

Alternative Delivery Methods

David Wells
Construction Arbitration & Mediation LLC

August 18, 2006



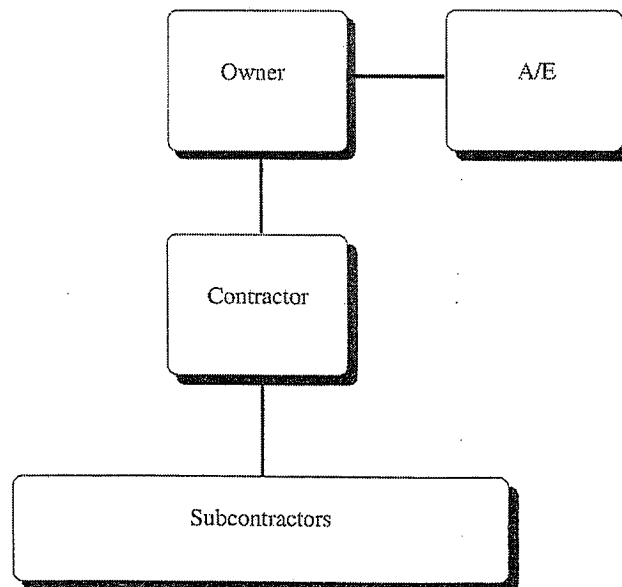
Alternative Delivery Methods

David Wells
Construction Arbitration & Mediation LLC

August 18, 2006

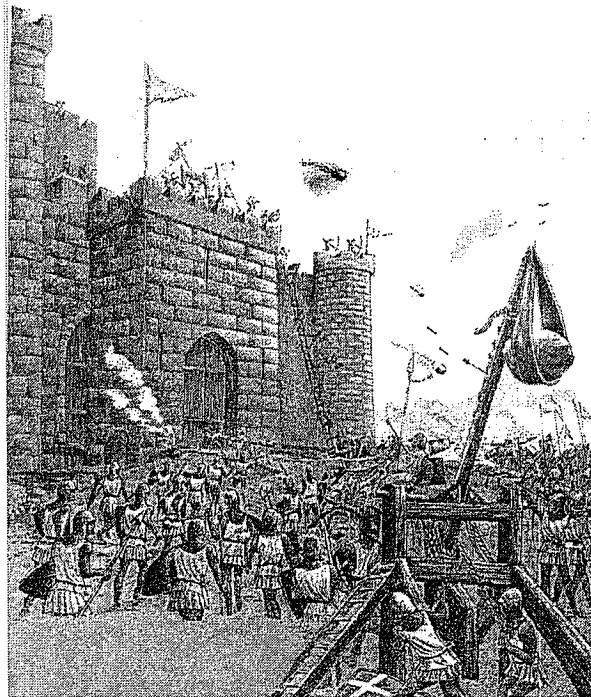
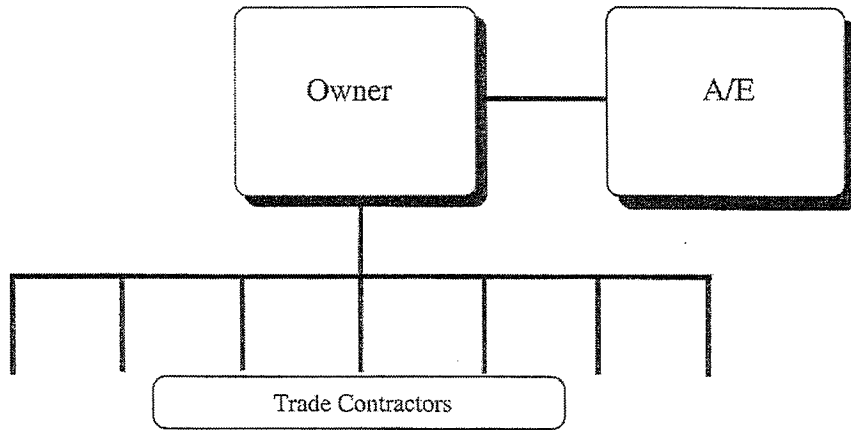


Traditional





Multiple Prime Contractors





AIA DEFINITIONS A-201 GENERAL CONDITIONS

- 1.1.3 THE WORK

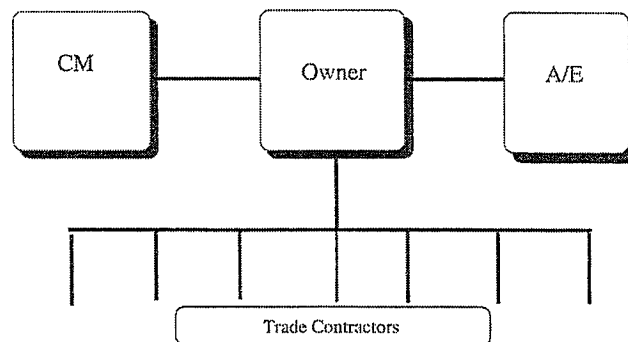
The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

- 1.1.4 THE PROJECT

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors.

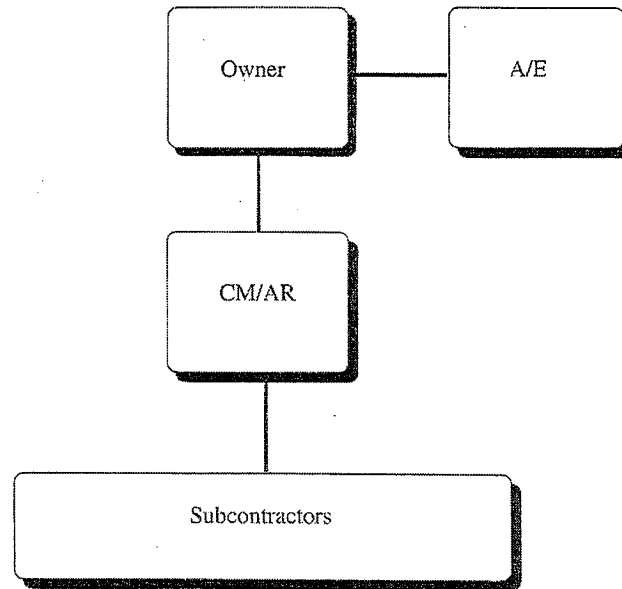


Agent Construction Manager





Construction Manager/At Risk



PROCUREMENT OF CM SERVICES / PREFERENCE

- 16-6-701. Definitions.
(vi) "Construction manager agent" means a type of construction management delivery where the professional service is procured under existing statutes for professional services. The construction manager agent is a construction consultant providing administrative and management services to the public entity throughout the design and construction phases of a project. Under this delivery method, the construction manager agent is not the contracting agent and is not responsible for purchase orders;
* * * * *
- 16-6-707. Construction management alternate delivery method.
(a) Excluding contracts for professional services, construction management delivery negotiations by public entities and construction managers shall be in accordance with residency and preference requirements imposed under W.S. 16-6-101 through 16-6-107.
* * * * *



