



حرفه مدیریت ساخت (سند Capstone، از مراجع اصلی اخذ مدارک CMAA)

بخش هفتم: خطرات ایمنی و مسئولیت در مدیریت ساخت

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What we will learn?

- ☐ Section Objectives
- ☐ Safety and Liability Risks
- ☐ Safety Management
- ☐ Liabilities
- ☐ Third Party Liability Issues
- ☐ Dispute Resolution

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Section Objectives

Section objectives

- ☐ Understand **safety management** and the **three key elements** of a **safety culture**.
- ☐ Become **familiar** with **existing training programs**.
- ☐ Learn **how safety metrics** can help determine if **objectives** are **being accomplished**.
- ☐ Understand **how to meet** the **requirements** for safety reporting, project safety, and safety planning.
- ☐ Learn about **potential liabilities** in design, costs, scheduling, inspection, and contractor payment.
- ☐ **Explore** the **issues** that may occur with **third parties** such as contractors and other construction site personnel.
- ☐ Understand there are many **ways to manage** and **resolve disputes** other than litigation.

Safety and Liability Risks

Introduction

❑ CMs

1. **Assist** project owners in identifying and assessing the **sources of risk** well in advance of critical project decision-making and then
2. **Help** the owner manage risk throughout the **project lifecycle**.

❑ The **objective** is **not** to eliminate or cover up risk,

but to manage it **proactively**, with

an **understanding** of the divergent interests of **all** the project's stakeholders.

Introduction

❑ One of the **primary strategies** used in the **construction industry** for **managing risk**

is a process commonly referred to as risk allocation.

❖ The **risk** may be **allocated** through

1. Contract language,
2. Generally recognized trade practices, or
3. Court decisions.

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Introduction

❑ Of these allocation methods, the **most controllable** is the allocation or assignment of risk through contract language.

❖ **Other** risk management strategies,

such as risk transfer through **insurance**,

are generally covered **under other provisions** of the contract (e.g. clauses for **liability** and **property insurance**).

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Safety Management

Safety management

- ❑ Construction is a **high-hazard industry** that comprises a **wide range of activities** involving construction, alteration, and/or repair.

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Safety management

- ❑ The **safety responsibilities** of CMs on the construction site will **vary** depending on
 1. The **specifications** in the contract and
 2. Their roles.
- ❑ Whether **working** as a contractor or as a representative of the owner working with the contractor,
CMs **must** have a thorough **understanding** of construction safety and their responsibilities.
 - ❖ Even if there is a site-specific safety plan and/or a safety manager,
it's **still up to** the CM to
manage,
promote, and
instill
a **culture of safety** on the project.

Safety management

3 Key Elements of a Safety Culture



Ownership and Management Buy-in



Employee Engagement



Environment of Continuous Improvement

Safety management

- ❑ In the United States, the Department of Labor's Occupational Health and Safety Administration (OSHA) establishes federal construction **safety requirements**.
- ❖ **State** and **local** agencies may establish stricter standards but may **not relax** federal standards.
- ❑ Depending on their **role** on the **construction site**, the CM **must**
 1. **Assess** their duties to the owner, contractors, and workers for job site safety and
 2. **Understand** their **legal obligations** under OSHA.

Construction safety training

- ❑ CMs will most likely receive **initial safety training** and **education** regarding safe work practices by their **employers**.
- ❑ **Some** of the training could include OSHA outreach construction-related training, and/or specific task-oriented training courses associated with the type of construction activities and potential hazards of a project.
 - ❖ OSHA outreach training is primarily focused on an **overview of the hazards** a worker may encounter on a **job site**.
 - ❖ **Training** emphasizes hazard identification, avoidance, and control and prevention.
- ❑ In order to **identify** the **required training**,
every CM should ensure that a project-specific hazard assessment is completed **prior to beginning work** in order to minimize exposures and job site incidents.

Construction safety training – Training programs

❑ OSHA 10-hour (OSHA Outreach Training Program).

- ❖ The 10-hour training program is primarily intended for **entry-level workers**.

❑ OSHA 30-hour (OSHA Outreach Training Program).

- ❖ The 30-hour training program is intended to provide workers with some **safety responsibility** at greater depth, and with **more specialized** training, than contained in the 10-hour course.

Construction safety training – Training programs

☐ Specialized Activity Training.

- ❖ These training sessions are oriented to performing **specific job site tasks safely**.
 - ✓ *Examples would include working adjacent to moving traffic, cranes & rigging, fall protection, excavation and trenches, and confined space entry.*
- ❖ An example of other potentially required specialized training could include the OSHA HAZWOPER 8/24/40-Hour Courses that provide training for workers, supervisors, and managers that are potentially exposed to or overseeing hazardous waste operations and emergency response (HAZWOPER) operations.

Safety metrics

❑ As the old saying goes, “**What gets measured gets managed.**”

❖ The construction industry utilizes several

1. Leading indicator metrics (proactive) and
2. Lagging indicator metrics (reactive)

to

1. **measure** safety **performance** and
2. **determine** whether **safety objectives** are being **accomplished**.

✓ Understanding what constitutes a leading vs a lagging **safety indicator**

provides the CM with **reasoning** to

support **proactive safety measures** that will **minimize** the
negative effects of the lagging indicators.

