

California Expands Construction Manager At-Risk Authorization for Certain Public Entities

*Mary A. Salamone and Dan J. Bulfer**

California enacted a new law that will expand the authority of counties and certain county-affiliated public entities to utilize the construction manager at-risk delivery method for public works of improvement. The authors of this article discuss the new law.

California Governor Jerry Brown has signed into law a measure that will expand the authority of counties and certain county-affiliated public entities to utilize the construction manager at-risk (“CMAR”) delivery method for public works of improvement. Senate Bill 914 (“SB 914”) builds on California’s recent expansion of public entities’ authority to utilize alternative delivery methods in public works of improvement, an expansion that had previously been focused on design-build delivery.

Design-Build Delivery

In a design-build delivery, the owner contracts with a single entity to design and construct a project. Before inviting bids, the owner prepares documents that describe the basic concept of the project, as opposed to a complete set of plans and specifications of the final product. This differs from the traditional design-bid-build approach, which splits the project into two phases: design and

construction. In a traditional design-bid-build delivery, the owner prepares a detailed set of plans and specifications either using its own staff or by hiring outside architects and engineers. Once the design is complete, the owner invites bids from the construction community and awards the contract to the lowest responsible, responsive bidder. In 2014, California authorized most public entities to utilize design-build delivery for projects in excess of \$1 million.

CMAR

Like design-build, CMAR allows the owner to contract with a single entity who assumes the burden of managing and coordinating the project during design and construction. Under this delivery method, a construction manager agrees to deliver the project within a Guaranteed Maximum Price (“GMP”), which is based on the construction documents and specifications at the time of the GMP plus any reason-

*Mary A. Salamone is a partner at Atkinson, Andelson, Loya, Ruud & Romo concentrating her practice on public and private construction projects and disputes. Dan J. Bulfer is an associate at the firm, where he is a trial and appellate litigator. The authors may be contacted at msalamone@aalrr.com and dbulfer@aalrr.com, respectively.

ably inferred items or tasks. Generally hired before the design team, the CMAR often selects the architect for the project, provides professional services, and acts as a consultant to the owner in the design development and construction phases. The CMAR may also provide some of the actual construction of the project, depending on the availability of bidders and the CMAR's expertise. In addition to acting in the owner's interest, the CMAR must manage and control construction costs to not exceed the GMP. Through these and other mechanisms, the CMAR delivery method provides owners with a greater degree of cost control than traditional design-bid-build delivery.

Current Law and SB 914

Under current law, counties are authorized to use CMAR in connection with a contract for the erection, construction, alteration, repair, or improvement of any *building* owned or leased by the County, as long as the contract exceeds \$1 million in value. SB 914 will expand this authority by authorizing a county, or any other public entity whose governing body is made up of the members of a county's board of supervisors ("County-Affiliated Entity"), to utilize CMAR for public works involving the erection, construction, alteration, repair, or improvement of any *infrastructure* owned or leased by the county or public entity. Like current law, SB 914 restricts the authority to utilize CMAR contracts to projects in excess of \$1 million. Further, SB 914 does not authorize the CMAR delivery method for road projects. CMAR contracts may be awarded on either a low bid or best value basis.

SB 914 expands the existing authority of counties in two principal ways. First, it adds

County-Affiliated Entities to the list of public entities that are authorized to utilize CMAR contracts. Second, it allows CMAR delivery for *any* infrastructure project owned or leased by a county or County-Affiliated Entity (so long as the project is in excess of the \$1 million threshold), rather than limiting that authority to buildings owned or leased by counties. Thus, CMAR delivery will now be available for utility improvements, flood control, underground utilities, and bridges, among other infrastructure projects constructed by counties and County-Affiliated Entities.

SB 914 Restrictions

Although authority for CMAR procurement is greatly expanded, SB 914 also includes certain restrictions. CMAR delivery is not authorized in certain cases in which a county, County-Affiliated Entity, or CMAR has entered into a project labor agreement in connection with a project. The new law also: (1) requires that the CMAR provide certain notices and observe certain formalities regarding work to be subcontracted; (2) limits retention to five percent of progress payments if payment and performance bonds are required in the solicitation of bids and have been furnished by an admitted surety; and (3) limits the percentage of retention that a CMAR may withhold in contracts with its subcontractors, and between subcontractors and lower-tier subcontractors, to the percentage specified in the CMAR's contract with the county or County-Affiliated Entity. The latter limitation does not apply, however, if a subcontractor has been given notice that performance and payment bonds will be required at the time bids are solicited and fails to provide those bonds to the CMAR.

California Expands Construction Manager At-Risk Authorization for Certain Public Entities

Benefits

With SB 914 taking effect on January 1, 2019, counties and County-Affiliated Entities have the benefit of another alternative to traditional design-bid-build delivery that provides enhanced project schedule controls, greater cost predictability as the contractor assumes the responsibility for the construction of a project at-risk for cost-overruns, design support services from the contractor during the pre-construction phase, and general contractor services during the construction phase. CMAR also provides a method for procuring contracts through a qualifications-based selection, rather than the traditional competitive bidding process under which a contract must be awarded to the lowest responsible bidder. The contractor's personal stake in controlling costs and involvement in the pre-construction phases of a project generally lead to improved communication and cooperation throughout the project schedule.

The Importance of Effective Project Management

While the CMAR delivery method has many benefits, these benefits can be diminished if

the project is not managed effectively. An adverse relationship between the CMAR and architect can lead to some of the same issues that arise in a traditional design-bid-build delivery. Having the CMAR involved in the selection of the architect minimizes the risk of an adverse relationship. In addition, a thorough prequalification process minimizes the number of low bidders that are disqualified, and generally leads to lower long term costs, higher quality, and fewer claims because only prequalified contractors are performing work.

Further, as with any delivery method, incomplete or inaccurate drawings will result in change orders. A common misconception is that the GMP is a maximum price that will not be exceeded in any case. However, the GMP is based on the plans and specifications at the time the GMP is established, with some reasonable assumptions made and a reasonable contingency included. Major changes in scope and any owner changes will usually result in a change order, which will in turn increase the GMP. Requiring the design to be 100-percent complete prior to establishing the GMP will minimize the risk of unanticipated change orders. In sum, effective use of the CMAR delivery method is the key to its success.

