design. According to the court, "the plain language of the contract supports, rather than disclaims, the implied warranty."

Here, said the court:

"Gilbane has undertaken extensive design review and consultation obligations while the Designer remains responsible for producing the designs. If Gilbane is found liable for additional costs to Coghlin, Gilbane may be able to recover, but only to the extent that the additional costs were caused by Gilbane's reasonable and good faith reliance on the defective plans and specifications that resulted in a breach of the owner's implied warranty, despite Gilbane's own contractual design responsibilities."

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Conclusion

This important decision clarifies that the historic rule of law concerning an owner's implied warranty of the design specifications to contractors will apply to CMARs just as it does to general contractors, and that the only real difference is the fact-specific question of how much reliance by the CMAR is reasonable under the circumstances.

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