PROCUREMENT OF CM SERVICES / PREFERENCE (continued)

- 16-6-707. Construction management alternate delivery method.
 - (b) Formal requests for proposal for preconstruction or construction services by a construction manager submitted by a public entity shall require at least the following information:
 - (i) The location of the primary place of business;
 - (ii) The name and identification of individuals to be assigned to the project;
 - (iii) Experience with similar projects;
 - (iv) Qualifications;
 - (v) Ability to protect the interests of the public entity during the project;
 - (vi) Ability to meet project budget and time schedule requirements; and
 - (vii) Excluding contracts for professional services, compliance with W.S. 16-6-102. [Preference]



CM/A BONDING

- 15-1-113. Contracts for public improvements.
 - (d) Every contract shall be executed by the mayor or in his absence or disability, by the president or other presiding officer of the governing body and by the clerk or designee of the governing body. The successful bidder or respondent shall furnish to the city, town or joint powers board a bond as specified in the advertisement, or if the contract price is one hundred thousand dollars (\$100,000.00) or less, any other form of financial guarantee satisfactory to the city, town or joint powers board. The bond or other form of financial guarantee shall meet the requirements of W.S. 16-6-112.

* * * * *



CM/A BONDING (continued)

- 16-6-112. Contractor's bond or other guarantee; when required; conditions; amount; approval; filing; enforcement upon default.
 - (a) . . . The bond or other form of guarantee shall be:
 - (ii) For the use and benefit of any person performing any work or labor or furnishing any material or goods of any kind which were used in the execution of the contract, conditioned for the performance and completion of the contract according to its terms, compliance with all the requirements of law and payment as due of all just claims for work or labor performed, material furnished and taxes, excises, licenses, assessments, contributions, penalties and interest accrued in the execution of the contract;
 - (iii) In an amount not less than fifty percent (50%) of the contract price unless the price exceeds one hundred thousand dollars (\$100,000.00), in which case the appropriate officer, agent or the governing body may fix a sufficient amount;



AIA DEFINITIONS A-201 GENERAL CONDITIONS

- 1.1.3 THE WORK
The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.
- 1.1.4 THE PROJECT
The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors.



CM/AR SERVICES

- 16-6-701. Definitions.
 - (vii) "Construction manager at-risk" means a type of construction management delivery in which the construction manager at-risk is an advocate for the public entity as determined by the contracts throughout the preconstruction phase of a project. In the construction phase of a project, the construction manager at-risk is responsible for all project subcontracts and purchase orders and may conduct all or a portion of the construction project work. Under this delivery method, the construction manager at-risk is responsible for providing a guaranteed maximum price for the project to the public entity prior to commencing the construction project and the construction manager at-risk shall be required to bond any project with a guaranteed maximum price in excess of one hundred thousand dollars (\$100,000.00) in accordance with W.S. 16-6-112;

* * * * *



CM/AR SERVICES (continued)

- 16-6-112. Contractor's bond or other guarantee; when required; conditions; amount; approval; filing; enforcement upon default.
 - (a) . . . The bond or other form of guarantee shall be:
 - (ii) For the use and benefit of any person performing any work or labor or furnishing any material or goods of any kind which were used in the execution of the contract, conditioned for the performance and completion of the contract according to its terms, compliance with all the requirements of law and payment as due of all just claims for work or labor performed, material furnished and taxes, excises, licenses, assessments, contributions, penalties and interest accrued in the execution of the contract;
 - (iii) In an amount not less than fifty percent (50%) of the contract price unless the price exceeds one hundred thousand dollars (\$100,000.00), in which case the appropriate officer, agent or the governing body may fix a sufficient amount;



CM/A SERVICES

- 16-6-701. Definitions.
 - (a) As used in this act:
 - (vi) "Construction manager agent" means a type of construction management delivery where the professional service is procured under existing statutes for professional services. The construction manager agent is a construction consultant providing administrative and management services to the public entity throughout the design and construction phases of a project. Under this delivery method, the construction manager agent is not the contracting agent and is not responsible for purchase orders;



**MULTIPLE PRIME
AND
CONSTRUCTION MANAGEMENT
PROJECT DELIVERY METHODS**

Copyright © 2006 by David C. Wells
All Rights Reserved

The key to the delivery of a project on time and within budget is the engagement of qualified people. Specifically, where an owner surrounds itself with well qualified design professionals, construction firms, attorneys, financial advisers, insurance personnel and sureties the owner is in the best position to achieve satisfaction with the completed project and minimize the exposure to claims and litigation. It is the reputation for quality performance and not the contract provisions, lowest bid or other financial considerations which is the key ingredient.

1. WORK BY OWNER OR BY SEPARATE CONTRACTORS

The multiple or parallel prime contractors method of project delivery consists of an owner who, rather than contracting with a single prime contractor for construction of the entire project, lets individual contracts for portions of the overall construction. For example, the owner contracts separately with site preparation, general, mechanical, electrical and possibly a myriad of other trade and specialty contractors. In doing this the owner perceives that it can eliminate the general contractor's markup of overhead and profit on subcontracted work, eliminate layering of bonds, and keep bid packages low enough to permit local bidders to participate thereby keeping more of the project cost in the local economy.

Multiple prime contracts are seen with some frequency, usually where the project is being fast-tracked, built in phases, built with the various trade contractors working concurrently in the same areas, and in larger projects where a shell is constructed and separate contractors are engaged for tenant fitup and finish.

