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"At Risk" Construction Management

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"AT RISK" Construction Management has become a hot topic recently. I'm sure folks have been practicing it in different variations for a long time, without necessarily giving this name to it. This article will describe the concept generally and some of the key considerations and (often overlooked) precautions that should be taken.

First, what is it? The **Construction Management Association of America** (CMAA) describes it this way:

"An Owner embarking on a construction project must make an important decision regarding the method by which the project is designed and constructed — the project delivery method. This decision has become more difficult in recent years as several "alternative delivery methods" have been developed to address weaknesses in the traditional design-bid-build scenario. Methods that have gained in popularity include **at-risk construction management**, fast-track construction, multiple prime contractors, and design-build. Proponents of particular alternative methods promise improvements over the traditional system in terms of cost, project control and reduction in disputes...

"*(The at-risk construction management)* delivery system is similar in many ways to the traditional Design-Bid-Build system, in that the CM acts as a general contractor during construction. That is, the CM holds the risk of subletting the construction work to trade subcontractors and guaranteeing completion of the project for a fixed, negotiated price following completion of the design. However, in this scenario, the CM also provides advisory professional management assistance to the owner prior to construction, offering schedule, budget and constructibility advice during the project planning phase. Thus, instead of a traditional general contractor, the owner deals with a hybrid construction manager / general contractor."

Another useful description is provided by **Alberta Infrastructure**, as follows:

"**Construction Manager (CM) as Constructor** is a form of Construction Management under which the Construction Manager enters into multiple trade contracts with the trade contractors and suppliers. The Construction Manager assumes responsibility for the performance of the trade contracts (subcontracts) much as a general contractor would under the traditional method, and is paid for the trade contract work on a cost reimbursement basis. The Construction Manager may, or may not, also provide a guaranteed maximum price and schedule to the Owner under a cost plus type of arrangement, or enter into a stipulated price contract ***[in my experience, the stipulated sum contract is more common]***, when the design is sufficiently complete. **When this is the case, this form of Construction Management is sometimes also referred to as 'CM at Risk'**."

Some of the pros and cons discussed at the CMAA and Alberta Infrastructure websites are as follows ***[editorial comments in brackets]***:

"In addition to providing the owner with the benefit of preconstruction services which may result in advantageous changes to the project, the CM at Risk scenario offers the opportunity to begin construction prior to completion of the design. The CM can bid and subcontract portions of the work at any time, often while design of unrelated portions is still not complete. In this circumstance, the CM and owner negotiate a guaranteed maximum price contract ***[or stipulated sum contract]*** based on a partially completed design, which includes the CM's estimate of the cost for the remaining design features. Furthermore, CM may allow performance specifications or reduced specifications to be used, since the CM's input can lead to early agreement on preferred materials, equipment types and other project features.

"The primary disadvantages cited in the CM at Risk system involve the contractual relationship among designer, CM and owner once construction begins. Once construction is underway, the CM converts from a professional advisory role of the construction manager to the contractual role of the general contractor. At that time, tensions over construction quality, the completeness of the design, and impacts to schedule and budget can arise. Interests and stake holding can become similar to the traditional design-bid-build system, and adversarial relationships may result. While the fixed guaranteed maximum price contract ***[or stipulated sum contract]*** is supposed to address the remaining unfinished aspects of the design, this can in fact increase disputes over assumptions of what remaining design features could have been anticipated at the time of the negotiated bid.

"One mitigating approach to this problem is for the CM to share with the owner its subcontractor bids, to ensure openness in the process ***[The usual CM arrangement requires this "sharing", and I suggest the owner should not depart from it under any CM at Risk arrangement.]*** The CM may further assume risk by taking some responsibility for design errors discovered during construction, if it was involved in the review of the design prior to establishing the guaranteed maximum price contract ***[or stipulated sum contract]***. In addition, arrangements can be made regarding risk sharing and profit sharing if there are over-runs or under-runs in the guaranteed maximum price contract ***[or stipulated sum contract]***.

