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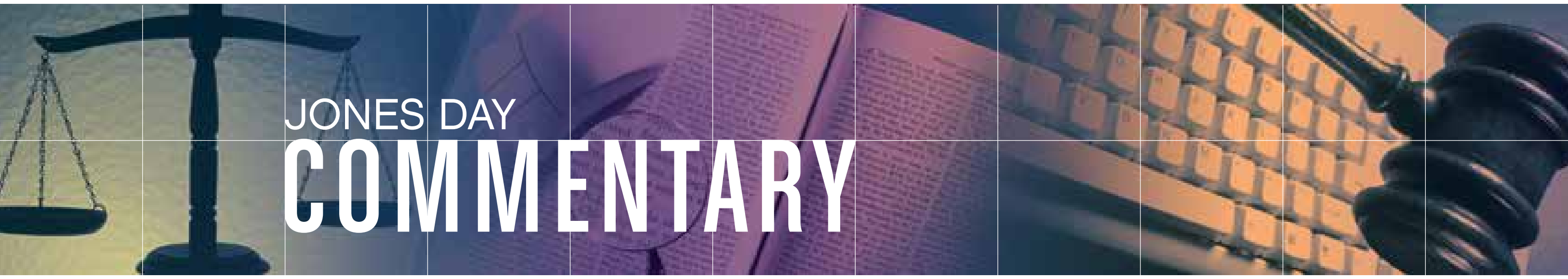

CALIFORNIA EXPANDS USE OF CONSTRUCTION MANAGER AT-RISK TO COUNTIES ON PROJECTS OVER $1 MILLION

On October 3, 2013, California Governor Brown signed Senate Bill No. 328, which is now codified as Public Contract Code § 20146 (PCC § 20146). The new statute permits counties to utilize “construction managers at-risk” (“CMAR”) in lieu of the traditional public bidding process requiring a public owner to award construction contracts to the lowest responsive, responsible bidder through the competitive bidding process. More specifically, on projects over $1 million, counties may award a CMAR contract using either the lowest responsible bidder or the best value method to a properly bonded CMAR entity.

CONSTRUCTION MANAGER AT-RISK

CMAR is a relatively unusual delivery vehicle for public construction projects. The premise is that the CMAR is retained at some point shortly after the design team is assembled to assist with the design, primarily from a constructability, scheduling, and cost standpoint. Then, when the design is closer to completion (or possibly when it is complete), the same CMAR acts as the general contractor for the project. The CMAR is “at-risk” by being the party responsible for subcontracting the construction work, finalizing the cost of construction as a fixed price or a guaranteed maximum price (“GMP”), and managing completion.

ADVANTAGES OF THE CMAR DELIVERY VEHICLE

If used properly, the CMAR process can better position the project team to deliver the project on schedule and on budget. Accordingly, counties will have the potential for greater control in selecting the CMAR through the best value method rather than selection based on cost alone. The best value method focuses on how qualified a bidder is, using price as one of many determining factors. Allowing selection based on best value rather than the lowest bid may encourage a smoother process with fewer requests for information and change orders.

CMARs become involved at the beginning of a project and provide the county and its design professionals preconstruction services such as constructability review, cost estimating, value engineering, and scheduling support. This allows the CMAR to have a better knowledge of the project before construction begins than would a general contractor in the design-bid-build process who does not become involved until after the construction plans have been finalized. Further, instead of encouraging adversarial roles inherent in the design-bid-build process, the designer and the CMAR should work cooperatively and as a team to complete design and construction.

When managed effectively, the CMAR approach allows counties to minimize construction costs based on the CMAR's input on the cost during the design phase and input on the effectiveness of the means, methods, and techniques to be employed during the construction phase. Counties will also be able to save time through fast tracking and a reduced schedule because the CMAR is able to begin construction activities before all aspects of the design are completed, unlike the design-bid-build process, where construction activities do not typically begin until after the design is complete.

DISADVANTAGES OF THE CMAR DELIVERY VEHICLE

However, counties using the CMAR delivery method need to have sufficient expertise and control to manage both the CMAR and the design team to make sure that a true fixed price or GMP is established so that the project does not come in dramatically over budget. Further potential downsides of the CMAR delivery vehicle are that cooperation and teamwork can only be achieved with the right personality mix. The design professional and CMAR may develop an adversarial relationship over construction quality, design completeness, and schedule impacts once the CMAR's role converts from its preconstruction advisory role to the contractual role of general contractor. Additionally, once the CMAR's role switches, it is less likely to provide the county with professional advisory management assistance during the construction phase because the CMAR is now the party "at-risk" with regards to holding the trade contracts, managing schedule, and making sure that the project does not exceed the fixed price or GMP.

THE LEGAL REQUIREMENTS OF PUBLIC CONTRACT CODE SECTION 20146

PCC § 20146 will allow counties, with the approval of the board of supervisors, to use a CMAR construction contract for "the erection, construction, alteration, repair, or improvement of any building owned or leased by the county." Counties may award a CMAR contract on projects in the county over $1 million in cost, using either the lowest responsible bidder or the best value method, to a properly bonded CMAR entity. "Best value" is defined as "a value determined by objective criteria related to the experience of the entity and project personnel, project plan, financial strength of the entity, safety record of the entity, and price."

The CMAR must be a licensed contractor in California, and the CMAR contract must guarantee the cost of a project and furnish "construction management services, including, but not limited to, preparation and coordination of bid packages, scheduling, cost control, value engineering, evaluation, preconstruction service, and construction administration." The CMAR must then award subcontracts "in accordance with the process set forth by the county."

The CMAR must provide (i) public notice of the availability of the work to be subcontracted according to the county's publication requirements for public bidding and (ii) a date and time on which the subcontracted work will be awarded. The county using the CMAR process must make a copy of the contract available for public inspection on its website and notify appropriate policy committees of the Legislature with instructions on how to access the CMAR contract.

Retention proceeds withheld by the county from the CMAR may not exceed 5 percent if a performance and payment bond issued by an admitted surety insurer is required in the solicitation of bids. The percentage of retention proceeds withheld for any subcontract or sub-subcontract may not exceed the percentage specified in the contract between the county and the CMAR. The CMAR may withhold retention proceeds in excess of that percentage only if the CMAR provides written notice to a subcontractor "prior to or at the time the bid is requested, that a bond may be required and the subcontractor subsequently is unable or refuses to furnish a bond" to the CMAR entity.

The section expressly applies the indemnity limitations relating to public works found in Civil Code §§ 2782 and 2782.05, prohibiting the shifting of liability for active negligence from construction managers or general contractors to subcontractors or from subcontractor to subcontractor.

LAWYER CONTACT

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