On the surface this approach looks attractive. Not readily apparent, though, are some very serious potential problems and legal responsibilities. For example, it takes a very knowledgeable and sophisticated owner to undertake the role of a general contractor, which is what the owner is doing when it elects this method. In particular, the owner must provide for the scheduling and coordination of the work of the various trade contractors throughout the period that the multiple primes are on the job. Also the owner undertakes responsibility for jobsite safety, resolution of labor disputes between union and nonunion contractors, and a whole host of other obligations. Usually the owner does not have this in-house capability, doesn't provide for it, and ends up in a nightmare of claims and disputes.

In Article 6 of the AIA General Conditions A201, 1997 Edition, the owner reserves the right to perform portions of the project with its own forces as well as to award separate contracts. (¶6.1.1) The article also requires that the owner provide for coordination of the activities of the

owner's own forces and of each separate contractor with the work of the contractor (§ 6.1.3), requires mutual responsibility of the various parties for the introduction and storage of their materials and equipment as well as the connection and coordination of their work (§ 6.2.1), the reporting of defects in the work of a prior contractor which interfaces with the work of the follow-on contractor (§ 6.2.2), the responsibility for defective or ill-timed work (§ 6.2.3), the remedying of damage to the work of another contractor or the owner (§ 6.2.4), and project cleanup (§ 6.3.1). The Engineers Joint Contract Documents Committee Standard General Conditions of the Contract 1910-8, 1996 Edition, contains similar provisions in article 7.

a. Coordination of Multiple Primes

There is very little case law specifically applicable to these portions of Article 6. Most of the disputes surrounding the owner's right to award separate contracts arise out of the issue of the owner's responsibility for the coordination of the work of the various prime contractors. Applicable case law almost uniformly imposes a duty upon the owner to coordinate the work of its own forces and its separate contractors where the owner has elected to use the multiple prime approach to project delivery.

i. Federal Projects

The federal government is the largest owner of projects in the world, and awards more contracts than anyone else. From time to time it awards multiple prime contracts, although there is no applicable statute requiring the use of multiple primes. Based upon the use of this approach a body of law has developed which places the duty and legal responsibility upon the government to coordinate the work.

In one of the first reported government decisions on the issue, the Court of Claims found the government responsible for coordination. Hoffman v. United States, 340 F.2d 645 (1964). In Hoffman, the contract required the separate contractors to cooperate with each other, and to fit their work with that of the other contractors. When one contractor severely interfered with the work of the complainant, the complainant asked for the Contracting Officer (CO) to intervene. The CO refused to become involved and responded to the complainant's request by stating:

... it is incumbent upon you to meet fully the requirements of your contract, to cooperate and coordinate your efforts with the state contractor for your mutual benefit ... page 650

In finding the government liable, the Court of Claims stated:

... for the Board to say, under the circumstances where the Contracting Officer himself found the acts of the contractor upstream to be the cause of plaintiff's delay, that the 'Contracting Officer is not designated by the contract as the arbiter and quite properly refused to take side in the matter' is a complete and unwarranted disavowal of all

responsibility on the part of the government to direct or require cooperation from anyone (except plaintiff). (page 650)

The Hoffman decision was followed two years later by L.L. Hall Construction Company v. United States, 379 F.2d 559 (1966). Again, where the activities of one contractor delayed plaintiff contractor the government was found liable. The court stated:

. . . the government may not, with impunity, do whatever is in the its own best interest regardless of the harm which may be done to its contractor. . . . It is plain that the government is obligated to prevent interference with orderly and reasonable progress of a contractor's work by other contractors over whom the government has control. . . . (page 564)

In Paccon, Inc. v. United States, 399 F.2d 162 (Ct.Cl. 1968), the multiple prime issue with the same clause requiring each contractor to cooperate and coordinate its work with the other prime contractors, was presented. Once again, the legal result was the same.

This rule was reaffirmed again in Baldwin-Lima-Hamilton Corporation v. United States, 434 F.2d 1371 (Ct.Cl. 1970). In Baldwin the court stated:

The use of separate prime contracts, in lieu of a single contractor who then subcontracts the separate elements of the power unit, undoubtedly resulting in savings by avoiding the pyramiding of profit and overhead. But it correspondingly shifts to the government the management responsibility originally vested in a single prime contractor. (note 20, page 1389)

In accord with the foregoing is Pierce Associates, Inc., 77-2 GSBGA ¶ 12,946.

ii. Non-Federal Projects

Applicable case authority is not limited to the federal government. In fact, although not utilizing the phrase "duty to coordinate", the reported cases go back at least to Stehlin-Miller-Henes Co. v. City of Bridgeport, 117 A. 811 (Conn. 1922). In Stehlin, multiple prime contracts were let for the construction of a high school. The contractor initiated an action against the owner arising out of delays caused by another prime contractor. In finding for the contractor, the Connecticut Supreme Court stated:

. . . The rule is undoubted in circumstances such as were present in this case that an implied contract arose on the part of the defendant (owner) to keep the work on the building, whether done by itself or other contractors, in such a state of forwardness as would enable the plaintiff to complete its contracts within the time limited. (page 813)

This case is followed by Byrne v. Bellingham Consol. School District No. 301, Whatcom County, 108 P.2d 791 (Wash. 1941), another multiple prime project for construction of a school

building. In this case an action for damages arising from scheduling delays was brought on behalf of the electrical contractor holding a separate contract with the school district. The contract contained provisions requiring each contractor to coordinate its work with the other contractors, and the entitlement to time extensions for delays caused by the owner's separate contractors. In finding the school district liable for the damages resulting from scheduling delays the Washington court stated:

. . . Respondent (School District), on the other hand, was obligated, under the clear implications of the contract to have and to keep the building in such a state of forwardness as would enable Watts and appellant to complete their contract within the time specified. The principle of law affecting respondent's reciprocal obligation has been frequently stated and upheld. (page 795)

* * * *

The fact that the delay, in this instance, may have been caused by the general contractor does not absolve the respondent. From the legal aspect respondent was required to do, or to have done, the work of constructing the building into which the electrical work has to be installed

The rule announced by the courts in practically every state in the union, including this state, is that, in the absence of any provision in the contract to the contrary, a building or construction contractor who has been delayed in the performance of his contract may recover from the owner of the building damages for such delay is caused by the default of the owner Such right of recovery is predicated upon the breach of what we have already stated is an implied obligation on the part of an owner to furnish to the contractor a building in a state of forwardness sufficient to enable the contractor to complete his contract within the time limit. (pages 795 and 796)

For additional cases on the state of forwardness, see: J.J. Brown Co. v. J.L. Simmons Co., 118 N.E.2d 781 (Ill. App. Ct. 1954); and Studer v. Rasmussen, 344 P.2d 990 (Wyo. 1959).

