

PAPER CONTRACTING

The How-To of Construction
Management Contracting

by William D. Mitchell & Gary W. Moselle



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CHAPTER 1

PAPER CONTRACTING

YOU'VE HEARD THE TERM *paper contractor*. Such as, "That guy is only a paper contractor." But what does that term really *mean* in the construction community?

The term, as most of us in construction understand it, is used to distinguish between the *typical* general contractors (those with payroll and specialized equipment) and those who only manage the construction process and don't actually do the work (those *without* payroll and specialized equipment).

The implication on the street is that anyone with a business card could become a paper contractor overnight. Even worse, the term implies no acceptance of responsibility — that a paper contractor has nothing to lose. If the job goes bad, he (or she) has no skin in the game. They could simply walk away, leaving others to deal with the mess.

If that's what paper contracting means to you, keep reading. There may be reasons to take another look.

Here's our definition of *paper contracting*:

- A paper contractor has a contractual agreement with a property owner to manage the design, budgeting, scheduling, bidding and construction of a specific project.

- The paper contractor agrees to manage that project in exchange for a specific contractual fee.
- This fee may include a financial incentive for controlling costs.
- The contract may or may not include a guaranteed maximum price (GMP).
- The trade contracts are prepared by the paper contractor; however, it's the owner, not the paper contractor, who actually signs contracts with trade contractors.
- The paper contractor may advise on pre-construction issues such as design and cost control.
- The paper contractor will make recommendations on all the issues normally handled by a general contractor: selection of trade contractors, scheduling, approval of payments, resolving claims, and project closeout.

So, as far as being responsible for the complete construction process is concerned, a paper contractor operates under a legal contract just as any typical contractor would. The difference is that a paper contractor escapes the obligations associated with having employees on staff and all of the headaches of owning, maintaining and insuring expensive equipment.

Is anyone really doing this?

The answer is yes. In fact, it's the most common form of construction contract for state and local government. Many of the largest projects undertaken by the Corps of Engineers are now done on this basis. Many small commercial and residential jobs are also done by paper contractors. Some of the most experienced, most successful, most respected construction professionals we know fit the definition of paper contractor.

For example, we know of a paper contractor who makes a very good living doing residential work almost exclusively. His clientele is very comfortable dealing with consultants — lawyers, accountants, financial advisors, etc. In their eyes, he's just another consultant, a *construction* consultant. This contractor gets involved early in the project, before design has started. He recommends an architect and an engineer, gets owner approval of the plans, guarantees a maximum price, selects trade contractors, ensures project completion to the owner's satisfaction and usually collects a nice premium for completing work on time and under budget. It's a good business. But it's not the typical general contracting business as most people understand it across the nation. It's a paper contracting business that embodies far less risk than is normally taken on by typical general contractors.

Is this legal?

Of course it is. No state requires that general contractors have employees and payroll. In fact, the potential profit deck is stacked against any general contractor that supports large crews: worker's compensation insurance, high overhead, high payroll taxes and liability insurance premiums.

But please be aware of this: We're not going to recommend anything that's even marginally illegal. Be assured, everything you read in this manual is strictly legitimate. If you're looking for a scheme to avoid taxes or bend the rules or for a way to flim-flam clients, please look elsewhere. We stand foursquare behind high professional standards and ethical conduct for all types of construction contractors. We assume you won't tolerate anything else.

Is this just another construction management book?

No, it's a paper contractor how-to book, and all a paper contractor does is manage. This is an important distinction that needs to be clear right up front. There are in this business, *general contractors*, *construction managers*, *program managers* and *paper contractors*.

General contractors have employees and specialized equipment.

Construction managers generally don't have many field employees and very little, if any, specialized equipment. A construction manager is usually doing the construction *at risk*, meaning they're on the hook financially for the entire construction process, including the labor and materials.

A *program manager* quite simply manages the program, that is, the designers and contractors. But they don't manage the day-to-day construction.

A *paper contractor*, by way of distinction, manages the day-to-day construction, but never has any field employees, nor does he have any equipment beyond a phone, a laptop computer, and a calculator.

Now, we assume you're already experienced at getting work done on a construction site, so this isn't a book about how to build a project; it's a book about how to manage a construction project with the least amount of risk, the least amount of staff, and no equipment. What we're going to show you here is a different way of doing business contractually. We're going to provide the tools and the background you need to adapt to an ever-changing environment for construction services.

