

Rebuilding Texas: The 2 Types Of Construction Management

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In late August of 2017, Hurricane Harvey dropped a staggering 40-61 inches of rain across southeast Texas. Individual drops of water combined to create over \$180 billion worth of estimated damages to public and private buildings and structures statewide. The federal government has committed substantial dollars toward reconstruction efforts with the promise of more dollars to follow. Many public entities will be the recipients of those federal rebuilding dollars. For members of the construction industry who plan to enter the Texas market, and for those already in the private Texas market who wish to engage in public projects, there are important aspects to know about Texas public procurement law.



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Texas public procurement statutes allow for several alternative delivery methods on public projects. This article explains how Texas public procurement statutes regulate the construction manager-agent and the construction manager-at-risk project delivery methods. (This is the second article in a five-part series. The first part **provided** an overview of public procurement in Texas.)



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The Difference Between a Construction Manager-Agent and a Construction Manager-at-Risk

Construction management is commonly divided into two types, construction manager-agent (CM-agent) and construction manager-at-risk (CM-at-risk).

The intended benefit of having a “construction manager” involved in a project is to provide a contractor/builder perspective into the process during the design period. A skilled construction manager can provide input on value engineering, perform constructability and budget reviews, and provide a contractor’s input during the design of the project. This, in turn, should help cut down on avoidable issues during construction and provide an optimized design/construction experience for the owner of the project. The key difference in a CM-agent and a CM-at-risk is what occurs after the project moves out of design and then into construction.

A CM-agent performs the role expected of an agent in an agency relationship, acting as a representative of the owner of the project. A CM-agent exclusively serves the interest of the owner, advises the owner, and helps the owner to make critical decisions regarding the project. In this role, the CM agent does not

take on any contractor risk regarding the project's timeline or budget because the CM-agent does not serve as the constructor of the project. The CM-agent provides guidance to the owner while the owner contracts with trade contractors directly (multiprime) or with a separate general contractor to provide the actual construction of the work. While serving in this role, the CM-agent must be mindful of its actions because it represents the governmental entity in a fiduciary capacity. This fiduciary relationship means that the CM-agent owes the governmental entity the highest standard of care and loyalty under the law.

In contrast, a CM-at-risk is a delivery method by which the CM-at-risk turns into the constructor of the project when the project moves out of the design phase and into the construction phase. The CM-at-risk operates as a general contractor, holding a single contract with the owner and all of the subcontracts with subcontractors. In this role, the CM-at-risk takes on the schedule and monetary risks for constructing the project and maintaining the schedule.

Limits on the Construction Manager-Agent

The contract between the government entity and the CM-agent may require the CM-agent to provide administrative personnel, equipment necessary to perform certain duties, on-site management, and other services specified in the contract. However, in its limited role as agent to the owner, there are many tasks a CM-agent may not take on. A CM-agent may not self-perform any part of the public project, including construction, construction, rehabilitation, alteration or repair. In addition, a CM-agent may not be a party to any of the construction subcontracts.

Use of an Architect or Engineer

Whether the governmental entity/owner uses a CM-agent or a CM-at-risk (or both as a manager and then a separate delivery method) the project owner/entity must first select an architect or engineer to prepare the construction documents for the project. Texas law restricts whether an architect or engineer is allowed to function in its typical role and then also operate as a construction manager. The architect or engineer is only allowed to also serve as the CM-agent if the services it provides are those customarily provided by those professions, or if the architect or engineer is hired into such a position through a separate selection process. Texas law imposes a greater restriction on CMs-at-risk. The architect or engineer, or even entities related to the architect or engineer, may not serve in the CM-at-risk role, regardless of role or selection process.

An entity is considered "related" to the governmental entity's architect or engineer if there is any relationship in which the governmental entity's architect or engineer has an ownership interest, or is subject to common ownership or control, or is party to an agreement by which it will receive any proceeds of the CM-at-risk's payments from the governmental entity.

Provision of Performance or Payment Bonds

A CM-agent may not provide, or be required to provide, performance bonds or payment bonds for the project. Instead under this method of management, the governmental entity/owner shall secure a general contractor, or trade contractors who will serve as the prime contractor for their specific portion of the work, who will then provide performance and payment bonds to the governmental entity.