The State of New York, by its State Financial Law, Article 9, Section 135, et. seq., requires the awarding of multiple prime contracts on all state buildings with a contract value in excess of \$50,000.00. The statutory sections do not impose any duty on the part of the state to coordinate the work, however, the case authority in that jurisdiction has imposed such a duty.

In John Weil Plumbing Corporation v. State, 45 N.Y.S.2d 456 (1943) a claim arose out of the State's failure to coordinate the work of the several primes. The Supreme Court, in finding the state liable, stated:

It is well established that the State is liable for the damages occasioned a contractor by the default of a general contractor who undertakes contemporaneously to perform and complete work on the same completion date. (page 459)

This case was followed in 1960 by Snyder Plumbing & Heating Corp. v. State, 198 N.Y.S.2d 600 (1960) again involving four prime contracts. In Snyder the court said:

Under circumstances such as these, the State has a duty to exercise due diligence to coordinate the work of the various contractors The State may become liable for delay where it unreasonably fails to coordinate the progress the work (page 604)

In 1966, the issue arose in Forest Electric Corp. v. State, 275 N.Y.S.2d 917 (1966). This time the court, while restating the state's duty to coordinate, noted:

The court would like to observe that Section 135 of the State Finance Law, and any other statutory requirement, should be studied with the express purpose of either eliminating or amending the law to permit the State to let such contracts as this one to one bidder, instead of five, six or more bidders, with none having authority over the others but all having the same privilege of screaming for help from the State engineer on the job, whose own efficiency is diluted because too often he has to 'mother' the disputing contractors, rather than perform his primary duty of progressing the job. Experience would indicate that under the prevailing system the State squanders huge sums of money in trying to keep the jig-saw puzzle together, whereas under the one bidder system, the responsibility of efficiency and coordination would not only be upon the one contractor but it would be to said contractor's financial advantage to move with coordination, efficiency and due speed to complete the contract, for the basic reason that the contractor could not place up the shoulders of others, but only upon himself, any blame for a slowdown or uncoordinated work. Were this the case, then the State's engineer would essentially only be called upon to watch the proficiency of the work and not arbitrate either arguments or uncooperation among many contractors.

In yet another New York decision on the same issue but this time considering a waiver issue the Supreme Court stated in New Again Construction Co. v. City of New York, 351 N.Y.S.2d 895 (1974):

The facts disclose that the city representatives and the architect failed to coordinate the work of the several building trades as required, and breached the contract with the plaintiff. The city cannot now, and for its own benefit, avail itself of an alleged waiver of provision in the very same contract . . . the tremendous advantage and protection given the [city] by its own specifications and proposals against the contractors may not be used . . . to thwart the rights of the contractors.

. . . It is unreasonable to suppose that the parties intended to enter into obligations providing for the performance of the work by claimant under a penalty for non-performance within a given period which yet left it optional for the State to facilitate or retard such work at its pleasure or discretion. Any other construction would destroy the mutuality of the agreement and put practically in the power of one party to defeat the performance by the other. . . .

Equity will not permit the city to benefit from its own lack of good faith, nor from its untimely direction to plaintiff to commence work despite the fact that the prerequisite electrical work had not yet been assigned, far less commenced. There is neither justice nor equity nor honor in the [city's] position in this case. It is attempting to accomplish by subterfuge that what no private citizen would be permitted to do. In the performance of its contracts the [city] should be held to the same accountability as would one of its citizens and it should be governed by the rules of common honesty and fair dealing binding on all individuals. (pages 900-901)

The issue of coordination was carried one step further, this time involving the liability of an architect for coordination. In General Building Contractors of New York State, Inc. v. County of Oneida, 282 N.Y.S.2d 385 (Sup. Ct. 1967) the court stated:

It does not appear that the shifting of responsibility for coordination and supervision from the county or its agents, in these cases its architects, may be shifted to any of the prime contractors. The power which the county seeks to imply into the language of the statute is not a necessary one, but merely a convenient one.

If the Legislature had intended to give to the county the power to shift some of its responsibilities and obligations from itself or its architect to one of the prime contractors it could have easily provided for it. Indeed the State Legislature in legislation similar in nature to this statute has chosen to do just that

These statutes which provide for separate contracts were enacted to protect the municipalities and the taxpayers Such is not an issue here because the taxpayers are going to pay for this work or coordination and supervision of the job regardless of who performs it. The practical question is whether it shall be performed by the architects or by one of the prime contractors. Both claim that the other should perform this work. In that connection it is to be noted that in Chapter 16 of The Architect's Handbook of Professional Practice, (Sept. 1963 Ed.) it is stated at page 2: 'Because of its simplicity of administration, the single contract system is the most convenient for the architect, and is generally considered to be the most satisfactory. The separate contract system will result in more work and responsibility for the architect . . . He must assume the role of coordinator of all the prime contractors The administration of multiple contracts is obviously more time consuming than is a single contract.' This language is a clear admission as upon whom the responsibility for coordination and supervision must devolve in a separate-bid contract (pages 389-390)

See also: Websco Construction Corporation v. State, 292 N.Y.S.2d 315 (1966); Visitine & Co. v. New York, Chicago, & St. Louis R. Co., 160 N.E.2d 311 (Ohio 1959); Mason Tire & Rubber Co. v. Cummins-Blair Co., 157 N.E. 367 (Ohio 1927); B&L Painting Company, Inc. v. United Pacific Insurance Co., 527 P.2d 554 (Mont. 1974); J.A. Jones Construction Company v. City of

Dover, 372 A.2d 540 (Del. 1977); and Gasparini Excavating Company v. Pennsylvania Turnpike Commission, 187 A.2d 157 (Pa. 1963).

An aberration to this line of authority is Hanberry Corporation v. State Building Commission, 390 So.2d 277 (1980) from Mississippi. This decision is contrary to all of the other reported case authority on the point, and the basis for it seems to make it distinguishable.