The Way It Was

Fifty years ago it was unusual to find any construction project that wasn't headed by a conventional general contractor. The lowest responsible bidder got the job. Much of the work (such as excavating, concrete, framing and drywall) was done by crews employed by the general contractor. The remainder of the construction work was done by contractor specialists (subcontractors) working under agreements with the prime contractor. Invoices flowed up the chain of contractors to the owner and money flowed down the same chain from the owner or lender to subcontractors and suppliers. The prime contractor ran the show, handling invoices, claims, disputes, payments, change orders and other requests.

General contracting as it was practiced 50 years ago isn't going to vanish. But today, more projects, especially major projects, are handled by construction companies that do little or none of the actual construction. Paper construction management has become a specialty with its own set of rules, standards and qualifications.

Why Owners Choose Construction Managers

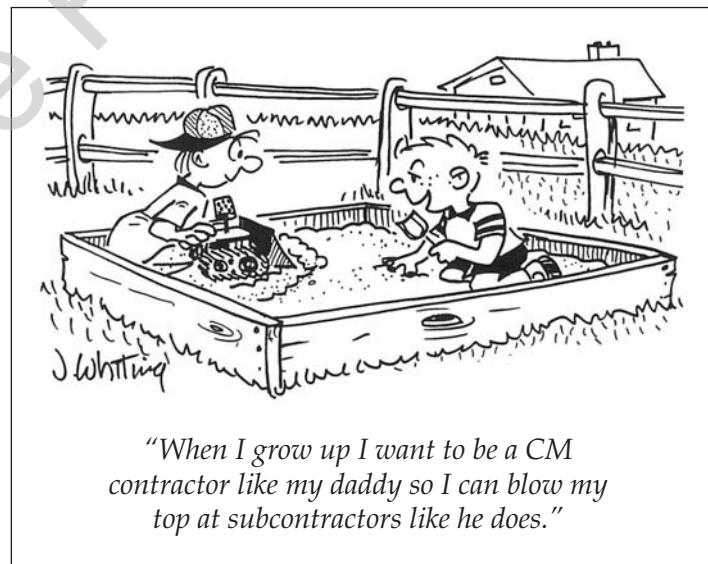
Most property owners know very little about design and construction: finding qualified design personnel, preparing bid documents, researching potential contractors, evaluating bids, responding to change orders and requests for information. Very few property owners want to manage the day-to-day operation of a construction project.

A construction manager is the owner's representative — answers only to the owner. The primary role of that manager is to protect the owner against excessive cost, delay, poor craftsmanship and unnecessary risk. Everyone else on a construction site has some other agenda.

Becoming a Paper Contractor

You probably picked up this book because you know plenty about construction contracting already. You may have made a living as a general contractor. We hope you've completed at least a few projects successfully and, in the process, started building a reputation for quality work and professionalism. We hope property owners come calling when they need a bid on a proposed project. We hope you enjoy what you're doing — the smell of fresh-cut lumber and the sight of construction materials coming together to better serve the people who will live and work in what you're creating.

If you're the general contractor we've just described, you almost certainly recognize problems associated with traditional general contracting: risk of loss, disputes, excessive regulation, employee problems, warranty claims, change orders, callbacks and, perhaps most difficult, the constant need for additional working capital. Traditional general contracting is fraught with



"When I grow up I want to be a CM contractor like my daddy so I can blow my top at subcontractors like he does."

enormous risk-taking, and it doesn't take many things going wrong to put you under. But if you're a paper contractor, your risks are minimal.

It would be a shame if headaches like those drove you out of construction. What you do best and what you enjoy most is bringing the parts together to create something of value. What you don't like are the headaches that nag general contractors — and eventually drive many into another line of work. If you're looking for a better way to make a living in the construction industry — a way that makes good use of what you know about construction — please keep reading. That's precisely what we're going to explain.

Paper Contracting, aka Construction Management Contracting (CM for short)

We've elected to title this book *Paper Contracting*. We did that for several reasons. First, the term is both descriptive and widely understood. Second, the title emphasizes the intellectual part of construction, not the physical process. What you're selling is your skill and experience, the same as any consultant (attorney, accountant, financial advisor, etc.). Third, the term *paper contracting* is more descriptive and better understood than any of the alternatives, such as *construction consultant*, or *construction management contractor* or *owner's representative*.

