



CONSTRUCTION LAW ALERT

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Liability of Construction Managers

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The typical organization of a construction project consists of a three party system of an architect/engineer, general contractor and subcontractor. When standard construction contracts began to shift various duties of architects/engineers to owners, owners responded by retaining construction managers. The addition of construction managers to the traditional three party system significantly affected the duties and allocation of risk assumed by these parties, often leading to disputes and litigation. This Construction Law Alert discusses the role of the construction manager, types of construction manager arrangements, scenarios in which a construction manager may be liable during the course of a project, and identifies the AIA standard agreements for construction managers.

What is the Role of a Construction Manager?

A construction manager plans, directs and coordinates a wide array of construction projects, such as the building of residential, commercial and industrial structures. A construction manager may oversee part or all of an entire project. It is typical for a construction manager to schedule and coordinate all design and construction processes, including the selection, hiring

and oversight of specialty trade contractors, but not to do any actual construction of the structure. A construction manager may also prepare a project budget, review plans and specifications with the architect/engineer, determine the adequacy of the general contractor's personnel and equipment and availability of materials and supplies, prepare monthly project status reports, maintain accounting records, and develop and implement procedures to review, process, and pay contractors for progress and final payments.

Types of Construction Management Arrangements

The most common type of construction management arrangement is one in which the construction manager acts as the owner's agent for a fixed fee. Under this arrangement, the construction manager selects the trade contractors, and the trade contractors enter into contracts directly with the owner. Thus, the construction manager is not in privity with the trade contractors and not liable for the acts of the contractors.

A second type of construction management arrangement is the at-risk construction manager. Under this arrangement, the construction manager assumes the role of general

contractor, and has responsibilities for design review, supervision and other services usually furnished by the architect. The construction manager selects the subcontractors, enters into subcontracts, and is responsible for the performance of the work, costs and delivery of the project. The fees for the at-risk construction manager are greater than those for the construction manager acting as an agent for the owner.

A third type of construction management arrangement is the hybrid arrangement. The construction manager acts on behalf of the owner when performing certain services and acts as an independent contractor when performing construction tasks.

The Construction Manager's Potential Liability During Construction Phase

During the construction phase of a project, a construction manager may be liable to the owner and nonprivity contractors for improper scheduling or monitoring of the progress of a project where the contract language provides that the owner and trade contractors are relying upon the organization, management and skill of the construction manager (acting as general contractor) to direct and control the work.

A construction manager may also

be responsible for the general administration of a project, including construction inspection and approval, supervision of safety programs, and payment of trade contractors.

For example, a construction manager's involvement in on-site supervision and inspection subjects the manager to increased liability for defective work. In one Florida case, a construction manager was liable for a jury verdict of \$11 million because of its contractual duty to supervise, coordinate, manage and inspect the work of the trade contractors.

In another case, the construction manager was found liable to third parties where the manager agreed to supervise the trade contractors' safety programs. To avoid this liability, construction managers should leave responsibility for safety on job sites to the specialty contractors or hire an independent third party in charge of on-site project safety.

The construction manager may be responsible for defaults or defective work of the general contractor or the subcontractors. This will depend upon the type of construction manager relationship that exists. If the construction manager acts as the agent for the owner and the manager has not engaged in negligently coordination, supervision, inspection or hiring, the manager will not be responsible for the contractor's default or defective work. However,

an at-risk construction manager will be liable for the default or defective work. If this is the case, the construction manager may have a claim against the defaulting subcontractor for breach of the subcontract.

Finally, the construction manager may be liable to third-parties, such as contractors, workers, sureties and members of the public under the third party beneficiary theory of liability. Even if a third party is not a signatory to the construction manager's contract, the construction manager may be liable if the contact was intended to primarily or directly benefit the third party. In one case, a construction manager was found to be liable to injured workers. The injured workers were deemed third party beneficiaries of the construction manager's contract because the contact required the construction manager to take adequate safety precautions.

Construction Management Under The AIA Standard Agreements

The American Institute of Architects (AIA) has created standard form agreements between owner and construction manager. One form agreement is for use on projects where a construction manager, in addition to serving as adviser to the owner, assumes financial responsibility for construction of the project. The construction manager

provides the owner with a guaranteed maximum price proposal, which the owner may accept, reject, or negotiate. Upon the owner's acceptance of the proposal by execution of an amendment, the construction manager becomes contractually bound to provide labor and materials for the project.

A second AIA form agreement is for use when the owner seeks a construction manager who takes on responsibility for providing the means and methods of construction. In this form agreement, the construction manager does not provide a guaranteed maximum price. The form employs the cost-plus-a-fee method, in which the owner monitors cost through periodic review of a control estimate that is revised as the project proceeds. Both AIA owner/construction manager form agreements divide the construction manager's services into the preconstruction phase and the construction phase, portions of which can proceed concurrently in order to fast track the process.

Conclusion

Construction managers, owners and other construction participants should be aware of the duties, risks and liabilities associated with construction management. Although there is relatively little case law in the area of construction management, carefully drafted contracts, including the use of the AIA standard form of agreements, and applicable legal principles provide the best guidance and certainty. ■

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