Construction Management at-Risk:

Who Is Really at Risk?

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In recent years, the Construction Management at-Risk (CMAR) method has become a popular choice for construction projects. Its ability to streamline design and construction makes it an attractive option, however, with its rise comes new risks and challenges for the construction manager (CM) and the project owner. While CMAR is commonly used in private projects, its application in public contracts varies widely, and the nuances of how it affects the roles and responsibilities of both parties are not always well understood.

During my recent presentation with Chantal Fink Mehill, Esq., of UB Greensfelder and Ben Patrick of Gordon Rees Scully Mansukhani at the American Bar Association (ABA) Forum on Construction Law annual conference in Austin, Texas, I had the opportunity to explore these issues in depth. So, who truly bears the risk in CMAR?

WHAT IS CONSTRUCTION MANAGEMENT AT-RISK (CMAR)?

In a CMAR contract, the CM is engaged early in the project, typically during the design phase, and is responsible for overseeing the construction process. Unlike traditional methods, where contractors are hired after design completion, the CM in CMAR works directly with contractors and subcontractors to manage the project and is accountable for delivering it within a Guaranteed Maximum Price (GMP).

CMAR contracts often include pre-construction services such as value engineering, cost estimating, scheduling, plan reviews, and constructability analysis. As the design nears completion, the CM and the owner agree on a GMP, even though the design may not be fully finalized.

CMAR WITH GUARANTEED MAXIMUM PRICE (GMP)

The Guaranteed Maximum Price is one of the defining features of a CMAR contract, and one of the most misunderstood. These fundamentally different perceptions are the root of many GMP-related disputes. To the CM, the GMP is a conditional number, grounded in assumptions and based on what was known or shown at the time it was set. It reflects early estimates, incomplete designs, and clarifications about scope. It is not intended to account for every eventuality or design progression. In contrast, owners often perceive the GMP as just what it sounds like—a firm, fixed price guaranteeing the entire project cost.

Disputes frequently arise over what was “reasonably inferable” when the GMP was agreed to. Owners may expect certain elements to be covered that the CM believes fall outside the GMP based on their stated assumptions. That

disconnect can lead to disagreements about change orders, scope gaps, or cost responsibility. This tension often surfaces in discussions around contingency, where both parties may assume control or usage rights that the other does not agree with.

Although a contract's contingency provisions are meant to resolve some of these issues, providing a buffer for uncertainty doesn't always address the root cause: the misalignment in understanding what the GMP truly represents. When not addressed early, these differences can escalate into disputes during construction. Clarity around assumptions, scope, and contingency use is essential to bridge that gap.

SO, WHO REALLY BEARS THE RISK?

While the CM is contractually "at risk" for delivering the project within the GMP, the CM and the owner carry meaningful (and sometimes misunderstood) burdens. For the CM, the risks are primarily financial and operational. If actual costs exceed the GMP, they are often responsible for absorbing the difference. These risks are amplified by volatile market pricing, especially when the GMP is set before subcontractor buyout or full design completion. Additionally, the CM may be held to an elevated standard of care and expected to identify and address design errors during pre-construction reviews. Disputes over contingency use are common, particularly when contract terms are vague or ownership of those funds is unclear.

On the other hand, owners often enter CMAR contracts assuming total cost certainty, but that assumption doesn't always hold up. Post-GMP design changes, design progression gaps, and scope interpretation issues can lead to unexpected costs that fall outside the GMP. Owners also face potential quality concerns if the CM implements cost-saving measures to stay within budget. Misunderstandings can escalate if the contract lacks clarity on contingency terms or what is considered "reasonably inferable" from the documents.

THE PITFALLS OF CMAR—AND HOW TO MITIGATE THEM

Many of CMAR's challenges stem from misaligned expectations and incomplete contract terms. Below are three major pitfalls frequently encountered in CMAR and how to proactively manage them.

Pitfall #1: Misunderstanding the GMP

A common point of tension arises from differing interpretations of what the GMP includes. Owners often believe that the GMP guarantees a fixed cost for the entire project, even as the design continues to evolve. CMs, by contrast, view the GMP as based on what was known or shown at the time it was established. Disputes arise over whether certain work is "reasonably inferable" or outside the GMP and deserving of a change order. This misalignment is particularly dangerous when the GMP is set too early, before design is sufficiently developed or pricing is solidified.

Mitigation strategies include clearly defining what's included in the GMP; documenting all assumptions and clarifications; tailoring "reasonably inferable" language; and avoiding premature GMP execution. A shared savings structure can also align incentives between the parties.

Pitfall #2: Contingency Confusion

Contingency funds are often misunderstood or poorly defined in the contract. Owners may expect full control over how contingency is used. At the same time, CMs believe they have the discretion to apply those funds for things like estimating errors, coordination issues, or trade scope gaps. Without a straightforward process, arguments over control, documentation, and justification of drawdowns can delay progress and erode trust.

Mitigation strategies include defining CM and owner contingency funds separately, establishing approval rights and drawdown procedures, and setting the contingency amount based on design completeness. Transparency and documentation are key. Some contracts include shared contingency pools, with unused funds split at project closeout, encouraging cost control and cooperation.

Pitfall #3: Elevated Standard of Care

CMs may inadvertently take on more liability than anticipated by participating in pre-construction reviews or design-assist efforts. While case law is limited, courts have occasionally interpreted CM involvement in design reviews as creating a duty to detect errors or omissions, especially in jurisdictions where CMAR is treated differently than traditional delivery methods. Additionally, delegated design and design-assist blur the line between construction and design responsibilities, creating uncertainty around liability and risk allocation.

Mitigation strategies include clearly outlining the CM's responsibilities and standard of care in the contract; limiting liability for design issues unless explicitly assigned; and carefully managing design-assist and delegated design roles.

CMAR ENHANCEMENTS CAN OFFER GREAT BENEFITS, BUT FURTHER CLOUD RISKS

CMAR continues to evolve as owners and CMs seek greater efficiency, cost control, and quality. Design-assist and delegated design are enhancements that can offer significant advantages but also introduce new complexity and risk.

Design-assist involves engaging specialty subcontractors during the design phase to improve constructability, provide system insights, and suggest cost-saving alternatives. This can reduce RFIs, improve coordination, and speed up procurement. However, it can also blur the line between designer and builder, raising questions about who is responsible for design errors or omissions if the CM participates in or coordinates design-assist.

Delegated design, on the other hand, formally shifts responsibility for certain systems (e.g., fire protection, building enclosure, building automation) from the design team to trade contractors. While this can streamline delivery and provide performance-based solutions, it requires clear contract language and well-defined scope, review, and approval criteria. Without it, the CM may find themselves caught between the design team and the specialty subcontractor in the event of coordination issues or performance failures.

When clearly scoped, appropriately contracted, and jointly reviewed, these enhancements can deliver substantial benefits. However, they also highlight the need to define detailed roles, responsibilities, and risk allocation in the contract. Otherwise, the very strategies meant to enhance project delivery can create additional legal and financial exposure for the CM and confusion for the owner.

CONCLUSION: RISK SHARED IS RISK MANAGED

In CMAR, both the owner and the CM bear risk, but the risks differ in type, timing, and magnitude. Misunderstandings often arise when expectations aren't clearly stated or assumptions around cost certainty go unchallenged. To make CMAR work as intended, both parties must approach the project with transparency, shared accountability, and a clear understanding of allocating risk. CMAR can be a powerful delivery method when managed well, but it requires discipline, documentation, and dialogue.

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