Probably as a result of decisions such as those quoted, a different contractual approach has been employed. In accordance with basic contract law, the parties to a written agreement may, with some exceptions, expressly agree with respect to the transfer of a specific risk. A case in point is Broadway Maintenance Corp. v. Rutgers, 180 N.J. Super 350, 434 A.2d 1125 (1981). In Rutgers, the owner elected to utilize multiple prime contractors, and in the various contracts provided that the general contractor was to coordinate the project, and for the other prime contractors to coordinate their work with the general, with all contractors being intended third party beneficiaries. The contract went on with further express provisions declaring the owner's reliance upon the general to coordinate together with the reliance by each of the other primes on the general, the incorporation of a broad "no damage for delay" provision, an indemnification of the owner from claims for delay and disruption, and establishing the A/E and construction manager as independent contractors to avoid vicarious liability. With all of this in place, the owner successfully avoided liability.

2. CONSTRUCTION MANAGEMENT

a. Definition

There are sufficient variables for the role of the construction manager that the construction industry has not agreed upon a true single definition of what construction management is. Despite the lack of a true single definition, the basic parameters of construction management can be agreed upon in large measure.

b. Approaches to CM

The approaches to construction management run between two extremes: the agent construction manager (CM/A), and the construction manager/contractor or "at risk" (CM/AR).

i. Agency

At the agent extreme, the construction manager serves in a fiduciary capacity, acting as an agent of and advisor to the owner with respect to the design and construction phases, but takes on no subcontracts and performs none of the work with its own forces. This gives rise to the highest duty of care and loyalty on the part of the construction manager to the owner. The construction manager is on the owner's "side", and has a duty to schedule and coordinate the work, as well as

observe the work, and report all defects in construction and other deficiencies in trade contractor performance.

ii. Construction Manager/Contractor or At Risk (CM/AR)

On the other extreme, the construction manager still participates during the design phase, but takes one or more of the subcontracts for actual construction of the project and may self-perform. In this capacity the construction manager acts as an independent contractor.

For those projects where the CM/AR undertakes to provide construction with an agreed contract completion time and cost together with a guarantee of the trade contractors' work, the construction manager has a monetary incentive to keep the cost from exceeding the contract sum. Consequently, its interests no longer coincide with those of the owner, and it is not in a fiduciary capacity.

One concern of the owner's in using the CM/AR approach rests in the potential conflict of interest on the part of the CM/AR. The conflict may arise where the advice of the CM/AR on components and systems to be incorporated into the project may be influenced by the CM/AR's desire for additional profit, or a reduction of its risk to complete the work within the contract price.

c. Professional Organizations

The construction industry has various professional and trade organizations. For example, there is the American Institute of Architects (AIA) which serves the architects, the Engineers Joint Contract Documents Committee (EJCDC) serving the engineers, the Associated General Contractors (AGC), serving the contractors, and the Construction Management Association of America (CMAA) on behalf of the construction managers. Some of these organizations have become involved in construction management and developed their own pre-printed contract forms, with each promoting its own views of the virtues of construction management.

For example, the AIA and CMAA promote pure agency construction management, placing the construction manager in the role of advising the owner during both the design and construction phases, but correspondingly creating more potential owner involvement during the construction phase, with an increase in owner liability. In essence, the construction manager provides the design phase services and manages the project for the owner during construction, but does not undertake to provide any of the physical construction. For this the construction manager is paid a fee for its management and counseling services.

The AGC, on the other hand, approaches construction management with the same design involvement by the construction manager, but during the construction phase the construction manager acts more like the traditional general contractor, taking most, if not all, of the contracts for actual construction. In addition, the AGC approach can be on a lump sum as well as a cost

reimbursement basis, with a guaranteed maximum price option available. Which is the preferable approach? The answer depends upon what the owner wants to accomplish.

As is true with most things in life, there can be places between these two extremes where construction management can be tailor-made to furnish the owner with the desired arrangement. It should be noted that the decision to use construction management and the variables to be established must be made by the owner at or before the time of entering into the contract with the A/E, in order for the A/E contract to be compatible with the relationships created in the construction contract(s).

d. Liabilities of the Parties

Initially, the liability of the parties will be determined by whether the construction manager is an agent of the owner or a CM/AR. This will, in large measure, depend upon the terms of the owner-construction manager contract.

The greater the degree of the construction manager's autonomy the more likely it will be deemed to be a non-agent or a true independent contractor. Therefore, determining the owner's contractual right to control is important, and the right to enforce the scheduling, coordination and other obligations in particular provides an excellent indication of the legal responsibilities.

Some of the other factors a court may use in determining whether the construction manager is an agent or independent contractor include: the length of employment; the method of payment; whether or not the work is a part of the employer's regular business; and the intent of the parties. See also, Restatement (Second) of Agency § 1(1).

i. Scheduling & Coordination

The construction manager's scheduling and coordination responsibilities are the essence of its role, and where it fails to properly discharge that duty, it may be liable in damages based on the theories of negligence, John E. Green Plumbing & Heating Co v. Turner Construction Co, 500 F. Supp 910 (E.D. Mich 1980), breach of contract including third party beneficiary status, Edward J. Dobson, Jr., Inc. v. Rutgers State University 384 A.2d 1121 (N.J. 1978), and intentional interference with contractual relations, Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co., 355 F. Supp 376 (D.C. Iowa 1973).

It is also possible to consider the law applicable to multiple or separate prime contractors.

ii. CM/AR (At Risk)

Where a CM/AR has been employed, except for the preconstruction services, the rights and liabilities of the parties will be established by the existing law that governs the traditional owner, A/E and contractor relationship.

iii. CM/A

When it comes to stating the relative liabilities of the parties in the agency construction management situation, there is relatively little case authority directly on point. This is not to say that the law is not developed. Rather, the answers can be obtained from agency law as well as analogous situations.

Except for the scheduling and coordination responsibilities, the role of the agent construction manager somewhat resembles that of the architect on the traditional project, and construction managers have been held to the same, if not higher, standards to which the architects were initially held under earlier versions of the AIA forms. Lemmer v. IDS Properties, Inc., 304 N.W.2d 864 (Minn 1980); Hammond v. Bechtel, Inc., 606 P.2d 1269 (Alaska 1980); and DiSalvatore v. U.S. 456 F. Supp 1079 (E.D. Pa 1978).

