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CONSTRUCTION LAW

Construction Management Agreements: Defects and Failures



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This is the third in our series of articles dealing with construction management agreements (CMAs). In this article we address construction defects and failures, specifically those arising from faulty workmanship or materials. We will also offer a checklist of selected provisions for inclusion in CMAs designed to protect the owner against construction defects and failures. While the checklist is not a complete statement of all provisions to be included in a CMA, it will provide a road map to a comprehensive agreement.

Cause of and Responsibility

During the course of any given project, and after completion of construction, defects in design, workmanship and materials may be observed through an inspection of the work by any member of the project team, i.e., the owner, its architect and engineers (the A/E team), the construction manager (CM) or a subcontractor,

or by a failure of an element of the work, such a leaking roof or a malfunctioning HVAC system. The inquiry then becomes which party is responsible for the defect or failure and how should the problem be addressed.

As a general proposition, the A/E team is responsible for design deficiencies and the CM and its subcontractors are responsible for construction deficiencies; however, the A/E team may become responsible for construction defects by reason of inadequate review of the work in place and the CM may become responsible for failing to alert the owner to an obvious design deficiency in the plans of the A/E team. In either case, this secondary liability does not absolve the prime wrongdoer of responsibility for the initial deficiency.

CMA Protections of the Owner

A properly drafted CMA should address the CM's responsibilities to (1) review the plans and specifications (the drawings) of the A/E team and alert the owner to patent deficiencies or clashes in the drawings, and (2) perform the

work as specified in the drawings and other contract documents (collectively, the contract documents) and correct defective and nonconforming work.

Typically, CMAs cover CM services before and during the physical construction of the project. The CMA should provide that during the preconstruction phase, the CM shall:

- work with the A/E team in developing a constructible project;
- review the drawings and make recommendations to the owner and the A/E team in order to provide assistance and assure coordinated code compliant drawings;
- identify omissions, discrepancies, inconsistencies and deficiencies (a) in or among the drawings; (b) between the drawings and observable existing conditions at the project site; and (c) which may conflict with applicable laws, rules, codes and regulations, to the extent known to the CM;
- make recommendations regarding the selection of subcontractors and the division of work in the contract documents taking

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into consideration such factors as time of performance, availability of labor, and overlapping trade jurisdictions; and

- give due consideration to (a) maximizing the ease and degree of enforcement of subcontractors' guaranties and warranties; (b) minimizing the ability of subcontractors to shift blame for delays, improper integration of work into the project and defects in materials or workmanship; and (c) minimizing jurisdictional overlap or disputes for enforcement of the subcontracts.

The CMA should also provide that, during the course of the work, the CM shall:

- perform its work in accordance with the highest construction industry standards and practices for the type of project involved;
- provide all construction necessary to result in a completed, integrated, first-class and functioning project;
- coordinate the work between and among the subcontractors;
- perform all construction necessary to result in a completed and functioning project, notwithstanding any minor errors or omissions in the drawings;
- perform the work in compliance with all applicable federal, state, city and other local laws, codes, ordinances, regulations and orders, as well as applicable regulations of any other body with jurisdiction over the project and cause its subcontractors to do likewise;
- require its subcontractors to perform and complete their respective portions of the work

in accordance with the contract documents;

- follow the owner's instructions regarding the removal or uncovering of portions of the work and cause any nonconforming work to be corrected so as to conform to the contract documents;

- generally review shop drawings prepared by its subcontractors for constructability; and

- implement, oversee, supervise and monitor the work of its subcontractors to protect the owner against defects and deficiencies.

Finally, the CMA should provide that, upon the discovery defects or failures, the CM shall:

- stop and cause correction of work or reject work that is not in compliance with the contract documents;

- directly enforce the subcontracts and all warranties and guarantees required by the contract documents;

- supervise the correction of the defective work; and

- pursue claims under applicable bonds or subcontractor default insurance.

Cost of the Correction of Defects

The CMA will govern the CM's ultimate responsibility for the cost of the correction of defective work. Generally speaking, builder's risk or property insurance will cover damages to other elements of the project caused by defective work. Under a CMA where there is a guaranteed maximum price, the cost to correct defective work will initially be borne by the CM, which may have

recourse to the CM's contingency or to the responsible subcontractor and any bond or subcontractor default insurance which may be available.

Under a "cost plus" CMA, the cost of correcting defective work is generally a reimbursable cost of the work to the CM unless the CM failed in its responsibility to the owner, such as failing to monitor the work of the subcontractors. And even then, the CM might have recourse to the responsible subcontractor and bonds or insurance covering the subcontractor's work. Alternatively, a form of hybrid "cost plus" CMA may be used, where the CM is initially responsible for the cost of correcting defective work but may look to a limited contingency established for that purpose, as well as any bonds or subcontractor default insurance.

Regardless of the form of CMA used, the CM has the ultimate responsibility to guard the owner against defective or nonconforming work. Utilization of the provisions outlined above will solidify that responsibility to the owner.