Compare the CM-at-risk, who may be required to provide performance or payment bonds. Texas law specifies that if a fixed contract amount or guaranteed maximum price is not determined at the time the

contract is awarded, the penal sums of the performance and payment bonds delivered to the governmental entity must each be in an amount equal to the construction budget, as identified in the request for proposals or qualifications. The public procurement statutes mandate that the CM-at-risk deliver the bonds by the tenth day after contract is executed, unless other financial security acceptable to the governmental entity/owner is provided until a guaranteed maximum price is established.

Construction Manager-Agent and Construction Manager-at-Risk Selection Process

A Texas public entity is required to select a CM-agent in the same manner that it would select an architect or engineer, which, as required by Texas statute, is on the basis of demonstrated competence and qualifications.

The CM-at-risk may be selected in a one-step or two-step process, through which the entity/owner determines which proposal provides the best value.

Construction Manager-at-Risk One-Step Selection Process

The one-step process allows the governmental entity/owner to prepare a single request for proposals. The single request must include a statement as to whether the selection process is a one-step or two step process; general information regarding the project such as scope, schedule, information about the project site, selection criteria and each criterion's weighted value, estimated budget, time and place for receipt of the proposals or qualifications; and all other information that may assist the entity in its selection of the CM-at-risk. The entity must state all of its selection criteria in its request and may also request proposed fees and prices.

Construction Manager-at-Risk Two-Step Selection Process

The first step of the two-step process is called the initial request for qualifications and allows the governmental entity to obtain the same information as in the one-step process, with one exception. If a two-step process is used, the governmental entity may not request fees or prices in step one.

In the second step, the governmental entity may request that up to five "offerors" (Texas' statutory language for those who submitted proposals) provide additional information to the entity. At this time, the entity may request the offerors' proposed fees and prices. The entity is required to select this narrowed down pool of offerors solely on the basis of their qualifications. The governmental entity is then required to publicly open and read aloud the names of the offerors, and the submitted fees and prices if any are stated, in the individual offeror's proposal.

From the point that the final proposal is opened, the entity has 45 days to evaluate, rank each submitted proposal, and determine which proposal is the best value. The governmental entity must select the offeror that submits the proposal that comprises the best value to the entity based upon the published selection criteria and on its ranking evaluation.

After the entity makes its selection, it must attempt to negotiate a contract with the selected offeror. If the governmental entity is unable to negotiate a satisfactory contract with the selected offeror, the governmental entity must provide the offeror with written notice that negotiations are ending. The entity may negotiate with the next offeror in the order of the selection ranking until a contract is reached or negotiations with all ranked offerors end. The entity is required to make the rankings public within seven days of the date the contract is awarded.

Construction Manager-at-Risk Performance

Once a contract is established between the entity and the CM-at-risk, the CM-at-risk may fully step into its role and begin to publicly advertise for bids or proposals from trade contractors or subcontractors for the performance of all major elements of the work that is identified in the general conditions.

Texas law even allows a CM-at-risk to perform portions of the work itself if the manager meets two requirements. First, the CM-at-risk must submit its bid or proposal for the work in the same manner as all other trade contractors or subcontractors; and second, the governmental entity must find that the CM-at-risk's proposal offers the best value for the governmental entity.

The CM-at-risk is required to turn over all trade contractor or subcontractor bids and proposals to the governmental entity if requested. In addition, the CM-at-risk is required to publicly disclose subcontractor bids by the seventh day after the final selection of bids, or on the day the contract is awarded, whichever occurs last.

Texas law provides the CM-at-risk with protections as it carries out its performance. For example, if the CM-at-risk goes through the above process and recommends that a specific proposal from a specific trade contractor or subcontractor be accepted, and the governmental entity disagrees, the CM-at-risk may be entitled to compensation. If the owner requires that a different proposal be accepted, the governmental entity is required to compensate the CM-at-risk for any additional costs or risks that the CM-at-risk incurs because of the governmental entity's necessity that another bid or proposal be accepted. In addition, if a subcontractor defaults or fails to perform under its subcontract, the CM-at-risk may, without any type of advertising, either fulfill the contract requirements on its own or select a replacement subcontractor to fulfill the contract requirements, allowing the CM-at-risk to help mitigate any delays .

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