But we recognize that some, including some prospective clients, will be offended by the term. If you put "Paper Contractor" on your business card, it's likely that you'll make a poor first impression among prospective clients. So we need a better description when referring to the way you do business. After some soul searching, we settled on *CM contracting* or *CM for short*. That's the term we're going to use for the remainder of this book.

CM Summarized

To restate: a construction management contract is an agreement to pay for consulting services. The construction manager oversees project development in exchange for a fee. The project owner, not the construction manager, will sign agreements with trade contractors. The construction manager may advise on pre-construction issues such as design and cost control and will make recommendations on contract awards, coordination of trades, purchase of materials, payment of trade contractors, scheduling, and project close-out. The sidebar on the next page has a list of tasks usually handled by CM contractors.

As you read down this list, you'll probably say to yourself, "That's what I'm doing now" and that's precisely the point! That's what every general contractor does. But it's what a CM contractor *doesn't do* that better defines the process.

The job description for a CM contractor will usually include the following tasks:

- review of the plans and specifications
- preparation of bid packages and evaluation of bids
- reviewing owner and trade insurance coverage
- approval of the proposed trade contracts
- communication with designers, trade contractors and suppliers
- overseeing the building permit process
- monitoring the day-to-day construction process
- keeping the owner informed of the design and construction progress
- review and approval of trade and suppliers' invoices
- assistance with budgets, schedules and change orders
- protection of the owner from construction claims
- directing project equipment testing, warranties and closeout

What's *not* included in a construction manager's portfolio? That's easy. A CM contractor earns a fee for consulting services — period. The CM doesn't buy or install materials. A CM has no contracts with the trades and pays no bills. The owner signs agreements with trade contractors, pays all the bills and ultimately holds the installing contractors responsible for their work.

A CM contractor earns a fee as a consultant, the same as any architect or engineer. That fee could be a set amount for the job or a set amount per month, week or hour. Or it could be a percentage of the job cost. Or the fee could be based on performance — sometimes, depending on the contractual agreement, in which case it would be called a *CM at risk* contract. We'll explore each of these options later.

CM Contracting by Type of Job

The type of job will usually influence where you fit in the jobsite organizational chart. The charts following illustrate a CM's role on three of the most common types of construction projects. The arrows show the flow of information, requests, suggestions, submittals and approvals. These arrows are *not* lines of authority (to give instructions) or liability (for charges), as we'll explain later.

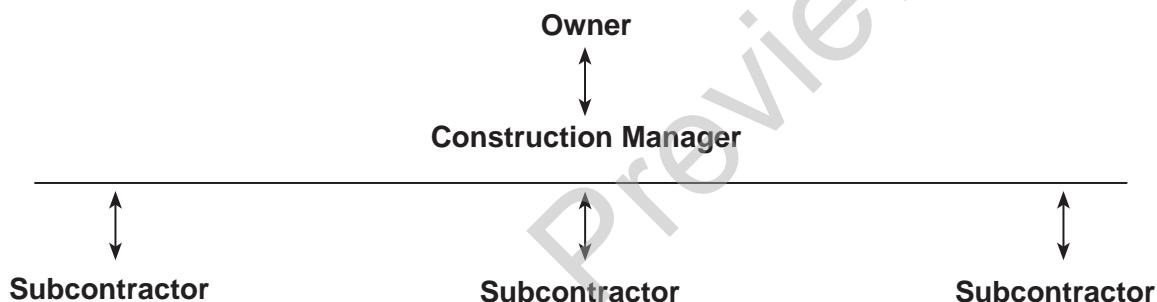
- *Residential project* — The CM assumes many responsibilities normally handled by a general contractor.
- *Commercial project* — The CM acts as a buffer between the owner and the general contractor.
- *Tenant improvement project* — One CM may represent the owner. Another CM may represent the tenant.

OPPORTUNITIES FOR CM CONTRACTORS

Residential

Home improvement and new home construction projects are good candidates for CM. These jobs are small enough so that no prime contractor is required. Instead, what often happens is that building departments allow homeowners to act as their own general contractor, which is known in the trade as an Owner Builder project. However, few owners are experienced in construction management. Most owners aren't prepared to participate in the design process either. Under these conditions a CM contractor can help deliver a superior product that meets the owner's expectations.

