

**CHALLENGES IN SCHOOL CONSTRUCTION USING THE
CONSTRUCTION MANAGER- AGENT DELIVERY METHOD:
RETURN OF THE OWNER AS GENERAL CONTRACTOR**

**COBBY A. CAPUTO
BICKERSTAFF, HEATH, SMILEY,
POLLAN, KEVER & MCDANIEL, L.L.P.
816 Congress Ave., Suite 1700
Austin, TX 78701
(512) 472-8021**

A. Introduction

Many years ago, some school districts in Texas used a method of construction for new buildings that removed the general contractor from the traditional triangular delivery system. Under the traditional delivery system, there are three parties: the Owner, the Architect, and the General Contractor. The Owner has two contracts, one with the Architect, and one with the General Contractor. The General Contractor then hires and has direct contracts with all of the various sub-contractors, suppliers, and material men needed to build the Project.

Under the alternate delivery system that some school districts experimented with in the late 1980's and early 1990's, the idea was to break the job up into component parts, and have the Owner enter into separate contracts with the prime trades on the job-site. Thus, the District would sign a contract with a site grading contractor, another contract with a plumber, another with an electrician, etc. This allowed the District to cut out the General Contractor and his direct mark-up, usually advertised as in the range of 8%-12%. This method of construction is sometimes referred to as “multiple prime contracts”, because the Owner is in direct contractual relationship with the prime trades on the job, who would ordinarily have had sub-contracts with a General Contractor in the traditional triangular delivery system. Effectively, the Owner becomes the General Contractor.

As a general rule, lawyers advised school clients not to enter into such arrangements. The added complexity of having direct contracts with the various trades leads to significant added administrative burden on the Owner. Instead of one contract with a General Contractor, the school district now had multiple contracts with each trade, requiring school staff to administer ten to fifteen or more contracts. Each prime contractor would have to carry appropriate insurance, payment and performance bonds (if their contracts were larger than the limit set out in the McGregor Act , now

found at Chapter 2253 of the Texas Government Code). The school staff had to coordinate with each trade to ensure that they were on the job-site at the appropriate time, make sure that supplies, consumables and equipment were present when each trade arrived, etc.

Resolving disputes became problematic, as the school district could no longer point to the General Contractor and demand that it resolve any disputes among the sub-contractors. The District was the General Contractor, in effect, and school personnel would find themselves having to resolve delay arguments between gym floor installers and electricians, between concrete installers and steel erectors, etc. After one experience with this, most districts would revert back to the traditional arrangement, as this delivery system was simply unmanageable for most school districts. The only way to effectively use this delivery system was for the school district to hire an administrator and support staff devoted to coordinating the construction project, which defeated the point of saving money on the project.

B. Construction Manager – Agent: Modifications to Multiple Prime Contracting

While it had not been used much in Texas (to my experience), the construction industry had a modified version of this delivery system, involving the use of a third party to consult with the architect during the design phase. This person, called the Construction Manager, would review the plans as they were being completed, and consult with the architect about possible alternatives, perhaps using a different kind of steel that is more readily available, or using different materials for finishes and amenities.

The Construction Manager would then later work during the construction phase of the project, administering the project on behalf of the owner. The idea was similar to multiple prime contracting, in that the district still acts as its own General Contractor, but instead of using school

staff to do the job of the General Contractor, a third party is brought in, and for a fee, performs many of the tasks related to coordination and technical administration of the project. This chart by the AIA schematically shows the difference between the Construction Manager–Constructor (what is called in the Texas Education Code “Construction Manager–At Risk”) and the Construction Manager–Agent delivery systems. It should be noted that the traditional General Contractor form would look identical to the Construction Manager–At Risk diagram, with the General Contractor in the place of the Construction Manager–At Risk.