It should be noted that as a provider of professional services the construction manager's status as an agent will not protect it from liability. Gateway Erectors Div of Imoco-Gateway Corp. v. Lutheran General Hospital, 430 N.E.2d 20 (Ill. 1981). However, while being exposed to greater liability to the owner due to a higher duty of care, being an agent may provide some protection against liability to third parties. For example, as the owner's agent, a construction manager may not be liable for nonperformance of the contract between the owner and any separate trade contractor. Gateway Erectors Div. of Imoco-Gateway Corp. v. Lutheran General Hospital, 430 N.E.2d 20 (Ill. 1981). In addition, as a fiduciary, the construction manager's liability to the owner may be limited to damages resulting from professional malpractice or negligence.

iv. Design Errors & Omissions

With regard to its role in reviewing the design, the construction manager has a duty to bring to the A/E's and owner's attention any drawings or specifications that are obviously inadequate, or violate applicable building, safety and fire codes, and may be liable if it fails to meet the standard of care. The construction manager may also be at least jointly and severally liable with the A/E to the owner if it recommends an alternative building system or materials which later proves to be unsuitable. As a result, a construction manager should try to obtain errors and omissions insurance coverage.

v. Cost Estimates

As noted above, the construction manager will frequently provide cost estimating services. Accordingly, a construction manager may be liable for misrepresentation of the cost of construction or negligent preparation of the detailed cost estimate. Reference should be made to case law applicable to architects and engineers where the actual cost significantly exceeds the owner's budget.

vi. **Safety**

All of the pre-printed contract forms place the risk of implementing and enforcing safety programs on the construction manager. Consequently, the construction manager will have substantial liability for job-site injuries.

Where the construction manager is an agent, some degree of protection against this liability can be created by inserting an indemnity obligation in the trade contractor agreements, naming both the owner and the construction manager as indemnitees where a loss is caused by the trade contractor or its employees.

e. **Factors to Consider**

In deciding upon whether to use the construction manager form of project delivery and the assignment of responsibilities, the owner needs to consider:

- i. The desirability of involving a construction manager in the design process.
- ii. Legal risks.
- iii. Whether there should be single or multiple sources of responsibility for design as well as construction.
- iv. Resources available.
- v. Trade contractors selected based upon price rather than past experience.
- vi. The duty of loyalty required of the construction manager, taking into account the potential for conflict of interest.
- vii. Competitive bidding requirements.
- viii. Cost factors including:
 - (1) A single prime contractor's overhead and profit, as well as bonding requirements (the owner should note that any savings here will be offset in part by the construction manager's fee and reimbursables).
 - (2) The method of compensation, i.e., fixed price, cost reimbursement with or without a guaranteed maximum price, etc.
 - (3) Exposure to scheduling and coordination claims.

- (4) Overall potential cost overruns.
- ix. Time factors including:
 - (1) Milestone completion dates.
 - (2) End delivery date.
 - (3) Whether the project will have to be fast-tracked.
- x. Insurance program.
- xi. Whether the owner wants the construction manager to be the A/E, considering the A/E's experience and capability to act as a construction manager, as well as its ability to conceal liability by "sweeping them under the rug". From an A/E's perspective, if it acts as the construction manager, it may be held to a higher standard of care, and be found liable for breach of an implied warranty of fitness for the intended purpose for its design errors.
- xii. Whether the owner wants a CM/AR to be the construction manager considering possible conflicts of interest.

f. Owner Responsibilities

The owner's responsibilities remain substantially the same whether an agent CM (CM/A) or independent contractor (CM/AR) is engaged. For example, the owner will still need to develop its program, engage a design professional and geotechnical engineer, provide the site, surveys, etc.

g. Procurement of Bidding Management Services

One question which arises from time to time on public works projects is whether the services of a construction manager must be competitively bid. The law in some jurisdictions is to the effect that agency construction management is a service, not the construction of a project, and as a service, it does not have to be competitively bid.

h. Compensation

Where an agent construction management is engaged, the compensation will typically be a fixed fee, with a provision for adjustment. However, it can also be done on an hourly basis. In addition to the base fee, provision needs to be made for adjustments as well as reimbursables.

For projects involving a CM/AR, the compensation can be a fixed price. However, most frequently, it is on the basis of cost reimbursement plus a fee. With respect to the fee, it is typically divided into two parts, with one portion attributed to the preconstruction services, and the second portion allocated to the construction phase. The fee will typically include the CM/AR's home office general and administrative or overhead type of expenses, as well as profit. A provision should also be added addressing the fee for changes in the work.

i. Preconstruction Services

One of the large benefits of engaging a construction manager pertains to its performance of preconstruction services. In essence, while the A/E prepares the design, the construction manager reviews that design and provides a different perspective.

During the design phase the construction manager will typically:

- i. Review the owner's program.
- ii. Develop information systems.
- iii. Review suitability of the site.
- iv. Help arrange for appropriate surveys.
- v. Participate in the financial aspects.
- vi. Provide value engineering.
- vii. Analyze availability of materials and labor.
- viii. Recommend materials, building systems and equipment.
- ix. Provide cost estimating services.
- x. Develop a safety program.
- xi. Review the design for feasibility, weaknesses, division of work, etc.
- xii. Help establish time aspects and address any need for long lead procurement.
- xiii. Possibly establish the total cost for construction.
- xiv. Assist with preliminary scheduling and establish scheduling requirements.
- xv. Assist with the insurance program.

- xvi. Assist with bonding requirements.
- xvii. Give input on dispute resolution, processes and procedures.
- xviii. Review the contract documents including recommendations relative to the furnishing of temporary facilities and services.
- xix. Assist in the preparation of bidding documents and information.
- xx. Assist in filing for approvals and permits.
- xxi. Assist with trade contract bidding.
- xxii. Assist with bid evaluation and awards.
- xxiii. Attend various project and public meetings.

j. Construction Phase Services

It is legally permissible for an owner to utilize the services of a construction manager during the design phase and then follow the traditional design-bid-build process for the construction phase by engaging a single prime contractor without a CM. If this method of delivery is used the construction contractor simply performs the role and accepts the responsibilities of the typical general contractor. Also, the owner's and A/E's roles remain as they have traditionally in this approach.

If the construction phase is to be accomplished through a CM/AR, the roles and responsibilities still remain substantially the same as the traditional design-bid-build process.