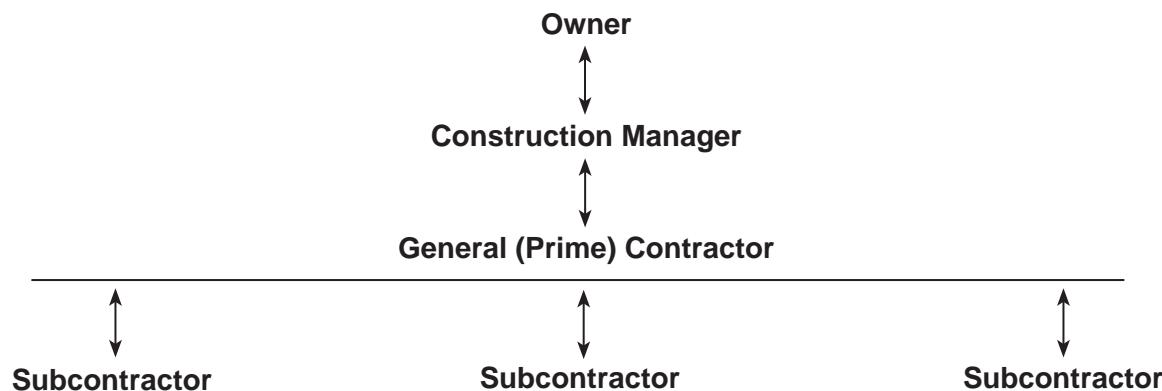
Residential Project (Home Improvement or Custom Home)



Commercial

These projects tend to be larger in scope. There may be several prime contractors on a large commercial job. One prime trade/contractor may finish before others begin work. The CM contractor provides continuity from beginning to end. The work of a CM begins with design and site requirements (port-o-pots, temporary fence, job trailer, etc.) and ends at final cleanup and project closeout. The CM has to work closely with each prime trade/contractor to be sure the project remains on schedule and under budget.

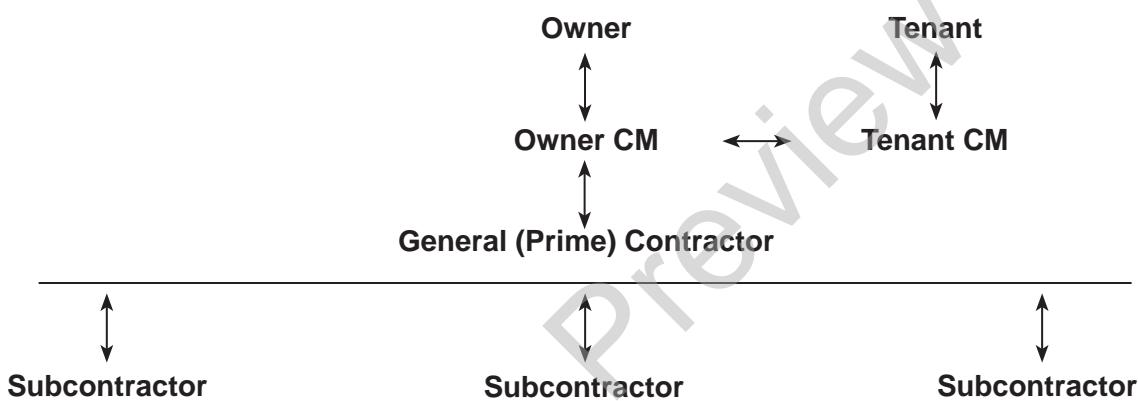
Commercial Project (Shopping Center or Office)



Tenant Improvements

A larger commercial tenant improvement project may have two CM contractors. The building owner who is funding the project will be represented by one CM contractor. The building tenant who will occupy the completed space may be represented by another CM contractor. Each CM contractor will have distinct interests and goals. The role of both CM contractors will be to meet the specific project expectations of each party.

Tenant Improvement Project (Commercial or Industrial Building)



Regardless of the type of job, all CM contracts have two elements in common.

1. The CM contract binds only the owner and the CM contractor, not the actual construction.
2. The primary responsibility of the CM is always to protect the interest of the owner.

What's Different About CM Contracting?

Most of a CM contractor's task will come as second nature to an experienced general contractor. After all, CM contracting is still construction, whether public works or private construction. The project could be a new commercial or residential building, non-building construction, tenant improvements or home improvements. But that's where the similarities end. There are many differences between CM contracting and traditional general contracting.