In the Construction Manager – At Risk arrangement, the Construction Manager acts in similar fashion to the General Contractor, being committed to a stipulated price to complete the project. The AIA forms refer to this as a Construction Manager who is also the Constructor (abbreviated as Construction Manager–C). The other form of Construction Manager, to be discussed in this paper, is the called by the AIA a Construction Manager – Adviser. Under this delivery

system, the Construction Manager is not responsible for the overall costs of the project, and there are significant limits to his role and responsibilities in the actual construction of the project.

C. State Law Authority To Use Construction Manager–Agent

Texas law allows school districts to use either form of Construction Manager to build a project. *See* Texas Education Code §§ 44.038 (Construction Manager – At Risk) and 44.037 (Construction Manager – Agent). These provisions were added in 1997. Careful analysis of the development of the Construction Manager – Agent delivery system identifies several major concerns that school lawyers should discuss closely with the Board of Trustees, before they choose this delivery method.

D. There Is No Guaranteed Project Cost

First and foremost, the Construction Manager–Agent is not responsible for the cost of the project. As clearly stated in AIA form B801/CMa – 1992, the projected cost of the building provided by the Construction Manager–Agent to the school district “represents a best judgment...” This section 5.2.1 goes on to note that the “Construction Manager cannot and does not warrant or represent that bids or negotiated prices will not vary from the Project budget proposed...” Thus, it is imperative to make certain that the Board understands that nobody involved in the actual construction of the building is responsible for the finished price of the project. The Construction Manager–Agent will devise estimates, based on the architect’s plans that are set out for bid, but if the project bids come in over that estimate, there is no recourse against the Construction Manager–Agent. It is possible to develop a “fixed limit of construction cost” per the procedures of § 5.2.3, but if that cost is exceeded, the school district still has limited recourse against the Construction Manager–Agent.

Section 5.2.4 of the AIA B801/CMA provides the sole relief to the Owner. The school district can authorize an increase in the fixed limit of construction cost. The district can re-bid or renegotiate the contracts with the various trades, in hopes that they will come down to meet the proposed budget or the fixed limit of construction costs. The school district can terminate or abandon the project. Or, the school district can direct the Construction Manager–Agent and the architect to go re-design the project to remove costs. This is a very backwards process, compared to the more traditional method of selecting at the start of the project among bids from one General Contractor, and then holding him to that cost. In the Construction Manager–Agent delivery system, different phases of the project are often bid at different times, meaning the school district may never know exactly what the project will cost. It is possible to try and negotiate with the Construction Manager–Agent to include a formal fixed price, but many of the Construction Manager–Agents will not agree to be bound in any meaningful way to a set price, or if they will, they increase their fee significantly.

E. Use Integrated Contracts For The Project

Another major concern to any lawyer advising a school district’s intent on entering the Construction Manager–Agent process is to ensure that the architect knows this at an early stage of his engagement. The Construction Manager–Agent process requires the use of an Owner-Architect contract tailored to the inclusion of the Construction Manager–Agent during the design phase, and providing for a slightly different role for the architect during the construction phase. Conveniently, the AIA has a specific form, called the B141/CMA–1992. The General Conditions of the Contract must also be specific to the inclusion of a Construction Manager–Agent. Again, the AIA has such a form, the A201/CMA–1992. Finally, the many contracts the District will have with the various trades must also be specific to the inclusion of the Construction Manager–Agent. The school district

must use the A101/CMA–1992. It is possible to develop all of the forms unique to each project, but the 1992 versions of the AIA forms are not too bad, provided the school district understands the nature of the Construction Manager–Agent services. Even with that understanding, there are certain modifications that can help the project proceed more smoothly.

F. Job-Site Supervision

Significant problems can arise on a project using the Construction Manager–Agent method in that there is no full time job-site superintendent called for in the standard AIA forms. Unlike in a typical General Contractor arrangement (or even in the Construction Manager–At Risk system), there is no one entity responsible for the cost of the project, and thus no one entity with the need to pay someone to be on site every day of construction, overseeing the project and making sure that disputes or requests for interpretation are resolved. The need for such oversight cannot be overstated. As the project progresses, it is most helpful, and advisable, to have someone on-site, who will review the work as it takes place, who will initially deal with disputes between two contractors, who will ensure that the proper supplies, material, and equipment is on-site at the appropriate times.