If, however, an owner engages multiple or parallel prime contractors and does not hire a CM/A, the owner has taken on a vast array of duties and corresponding legal responsibilities. First and foremost, the owner is legally responsible for providing the scheduling and coordination of the work. See. multiple or parallel prime section above. Also the owner will need to discharge all of the duties typically performed by a CM/A as set forth below.

It is with a CM/A during the construction phase that significant changes occur in the roles and responsibilities of all parties concerned, namely owner, A/E, trade contractors and CM/A.

During the construction phase the CM/A will perform many services which are typically performed by a general contractor. In particular the CM/A will help:

- i. Assure that the necessary permits and licenses have been obtained.

- ii. Establish the necessary channels of communication.
- iii. Circulate and participate in RFI's.
- iv. Circulate and review shop drawings and submittals.
- v. Review change order requests.
- vi. Implement all of the scheduling and coordination functions.
- vii. Address claims of delays and time extensions.
- viii. Address claims for money.
- ix. Address claims against the owner attributed to another prime contractor.
- x. Monitor site cleanup.
- xi. Observe the work and report defects and deficiencies.
- xii. Monitor the safety program.
- xiii. Review applications for payment.
- xiv. Make inspections for substantial and final completion.
- xv. Assist in developing punchlists.
- xvi. Assist in project closeout.
- xvii. Assist in warranty work.

One big caveat to CM/A, and something all parties must recognize, is that because the CM/A does not control the money, it has extremely limited means of enforcement. Enforcement must come from the owner. Many owners are simply not up to the task.



12.3

GUARANTEED MAXIMUM PRICE

12.3.1 At the conclusion of the Design Development Phase, Construction Manager shall deliver to Owner a Guaranteed Maximum Price proposal, which shall agree to perform all of the Work even though all of the Construction Documents have not all been finalized and released for construction, and guarantee the maximum price to Owner for the entire cost of the Work, as adjusted by deductive alternates required to maintain the Guaranteed Maximum Price below the Fixed Limit of Construction Cost.

12.3.2 The Guaranteed Maximum Price shall include all of Construction Manager's obligations to be performed pursuant to the terms of the Contract Documents and include, but not be limited to, the total of the following:

- .1 the total of all prices already received for all items bid before the establishment of the Guaranteed Maximum Price;
- .2 Construction Manager's estimate of the cost of all other items to be included in the Work but not yet bid;
- .3 the installation cost of items to be procured by Owner and assigned to Construction Manager for installation;
- .4 Construction Manager's Fee;
- .5 the cost of all Performance and Labor and Material Payment Bonds furnished by Construction Manager pursuant to Article 17; and
- .6 authorized adjustments as set forth elsewhere in this Agreement;

12.3.3 The Guaranteed Maximum Price proposal as set forth in paragraph 12.3.1 shall:

- .1 set forth a stated dollar amount;
- .2 include a reasonable construction contingency;
- .3 set forth a Schedule of Values therefor, which shall be consistent with any previously approved Schedules of Values;
- .4 contain no conditions or exceptions;
- .5 contain no allowances except for those previously approved in writing by Owner;

- .6 not exceed the Fixed Limit of Construction Cost; and
- .7 be substantiated with complete supporting documentation in form and content acceptable to Owner, setting forth all bidding and estimating assumptions and premises, clearly defining the anticipated work to be performed by Construction Manager and facilitate a determination thereafter when final Drawings and Specifications are released for construction purposes as to whether there has been an increase in the Work required of Construction Manager in the documents released for construction from the Design Development Documents on which the Guaranteed Maximum Price was based.

12.3.4 If at any time any Claim is asserted by Construction Manager for an increase to the Contract Sum or Guaranteed Maximum Price and/or extension of the Contract Time because of an alleged increase in the Work to be performed by Construction Manager as contained in the Drawings or Specifications released for construction as contrasted with the drawings and specifications upon which the Guaranteed Maximum Price is based, Construction Manager shall be required to satisfactorily demonstrate the increase in the Work, and if the supporting documentation necessary to make such determination is not sufficiently clear, the doubt shall be resolved against Construction Manager and Construction Manager shall be entitled to no increase in the Contract Sum, Guaranteed Maximum Price, or extension of the Contract Time.

12.3.5 If, in developing a Guaranteed Maximum Price, Construction Manager believes any documentation or information, consistent with the Design Development level of documentation, is not sufficiently complete to clearly define the anticipated work, Construction Manager shall be responsible for making all necessary inquiries and requests to establish the same.

12.3.6 If, through fault on the part of Construction Manager, and after receiving reasonable cooperation by Owner and Architect, Construction Manager submits a Guaranteed Maximum Price proposal contrary to the provisions of paragraphs 12.3.2 and 12.3.3 the proposal may be rejected by Owner; Owner shall be under no obligation to award subsequent Bid Packages; Owner may declare Construction Manager to be in default; and/or payment may be withheld from Construction Manager, excepting Construction Manager's Fee for the Preconstruction Services, until a Guaranteed Maximum Price is furnished in accordance with the foregoing.

12.3.7 When a Guaranteed Maximum Price is agreed upon and accepted by Owner, it will be made part of the Contract Documents by Change Order; will supersede the current Schedule of Values, if any, and estimates of Construction Cost; and will be subject to modification for Changes in the Work as provided in Article 13.

12.3.8 When Construction Manager provides a Guaranteed Maximum Price, all subcontracts for the Work will either be with Construction Manager or will contain the necessary provisions to assign the same to Construction Manager.

12.4 CONTRACT SUM

12.4.1 Subject to the terms and limitations set forth in this Agreement, Owner shall pay in current funds and Construction Manager shall accept as full compensation for Construction Manager's full and complete performance of this Agreement, the Contract Sum, subject to modifications for Changes in the Work as provided in Article 13.

12.4.2 The Contract Sum shall equal the total of:

- .1 The lump sum price for the aggregate of all Bid Packages added to Construction Manager's Work by Change Order;
- .2 The cost of installation of items to be procured by Owner and assigned to Construction Manager for installation;
- .3 The portions of Construction Manager's Fee as set forth in paragraphs 12.5.1 and 12.5.2;
- .4 The cost of all Performance and Labor and Material Payment Bonds furnished by Construction Manager pursuant to Article 17; and
- .5 Authorized adjustments as set forth elsewhere in this Agreement;

ARTICLE 17 PERFORMANCE AND PAYMENT BONDS

17.1 BOND REQUIREMENTS

17.1.1 Subject to the provisions of paragraph 17.1.3 the Construction Manager shall furnish an initial Performance Bond and an initial Labor and Material Payment Bond, each in the full amount of the Contract Sum attendant with the Change Order for the addition of the first Bid Package to this Agreement.