The Contract

CM contracts are very different from traditional prime contracts, and have to be drawn carefully to avoid problems with property owners, trade contractors, suppliers and state regulators. Because CM contracting is so different from traditional general contracting, it's easy for owners and others to be confused. That's why your CM contract is so important. In the next chapter, we'll offer a case study in what can go wrong when an attempt at CM contracting falls off track. For now, just understand that a good CM contract draws a line in the sand, placing limits on both the authority and the responsibility of a CM contractor.

"Because CM contracting is so different from traditional general contracting, it's easy for owners and others to be confused."

When you do CM work for a public agency, that agency will almost certainly prepare the contract. Your only responsibility may be to sign the agreement. If you build or remodel homes, offices or commercial buildings or handle industrial projects, you'll usually have the opportunity to offer a CM contract as part of the negotiating process.

Later we'll offer a link on the Web to a selection of blank CM contracts and trade contracts. We'll also suggest a way to get free CM contracts for any of the 50 states or the District of Columbia.

Recommending vs. Giving Orders

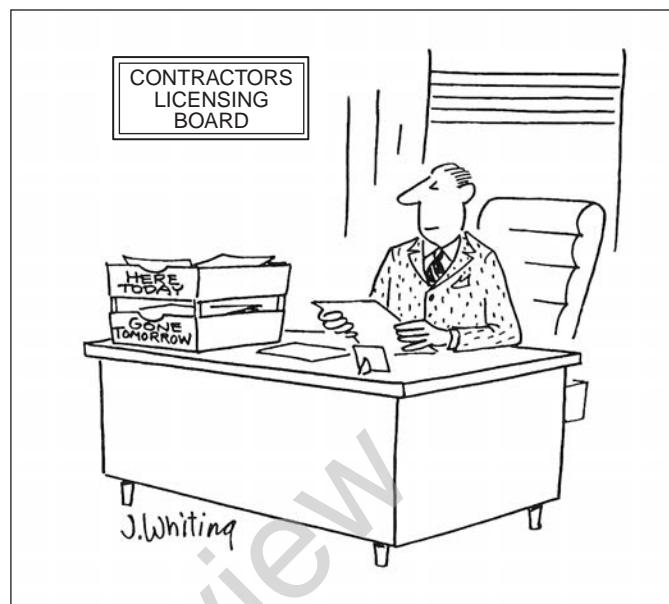
If you've been working as a traditional general contractor, you may not feel comfortable on your first CM job. A general contractor gives instructions to subs and suppliers and expects those instructions to be followed. A general contractor usually has written agreements with subs and can enforce penalties against subs who don't comply. That's not true with a CM (consulting) contract. Only the owner has written agreements with trade contractors. The owner may have many agreements with trade contractors on a single project. Those agreements are usually referred to as *multi-prime* contracts. Typically, the trade contractors are recruited by the CM contractor, are almost certainly approved by the CM contractor, and will work closely with the CM during construction. But these trade contractors are legally responsible only to the owner. The CM can recommend and encourage, but the owner makes the decisions. You, as the owner's CM, only have to see that those decisions are carried out.

Obviously, this difference in CM contracting cuts both ways. True, the CM's authority is limited, and that's typically bad, at least from the CM's perspective. But the upside to that limited authority is that it also brings with it a certain amount of immunity, in that the CM isn't legally responsible for

the failure of a trade contractor to perform. Of course, a CM can get a black eye when there's trouble with a trade contractor, which is something you'll have to guard against. But there's no legal liability. The CM doesn't have to make good on a trade contractor's mistakes. That's between the owner and trade contractor, and is up to them to settle. You're just the owner's advisor.

Paying Bills

A CM contractor earns a single fee as a consultant, and that's the only real cash that passes through his hands. All other money that constitutes payments for work completed on a project, after the CM's review, goes straight from the owner to trade contractors and suppliers. Again, this cuts two ways. A CM contractor doesn't have the benefit of float that results from holding (for a few days) payments made for work by subcontractors. But neither does a CM have the temptation to divert payments to some purpose other than paying subs. Some states impose a trust on payments for subcontract work held by a general contractor. Diverting those payments to any purpose other than what's intended would be a violation of that trust. In some states, that carries criminal penalties.



Licensing

If your state requires that contractors be licensed, do you need a license to work as a CM contractor? That's a very good question. Before we answer, remember that CM contractors don't install materials and don't have subcontractors. So, do CMs have to be licensed?