The Construction Manager–Agent process assumes (based on the standard AIA forms) that the Construction Manager–Agent will send a representative to the job-site on a regular or even daily basis, but does not define the frequency or duration of those visits. For instance, the Construction Manager–Agent is to record the progress of the project, and keep a daily log as to the weather, the work of each contractor on-site, the number of workers and identity of equipment on-site, work accomplished that day, and any problems encountered. *See* § 2.3.21. However, these reports can only be completed in a meaningful fashion if someone is at the job-site a good portion of each day. Many Construction Manager–Agents handle this job responsibility by having a field superintendent

pass through several different projects located near each other, spending an hour or so on each job-site. Careful attorneys will revise this section of the standard AIA document to require the presence of a representative of the Construction Manager–Agent on each and every day, for a sufficient period of time so that the reports generated are useful and complete.

Another area of concern if the Construction Manager–Agent does not have a full-time representative stationed at the project relates to his contractual obligation to ensure the coordination of the contractors, supplies, etc. *See* §§ 2.3.3 and 2.3.14. It is somewhat difficult to do this in a meaningful manner without an almost continuous job-site presence. The Construction Manager–Agent is also responsible for the initial review and processing of any requests for interpretation or for disputed claims lodged by different trades/sub-contractors. Overall, it is hard to see how the Construction Manager–Agent can properly carry out these duties, if the Construction Manager–Agent’s representative is working on three or four projects and is driving between them every day or so. Clarifying this one area of possible dispute will do more to ensure that the project proceeds smoothly than any other change the lawyers can address.

G. Contractors’ Compliance With Contract Documents

Many school districts are surprised when something goes wrong on the project and they find out that the Construction Manager–Agent is not responsible. Attention is called to § 2.3.7 (“The Construction Manager shall endeavor to obtain satisfactory performance from each of the Contractors.”). This is not the most forceful of phrasings. The standard remedy is equally loose. Under § 2.3.7, the Construction Manager is to “recommend courses of action to the Owner when requirements of a Contract are not being fulfilled.” This means that it will all boil down to the school district firing the Contractor who is falling down on the job, and if the District relies on the

Construction Manager–Agent’s advice and gets taken to court or arbitration, the district will get to pay an additional fee to the Construction Manager–Agent. *See* § 3.2.5, a “Contingent Additional Service”.

Additionally, § 2.3.13 states that the Construction Manager will “determine in general that the Work of each Contractor is being performed in accordance with the requirements of the Contract Documents, endeavoring to guard the Owner against defects and deficiencies in the work.” While this sounds helpful, a later section takes away some of the utility to the school district. Section 2.3.15 notes that the Construction Manager “shall not be responsible for a Contractor’s failure to carry out the Work in accordance with the respective Contract Documents.” Again, this means it is up to the school district to pursue a remedy against each and every Contractor who fails to perform, as the school district is made aware of it. There is not a single source of responsibility if a Contractor fails to build properly.

H. Contractors’ Performance and Payment Bonds

An area that has recently come to light as an area of concern relates to some of the more technical aspects of contract administration. As noted earlier, there is a need for each individual Contractor whose work exceeds \$25,000 to have a payment bond in place, and whose work exceeds \$100,000 to have a performance bond in place. *See* Texas Government Code § 2252.021. Nothing in the standard AIA forms requires the Construction Manager–Agent to ensure that each Contractor complies with these requirements. The AIA General Conditions adapted to the Construction Manager–Agent method, A201/CMA, state in Section 11.4 that the Owner shall have the right to require each Contractor to post a payment or performance bond, as needed. In projects involving Texas public schools, it is helpful to change this language to require that the Construction

Manager–Agent ensure that such bonds are posted, and that the surety on those bonds is properly authorized to write such bonds by the Texas Department of Insurance. Because the General Conditions represent a source of contractual responsibility that many Construction Manager–Agents do not refer to on a regular basis, it is also advisable to put this requirement into the B801/CMa, as well.