"An owner wishing to use the construction management at-risk approach can realize many benefits. Chief among them are the opportunity to incorporate a contractor's perspective and input to planning and design decisions and the ability to "fast-track" early components of construction prior to full completion of design. However, since a commitment is made to a contractor earlier in the process, a premium is placed on the proper selection of the CM to provide the best value to the owner.

"The CCA forms of contract... (CCA 5 and CCA 17) are specifically written for CM as Agent and are not suitable for use under CM as Constructor. The introduction to CCA 5 warns against its use for this form of Construction Management. Unfortunately, there is presently no Canadian standard form of contract available for the CM as Constructor form of Construction Management (there are in the U.S.). Some Owners or their consultants attempt to modify CCA 5 to suit this form of Construction Management, but the modifications required are extensive and caution is advised. Legal or other expert advice should be sought when taking this approach. ***[We have a lot of experience in this area. We have produced customised supplementary conditions for the CCA 5 and CCA 17 for Construction Management and CM at Risk.]*** Knowledgeable owners who intend to use the CM as Constructor form of Construction Management on multiple projects usually develop their own custom written form of contract designed specifically for this form of Construction Management. Allowing the Construction Manager to propose and prepare the form of contract may put the Owner at a significant disadvantage."

A benefit that I would emphasize, in comparing CM at Risk with the design-bid-build scenario / stipulated price contract approach, is the transparency to the bidding process and contracts with the subtrades. This is important especially on complex jobs, such as those requiring extensive phasing where operations will be ongoing during the course of the work, and a premium is therefore placed on minimizing disruption. The transparency gives a greater ability to select trades that the owner will feel comfortable with.

Before the conversion from construction manager to general contractor takes effect, the construction manager (soon to be general contractor) has various duties to the owner — for example, to pass on all identified cost savings, including of course ideas for possible costs savings, and to be forthright about bids and prices from the trades and suppliers. The parties have to understand that the duty to have done so, during the prior period, will survive and continue, even after the conversion to a fixed price contract, and the standard construction management contract has to be adapted to capture this. If a brainstorm occurs to the general contractor (formerly construction manager) after the conversion to a fixed price contract has occurred, then the saving would be for its benefit. If the brainstorm occurs before, then the benefit of the idea goes to the owner.

Construction management involves a higher degree of trust than the fixed price design-bid-build approach. Hudson's on Building and Engineering Contracts comments that construction management is more suited to owners who do a lot of projects, so that the construction manager will want to maintain that trust, in order (of course) to get more work down the road. This factor is particularly important for CM at Risk.

Properly used, CM at Risk can achieve the benefits of both construction management and a fixed price contract. **CB**

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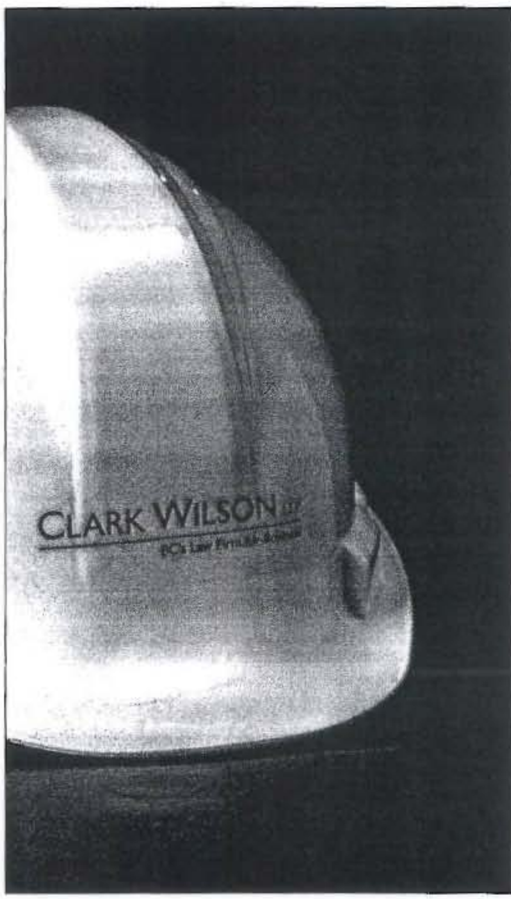

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