Coming to Grips With Construction Management

Wall and Ceiling Contractors Have a Powerful Stake in the Outcome of a Lawsuit Over the Need for CMs To Bid Like the Rest of the Industry

Why should wall and ceiling contractors be concerned about a construction management firm sued for "practicing general contracting without a license" on a public hospital project in Louisiana?

The Construction Management Association of America (CMAA) believes the case "strikes at the heart of the profession." And this is bad news for wall and ceiling contractors who have ever sweated out payments from general contractors, since "CM" is the leading alternative to traditional single contract construction.

At issue is whether Project Control, Inc., a Louisiana construction management firm, circumvented the state competitive bidding law when it agreed under an AIA standard CM contract to coordinate construction of a public hospital.

The law, which applies to general construction contracts on state projects, was broken said the local chapter of the Associated General Contractors in a suit brought last year. But CMAA argues that Project Control served only as the owner's consultant and performed no general conditions work.

Construction management, according to CMAA, is a professional service like architecture and engineering. Therefore, the Louisiana case "strikes at the heart of the profession (and) denies that construction management services are professional, and requires they be competitively bid."

What is CM? Clearly, the Louisiana case shows there is disagreement about the nature of construction management. And because there are disagreements about "what is CM," notable failures of "fast track" projects like the General Services Administration experiments of the late 1970s are touted as proof of the faults—or the misunderstandings—surrounding CM.

Because all agree the term "construction management" is among the most ill-defined in the industry lexicon, experts have tried to explain it and have come up with six basic strategies that come to mind when people say CM.

True "construction management" — the real CM — is in four forms, according to the symposium "The Law of Construction Management and Design/Build Fast Track Construction," held last year at the Duke University Law School. These four forms of CM are:

- **Agency CM** in which the building owner contracts separately with the construction manager, design professional and specialty contractors.
- **Guaranteed Maximum Price CM** in which the building owner contracts separately with the design professional and the construction manager — who guarantees a maximum price for the project. The construction manager may hold the specialty construction contracts, or the owner may deal directly with the specialty contractors; both arrangements are common.
- **Extended Services CM** in which the owner contracts directly with the specialty contractors and with a construction manager who also offers the services of a design professional.
- **Owner CM** in which the building owner acts as the construction manager and contracts separately with the specialty contractors.

According to the symposium, CM is to be contrasted with "project management" — or PM — which is essentially the traditional single contract method of construction performed by a general contractor and subcontractors, but with the additional layer of a project manager hired as the owner's consultant.

Two types of PM have been identified:

- **Team PM** in which the building owner contracts separately with a design professional, project manager and general contractor. The project manager performs administrative tasks, while the general contractor holds the subcontractors and performs construction.
- **Extended Services PM** in which the project manager also provides the services of a design professional, and the building contracts with a general contractor to perform the construction.

Says C.E. Haltenthalhoff, chairman of Elzinga & Volckers, Inc., construction management firm, Holland, Mich.,
“... because there are disagreements about ‘what is CM,’ notable failures of ‘fast track’ projects like the General Services Administration experiments of the late 1970’s are touted as proof of the faults—or the misunderstandings—surrounding CM.”

there is confusion “by the interchangeable use of the terms ‘construction management’ and ‘project management’ . . . (but as) can be readily seen when a single firm like E&V offers both, obviously CM and PM are not the same to that organization.

“The major difference between PM and CM can be explained quickly by connecting PM with administrative functions and CM with management functions . . . PM is actually an innovative administrative process, and CM is an innovative contracting process.”

Haltenhoff adds that “hands-on services available in CM generally not available in the PM menu” include the guaranteeing of a maximum price, jobsite coordination of the specialty contractors, direct purchases and any construction services.

• Back to Louisiana. So again, why does the suit against Project Control, Inc., affect specialty contractors?

According to Haltenhoff, “as the industry finds its way through this era of change . . . the trend toward innovative project delivery systems seems to be at its peak in today’s construction marketplace. The old standby, general contracting, is being seriously challenged by ‘other’ delivery systems.”

Naturally, this is a welcome development by wall and ceiling contractors who see CM as a way to deal directly with the owner and receive payments without a middle man—the general contractor—to hold things up.

The American Subcontractors Association believes the single contract method of construction “made sense when most work was performed by a single master builder. But today, when most actual construction is performed by specialized subcontractors, the general contractor has been thrust into a paymaster role for which he is often not suited.”

On the other hand, the Associated General Contractors in its very bylaws supports only the single contract system, believing that general contractors free to select and coordinate their subcontractors can best deliver to the owner a project at a mutually agreed price.

Studies indicate that separately bid specialty contracts produce lower initial prices than general packages. Most notably, a New Jersey Mechanical Contractors Association survey of 302 state project bid both ways during 1968-76 showed separate bids saving about ten percent over general bids. And a 1969 National Electrical Contractors Association comparison of 90 projects in several states showed similar savings for separate bids.

However, as debate has recently raged over New York’s 1921 “Wicks Law,” studies by New York City claimed that coordination problems arising from separate contracts added ten to 15 percent to the final cost of construction projects.

Admittedly, in the New York cases, the state attempted to act as construction manager rather than hiring an outside firm for this job. So observers disagree whether the general contractor’s markup under a single contract
exceeds the total price of a construction manager’s fee plus the sum of the specialty contracts.

But on some points there is agreement: wall and ceiling contractors generally agree that payments are often slow under single contracts and that alternative contracting methods such as CM are viable options. And all general contractors just as steadfastly agree that the ability to select and control the activities of subcontractors is the only system capable of consistently producing satisfactory performance.

What If? Suppose Project Control and CMAA lose their case in Louisiana, and a body of law develops that defines CM as a form of general contracting.

Professionals such as architects and engineers do enjoy certain immunities from liability for deficient construction; liabilities shouldered by the contractors. Under present CM agreements, because construction contracts are let directly between the owner and the specialty contractor, the construction manager has limited liability for deficient performance.

Should construction managers come to be regarded as general contractors in law and in standard industry documents, CMs will not likely assume liabilities for workmanship without asking control of their own destinies—or rather, control of the specialty contractors.

Then the industry is right back to the traditional relationships—a prospect denounced by AWCI general counsel McNeill Stokes, who in his “Statement on Construction Management” declared non-support for CM methods in which the construction manager simply functions as a “glorified general contractor.”

Also, if CM evolves into a competitively bid rather than negotiated service, construction managers could be leveraged by owners to guaranteeing maximum total project price—even today one of the four basic forms of CM. Should this arrangement come into vogue, construction managers would be increasingly pressured to assume control of the payment process and other contractual relationships which control costs.

And once again, the benefits of CM for specialty contractors in dealing directly with building owners is negated.

Should specialty contractors worry about a construction management firm in Louisiana? Certainly, CM has its faults for the specialty contractor and is no panacea. But when one faction of the construction industry is attempting to stifle development of any alternative to the traditional slow-paying single contract system, specialty contractors should be concerned.

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