I. Applications for Payment

Similarly, the process for approving applications for payment goes through the Construction Manager–Agent. As in the standard architect contract, the Construction Manager–Agent is not swearing or guaranteeing that the work covered in the application for payment has actually been done in accordance with the contract documents. As noted in § 2.3.11.4 of the B801/CMa–1992, the approval of a payment application is not a representation by the Construction Manager that he has actually ascertained that the work was truly performed in accordance with the contract documents. However, § 2.3.11.3 of the B801 notes that it *is* based on the Construction Manager–Agent’s determinations based on site visits. It is most advisable, therefore, to have the Construction Manager–Agent convene a meeting on the job-site among his representative, the architect, and any contractors applying for payment at that time.

This meeting should include a project walk-through with each contractor identifying the work covered by that application for payment, and a visual inspection and review of any stored materials included in the application. This requirement should be cross-referenced in the Construction Manager–Agent’s contract, in the Architect’s contract, and in the General Conditions (usually in § 9.4.1 of the A201/CMa–1992). This required review prior to approval of an application for payment can help alleviate the possibility of a Contractor being paid for work not completed, or not completed

properly or for receiving payment for supplies and material not delivered or for having the incorrect materials and supplies delivered.

J. Delay Payments

Another source of potential trouble in this delivery method is what happens if the project is not completed on time. There is at least one well-publicized case here in Central Texas where a Construction Manager–Agent was paid a construction management fee month after month after the initial agreed completion date, because they had included a clause that they were to be paid in the event of delays to completion not caused by their acts or omissions. Given the limited scope of the Construction Manager–Agent’s responsibilities under the standard AIA documents, the owner in that case has little choice but to pay the fees, because the only person who really knows if the delay was caused by a fault of the Construction Manager–Agent is the Construction Manager–Agent, and that firm is generally unwilling to blame itself. Beware of such clauses being inserted into these contracts, and guard against being placed in the same situation.

K. Arbitration

A major problem with the entire set of standard AIA forms is that they all assume binding arbitration as the sole remedy of the parties to a dispute that cannot be worked out amicably. As a general rule, these provisions should all be struck. It is impossible to quantify how much better a bargaining position a school district is in with an architect, a contractor or a construction manager, when the dispute will be resolved in the district courts of the county in which the school district is located. Given that the jurors will likely be tax payers of the school district, and given that the jurors will likely have some background knowledge of the facts of the case, the opposing party has a huge disincentive to proceed to trial.

Usually, a good modification to the standard Arbitration language in the various AIA contract forms is to require the parties to go to non-binding mediation before any suit is filed. With the specter of a jury trial in a hostile forum, many contractors, architects, or construction managers will settle, if presented the opportunity. This generally involves the school district doing a certain amount of investigation work before the mediation (using an architect or contractor to define the scope of the problems and to propose solutions). Under these conditions, confronted with an Owner that has knowledge of the defects and some proposed solutions, the opposing party will not be able to try and double-talk their way out of the situation. Rather than face a well-prepared school district in court, they will often agree to perform repairs, or pay for the required repairs.

L. Conclusion

The Construction Manager – Agent delivery system revives the old practice of multiple prime contracting. Although the Education Code identifies the Construction Manager – Agent as a fiduciary of the school district (*see* § 44.037(a)), the standard contract forms usually put forth by architects and Construction Managers do not lend themselves well to holding the Construction Manager to the heightened standard of conduct promised by being in a fiduciary relationship. It is important to brief the school district officials on some of the key differences between traditional contracting and the use of a Construction Manager – Agent. It is also important to try and modify certain key sections of the standard AIA forms, in order to provide some basis for holding the Construction Manager responsible for the outcome of the school district's project.