Unfortunately, this is a question that remains unsettled in many states. Generally, states that require contractors to be licensed define very precisely the term *construction contractor*. Sometimes the definition includes construction management and sometimes it doesn't. For example, Washington D.C. Code of Municipal Regulations § 17-3905.1 to § 17-3905.14 requires that construction managers comply with all standards that apply to general contractors.

In Tennessee, CM contractors need a license (*Lowrey v. Tritan Group Ltd.*, 2009 U.S. Dist. LEXIS 60312). The same is true in New York (*Liberty Management & Construction v. Wasserman*, 1996 U.S. Dist. LEXIS 4408).

California courts have decided (at least for now) that CM contractors don't need a contracting license. If you're interested, the case is *The Fifth Day, LLC v. Bolotin*, 172 Cal. App. 4th 939. The case was decided in March of 2009 and

includes a well-reasoned dissent by Justice Mosk. Expect the Bolotin decision to be reversed the first time a homeowner brings suit against an unlicensed CM home improvement contractor.

In Nevada, homeowners can act as their own contractor. However, if you're a general contractor acting as the owner's representative, the state licensing board will tend to view you as the responsible party if a dispute arises on the project.

In most other states where contractors have to be licensed, the licensing of CM contractors remains an open question. You should check with your local contractor licensing board before beginning any actual work.

For the purposes of this book, we're going to assume that CM contractors need the same license that a general contractor would need if working on the same job. We do this for three reasons:

1. Having the appropriate license is reassuring to everyone concerned — the owner, trade contractors, suppliers, lenders and design professionals.
2. We believe courts and legislatures are going to recognize the growing popularity of CM contracting and close any loophole that permits CM contractors to work without a license. You don't want to be caught in that loophole just when the loophole gets plugged.
3. Finally, the penalty for operating without a license is severe. In many jurisdictions, an unlicensed contractor has no right to collect. Don't take that risk — nobody likes to work for nothing.

Warranty vs. No Warranty

A hundred years ago, the rule in construction was *caveat emptor*, buyer beware. If the basement leaked or the roof blew off or if the foundation settled, the contractor wasn't responsible — unless the contract included an express written warranty. Gradually that's changed — in either or both of two ways. First, courts started assuming an *implied* (unwritten) warranty of workmanlike performance in every construction contract. Anything that didn't meet that standard was a breach of the court's implied warranty. The contractor had to fix the problem or pay for repairs. How long that warranty of workmanlike construction lasted and what it covered had to be settled on a case-by-case basis. Worse, warranty law was different in every state because construction is governed by state rather than federal law, and each state has its own rules.

Later, state legislatures jumped in to help protect consumers. Some states passed laws that made contractors liable for specific warranty repairs for a specific period. Other states protected consumers with their license law, threatening to revoke the license of any contractor who refused to repair shoddy work. Other states required coverage with warranty insurance. Still others set up mediation procedures intended to resolve warranty claims out of court.

Now, where does a CM contractor stand in this warranty muddle? There's no way to be sure. CM contracting hasn't been around long enough. We don't know of any CM contractor who has had to answer a warranty claim in court. It simply hasn't happened yet. Until it does, we can only guess. And here's our best guess.

Court-made warranty law (*workmanlike* construction) probably doesn't expose CM contractors to any risk. A CM contractor doesn't install construction materials, and so, is not a workman. That's the easy part.

But what about warranties imposed by statute? Can a custom home builder avoid all risk of warranty claim by working as a CM contractor? Stated that way, we feel the answer has to be "No." If the house slides off its foundation, everyone on the job is going to be named as a defendant — the engineer, the excavator, the cement mason, the concrete supplier, the framer and the CM contractor. Working as a CM doesn't provide total immunity from warranty claims. But CM contractor status clearly tilts the playing field in your favor. Remember, the owner of that sinking home approved and paid the engineer, the excavator, the cement mason, the concrete supplier and the framer as well as the CM contractor. Among those, the least likely to be found liable is the CM contractor. Of course, a job well done is your best protection against future claims, but it's not a guarantee.



O&P

Every general contractor's bid price includes markup — overhead and profit. Most bids also include a small contingency allowance. So isn't a contractor who signs a CM agreement giving away the potential for profit? The answer has to be a qualified "maybe."

Let's suppose you've received an offer to bid on a particular job that's right up your alley. Trained crews are on hand and available. There are very few unknowns. You've got plenty of working capital and bonding capacity available. You've done work like this many times, maybe for the same owner. And you've made good money every time. Is that job a candidate for a CM contract? Probably not. If you know exactly what you're doing and have no doubt about how the job will work out, go ahead and bid the work on a fixed fee basis.