17.1.2 The initial Bonds shall be filed with Owner at the time of execution and delivery of the Authorization to Commence Construction, Exhibit C.

17.1.3 If a Guaranteed Maximum Price has been agreed upon prior to issuance of the first Bid Package, the amount of each of the initial Bonds shall be equal to the Guaranteed Maximum Price. If, however, a Guaranteed Maximum Price is agreed upon after the first Bid Package is added to this Agreement by Change Order, a rider to the Performance Bond and a rider to the Labor and Material Payment Bond, each in an amount equal to the Guaranteed Maximum Price, shall be issued and promptly furnished to Architect.

17.1.4 Unless the initial Bonds are equal in amount to the Guaranteed Maximum Price, the amount of each Bond initially furnished shall be automatically increased as subsequent Change Orders are issued which add Bid Packages to this Agreement, and again as other Change Orders are issued which make changes in the Work. Once a Guaranteed Maximum Price is agreed upon and riders to the Bonds are furnished, if required, the amounts of the riders to the Bonds shall be equal to the Guaranteed Maximum Price, and shall be automatically increased as other Change Orders are issued which make changes in the Work. All automatic increases to the Bonds shall make the total amount of each Bond equal to the full amount of the then current Contract Sum or Guaranteed Maximum Price, whichever is the greater. Any riders to the Bonds and the Bonds as automatically increased shall apply to all Work included within the scope of this Agreement, including but not limited to all work which may have been performed or was by this Agreement required to be performed thereafter, which obligations existed prior to the execution of the riders to or automatic increase in the Bonds. All principals and sureties on all Bonds expressly acknowledge and agree to the terms of this Article and such automatic increases without the necessity for notification of such increase(s) or additional documentation to the Bonds to reflect such increase(s).

17.1.5 All Bonds shall be executed by corporate sureties licensed to transact business in the State of _____ and named in the current list of "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" as published in Circular 570 (amended) by the Audit Staff Bureau of Accounts, U.S. Treasury Department. All Bonds and riders signed by an agent must be accompanied by a certified copy of the authority to act and consent of surety. All Bonds and riders must provide for the Authority and Trustee to be co-obligees, and the form of all Bonds must be acceptable to Owner, Authority and Trustee.

17.1.6 The Performance Bond shall remain in effect through the warranty period and any remedial effort or for such longer term as may be provided by law or regulation or by the Contract Documents, whichever is the greater. The Labor and Material Payment Bond shall remain in effect for not less than the required statutory period. Nothing contained in this Article shall in any way be construed as a limitation on the time within which any action on such bond may be commenced.

17.1.7 Upon the issuance and acceptance of the initial Performance Bond and Labor and Material Payment Bond, the premiums therefor may be included in the first Application for Payment. With any subsequent automatic increases and the issuance and acceptance of the any riders to the Performance Bond and Labor and Material Payment Bond with acceptance of a Guaranteed Maximum Price, which include in the new Bond amounts the amount of any previously issued Bonds, the Owner shall be obligated to pay as the premium thereon only the premium applicable to the increase in Bond coverage in excess of the previously issued Bond coverage. The premiums for all Bonds and increases thereto to be provided by Construction Manager, as well as those subcontractors required to be bonded by Construction Manager, shall be included in the Contract Sum, Guaranteed Maximum Price, and the price of each Change Order, as applicable, and Construction Manager shall not be entitled to additional compensation therefor.

17.1.8 The Construction Manager shall also furnish such other bonds as may be required by the Contract Documents.

17.1.9 If the surety on any Bond furnished by Construction Manager is declared a bankrupt, becomes insolvent, is disqualified from doing business or its right to do business in the State of _____ is terminated, or it ceases to meet the requirements of paragraph 17.1.5 Construction Manager shall, at Construction Manager's expense, and within _____ () days thereafter, substitute replacement Bonds and surety, both of which must be acceptable to Owner, Authority and Trustee.



	D-BB	AGENT CM	CM-AR
KEY IS QUALIFIED PEOPLE			
SPEED OF PROJECT DELIVERY			
fast track possible	NO	YES	YES
COST FACTORS			
Smaller bid packages	NO	YES	YES
Contractor markup on subs	YES	NO	IN CM FEE
AE fee affected	NO CHANGE	POSSIBLE INCREASE	POSSIBLE INCREASE
Competitive bidding	YES	YES	YES
Cost known at start of construction	YES	NO	POSSIBLE
Fixed price contract	POSSIBLE	NO	POSSIBLE
Cost plus contract			
Identified costs	POSSIBLE	NO	POSSIBLE
Bid package blocks	NO	NO	POSSIBLE
Guaranteed Maximum Price	POSSIBLE	NO	POSSIBLE
Bond Layering	YES	NO	POSSIBLE
DUTY OF LOYALTY BY CONTRACTOR	NO	YES	CONFLICT POSSIBLE
DESIGN ASSISTANCE BY CONTRACTOR			
Value Engineering	NO	YES	YES
Cost estimates during design phase	NO	YES	YES
Careful division of work between trades	NO	REQUIRED	REQUIRED
CONSTRUCTION PHASE			
Single point source of responsibility	YES	NO	YES
Responsibility for Scheduling & Coordination	GC	O/CM	CM
Owner furnished schedule	NO	YES	NO
Schedule enforcement	GC	O	CM
Performance of work by contractor's forces	YES	NO	POSSIBLE
Contract administration	AE	O/AE/CM	AE
Responsibility for performance by trades	GC	O	CM
Inspections by	AE	AE/CM	AE
Rejections enforce by	O	O	O
Safety- responsible party	GC	O	CM
Substantial completion disputes	REDUCED	INCREASED	REDUCED
CLAIMS			
Compensation to one trade contractor for time extensions to another	GC	O	CM
Responsibility for cost of ill timed work	GC	O	CM
Responsibility for damage to work of other contractors	GC	O	CM
Owner liability for claims for additional compensation	REDUCED	SUBSTANTIALLY INCREASED	REDUCED