Now let's reverse the assumptions. The type of work is a little different from what you've done before. There are multiple unknowns. Finding trained

crew members could be a problem. Working capital and bonding capacity may fall short of what's needed. The owner could be hard to work with and may be undercapitalized. The plans seem a little primitive. There are sure to be changes once work starts. Is that job a candidate for your CM contract? *You bet it is*, because it's filled with risk, and doing the job on a CM basis goes a long way to vaccinate you against those risks.

But aren't you giving away the profit on that job? Not at all. There's more risk than profit in a job like that. Taking the job on a CM contract eliminates most of that risk. As a CM, you're paid for your time. If your contract contains project time limits that, if exceeded, would allow you to rework your fee, the inevitable delays on a job like this only mean you have a paid job for longer. Another benefit: if the owner runs out of cash and the job is shut down with liens, your contracting license isn't in jeopardy. As a consultant, you're not exposed to claims by trade contractors. We don't recommend taking on any job that you expect will fail. But where the risk exceeds the potential rewards, whip out your CM contract.

In short, CM contracting isn't for every job. Instead, choose wisely. Opt for a CM contract when it suits both your needs and the needs of an owner. Make the pitch, "I can save you some money on this job. I'll act as your consultant at a price my competition can't touch. There's zero profit for me in this job. Just pay me for my time. I'll give your job the same attention I give to every project I take on, but with no markup. You can't beat that deal. Say the word and I'll write up a contract we both can live with."

A CM Contractor's Fee

Traditional construction contracting came in two flavors — either (1) fixed price or (2) time and materials (cost-plus). CM contractors have many more choices, from simple to complex. Choices are described below in the order of most simple to more complex.

Hourly rate

Everyone can understand this. Lawyers usually bill by the hour. CM contractors can too. *The advantage:* Clients should receive regular statements showing the time worked and a short note about what was completed in each time period. If there's a dispute about any item billed, the amount in question is likely to be small. Presumably, each statement will be paid before the next statement is sent. So there shouldn't be any surprises. *The disadvantage:* Some clients may wonder if you're really putting in all that time. There won't be a time clock available where you're working. And, most of all, there's no limit to an hourly fee. The longer the job drags on, the more fees accumulate. There's no financial incentive to finish the job quickly. The solution is to put a cap on the total fee payable. The fee for the entire job can't exceed a certain amount. That can reassure an owner who's sensitive on the issue of cost. But

a fee cap can also reduce an owner's incentive to make good use of your time. So, you'll need to be diligent when it comes to keeping the job on schedule or your hourly rate will drop.

Note that a cap on the CM fee is not the same as a guaranteed maximum price (GMP). We'll cover that later.

"The CM's fee is a set amount no matter how much time is required and no matter how long the job lasts."

Lump Sum

The CM's fee is a set amount no matter how much time is required and no matter how long the job lasts. This fee plan will work best on small jobs that are likely to be completed in a month or two. If the job will last many months, there will be an issue of how much is due on each statement date. A CM contractor has a financial incentive to front-load charges (larger payments at first). An owner will prefer back-loaded charges (higher payments due on completion). Another disadvantage is that if a lump sum project takes longer than expected, you can end up working for free for the period beyond what you anticipated and based your fee on.

Weekly or Monthly Charge

For example, if the job lasts 40 weeks and the rate is \$2,500 per week, the total charge would be 40 times \$2,500, or \$100,000. Whether paid by the week or month, have a clear understanding about pro-rating any month or week before work starts, after work ends and during periods when work stops. It's common to have jobs delayed due to bad weather, material or labor shortages, code problems, or funding issues. Your fee agreement should identify what happens during an extended delay. *The advantages:* Compensation on a weekly or monthly basis will be a good choice when a CM contractor works substantially fulltime on a single job from start to completion. This is very similar to working on salary as an employee. *The disadvantages:* Not every job needs a fulltime CM. On a smaller job, the CM may be required only a few hours a week. But again, the customer will see there's no incentive for you to complete work on time or within budget.

Percentage of Construction Cost

This is where fee agreements begin to get more complex. Selecting the percentage is the easy part. Five to 10 percent is common on a smaller job such



as a residence. On a large job, such as an airport or power plant, the CM contractor's fee could be as little as one or two percent. When a CM contract is offered for public bid, CM contractors may compete on the basis of their percentage. The contract will usually be awarded to the CM contractor with the lowest percentage bid.

It's important to identify very precisely what's included in the definition of "construction cost." The list of what's included and what's excluded should be very complete — resolving every possible issue, including all change order costs. Your CM contracts should include very precise definitions of construction costs for each of four possible cost categories:

- labor
- materials
- equipment
- subcontracted services

Usually the CM contractor's fee will be a percentage of all four cost categories. But in a rare case, the agreement may exclude one or more of these categories from the definition of construction costs.

CM contracts routinely exclude from the definition of construction cost:

- compensation of design and engineering professionals
- the cost of buying or owning land or rights-of-way
- financing costs
- legal fees
- court costs or the cost of arbitration
- charges imposed by government authority on the owner of the construction site
- the CM contractor's fee

The CM contractor usually sends an invoice at the end of each pay period based on payments made to contractors and suppliers during that pay period. The most common pay period is monthly, although it can be done by phases such as: grading, concrete, or framing.

One word of caution. Any time the CM contractor's fee is based on the construction cost, the CM contractor needs the right to audit the owner's cost records. The CM contractor won't necessarily see all invoices for work done and materials supplied. To make sure *all* costs are considered when calculating the fee, the CM contractor needs the right to inspect and copy the record of construction costs paid by the owner.

Guaranteed Maximum Price (GMP)

To this point in our discussion of CM fees, we've considered only the consulting fee. We haven't considered the construction cost. But any of the fee agreements considered so far (hourly, lump sum, weekly, monthly or percent of job cost) could include a GMP. This is usually called an *at risk CM contract*, or CM@R. The CM shares in any savings if costs are less than the GMP. But the CM may have to pay some portion of the difference if there's a cost overrun. For example, if the division is 80-20, the CM contractor would receive 20 percent of any savings below the GMP. The same split could be used to share in any cost overrun. The owner might pay 80 percent and the CM contractor might have to contribute 20 percent. Obviously, the CM has a heavy financial incentive to deliver the completed project for less than the GMP.

CM@R contracting is a potential win-win-win for contractors. First, because it's a CM contract, most of a general contractor's worst headaches are shifted to the owner: disputes about payment, liens, warranty, contractor claims, change orders, code compliance, etc. Second, because it's a CM contract, you're going to get paid for your time. Your fee is guaranteed. Third, even though it's a consulting contract, you can earn more than the consulting fee. A CM@R contract sets the maximum cost to the owner (excluding change orders) and provides a formula for division of any savings below that amount.

Another advantage of a GMP contract: Six states currently require that contracts for home improvement work show the actual cost of work to the owner.

- California — Business and Professions Code § 7159(d)(5)
- Illinois — Compiled Statutes Title 815, § 513/15
- Massachusetts — General Laws 142A, § 2(a)(5)
- Nevada (residential pools only) — Administrative Code § 624.6958-2(f)
- Pennsylvania — Statutes Title 73, § 517.7(a)(8)
- Tennessee — Code Annotated § 62-6-508(a)(5)

A CM contract based on an hourly rate or even a lump sum doesn't qualify under these state laws because there's no set amount for the work. A CM contract with a GMP qualifies under the law in all six states because there's a set maximum price for the work. In these six states, the CM contractor can share in any savings on a home improvement job if the CM also agrees to absorb any cost overrun (exclusive of change orders).

The website: <http://PaperContracting.com> includes sample CM@R contracts for both residential and commercial construction. The download is free.

Where We're Headed

Obviously, this chapter has been a sales pitch. If you haven't offered your services as a CM before, we hope this discussion has convinced you to give it a try. We've also used this chapter to define essential terms. What follows is your CM toolbox — the practical tools you need to make a good living as a CM contractor. We'll start with a horror story, a CM job done exactly wrong.

Managing construction is taming chaos. A successful CM consultant needs good ways to monitor and control project development. The same control system should do "what if" analysis to anticipate problems on their way to becoming expensive mistakes. We're going to call this system the CM contractor's *control loop*. The objective is to provide sound recommendations to the owner on critical construction issues: time, costs, resources, cash flow and scope of the work. If a project is on track to bankrupt an owner, someone should warn the owner as soon as possible. That's a CM's job, as you'll see in the twelve chapters that follow.

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Online Preview

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