Safety metrics

❑ Leading Indicators –

- ❖ A preventive or proactive measure that is taken in order to **decrease** the **possibility** of an incident.
 - ✓ One example is a “**near miss**” report which
 1. is **submitted** from the project to an **organization’s management** and
 2. **describes** an incident that did **not result** in injury or illness but had the **potential** to do so.
 - This report is helpful in
 1. **Preventing** future incidents and
 2. **Developing** a culture of safety within an organization.

Safety metrics

❑ Lagging Indicators –

❖ Are **reactive** in nature; they measure the effectiveness of a safety program **after the facts**.

✓ Typical lagging indicators include the number of

1. Incidents,
2. Injuries, or
3. Days away from work.

Safety metrics

❑ Incidents that involve **workman's compensation claims** influence a **lagging indicator** called the Experience Modification Rate (EMR) as follows:

❖ Workers' compensation insurance provides

1. Wage replacement and
2. Medical benefits

to employees **injured** on the job.

✓ Workers' compensation is a **no-fault system**,

meaning benefits are provided without needing to determine **who was at fault** in the situation.

Safety metrics

❑ Incidents that involve **workman's compensation claims** influence a **lagging indicator** called the Experience Modification Rate (EMR) as follows:

- ❖ The EMR is **used to price** the cost of workers' compensation insurance premiums charged to the organization.
 - ✓ Think of it like a credit score or car driving history where third parties consider **history** as an indication of future risk.
 - ✓ In construction, insurance companies use an **organization's EMR** to gauge the past cost of injuries and the future chances of risk.

Safety metrics

❑ Incidents that involve **workman's compensation claims** influence a **lagging indicator** called the Experience Modification Rate (EMR) as follows:

❖ The **average EMR**, or the point at which a company is said to be no more or no less risky than another, is **1.0**.

✓ If a CM's EMR dips below 1.0, the company is considered **safer than most**, which translates to **lower premiums**.

✓ For contractors, an EMR score can be **critical**, as **some owners** have EMR standards or pre-qualification processes for their projects and will **only work** with contractors with an EMR **below 1.0** or some **other "safe" threshold**.

Safety metrics

❑ Incidents that involve **workman's compensation claims** influence a **lagging indicator** called the Experience Modification Rate (EMR) as follows:

❖ The **average EMR**, or the point at which a company is said to be no more or no less risky than another, is **1.0**.

✓ On the other hand, if the EMR **climbs above 1.0**, the company is considered riskier than most, and

the CM may be **prevented** from bidding on projects or have **difficulty** securing **skilled labor**. An EMR of 1.2,

for example, can mean that **insurance premiums** could be up to **20% higher than** a company with an **EMR of 1.0** and

that **20% difference** must be **passed on to clients** in the form of **increase bid prices**.

OSHA incident recording requirements

- ❑ CMs will be expected to ensure that projects comply with OSHA Injury and Illness Recordkeeping and Reporting Requirements.
- ❑ **Many employers** with ten or more employees are required to keep a **record of work-related injuries** and illnesses.
 - ❖ This information helps employers, workers, and OSHA
 1. Evaluate the safety of a workplace,
 2. Understand industry hazards, and
 3. Implement worker protectionsto **reduce** and **eliminate** hazards to prevent future workplace injuries and illnesses.

OSHA incident recording requirements

☐ How does OSHA define first aid?

❖ A **first aid injury** is an injury that requires

- ✓ A single first aid treatment and
- ✓ A follow-up visit for subsequent observation involving only minor injuries (minor scratches, burns, cuts, and so forth)

which do **not ordinarily** require medical care, and for which the **person** would typically return **immediately** to their **job duties**.

OSHA incident recording requirements

☐ How does OSHA define a recordable injury or illness?

- ❖ Any work-related fatality, injury, or illness that requires **medical treatment beyond first aid** is considered recordable.
- ❖ **Minor injuries** requiring **only first aid** do **not need** to be **recorded**.
- ❖ **Records** are kept through OSHA standard forms (300, 300A, and 301) and must be maintained for up to **five years** from the year of the **incident**.

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Safety planning

- ❑ The CM, owner, contractor, and employees **all** have **responsibility** for project safety.
- ❖ The **CM** must **assess** not only its **duties** to the owner and workers for job site safety but also **its legal obligations** under OSHA.
- ❖ The **owner** has the **overall responsibility** for taking action should **there be** an **issue** regarding
 1. The nature of a hazard or
 2. Safety responsibilities between the CM and contractor.

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Safety planning

❑ **Regardless** of the **contractual role**, a CM will likely encounter the following **CM safety planning roles and responsibilities**:

- ❖ A CM (as the contractor) is responsible for establishing a safe construction site.
 - ✓ Possibly with the **assistance** of a company qualified safety specialist, the CM will **conduct** a hazard assessment of the job site to
 1. **identify** potential hazards,
 2. **establish** training and protective equipment requirements, and
 3. **implement** procedures to minimize the hazards on the job site.
 - ✓ A Site-Specific Safety Plan will typically be **provided** to the **owner** as a part of the contractual requirements and is the **typical method** used to **document** the analysis process and mitigation requirements.

Safety planning

❑ **Regardless** of the **contractual role**, a CM will likely encounter the following **CM safety planning roles and responsibilities**:

- ❖ A CM (as a representative of the owner) is responsible for **establishing** a safe work environment for **employees**, including **ensuring** individuals are properly equipped and trained based on the **work hazards** present on the job site.
 - ✓ OSHA's multi-employer regulatory standard requires that **each employer** be **responsible** for the health and safety of their own employees.
 - ✓ The **CM** will
 1. **Perform** the same hazard assessment,
 2. **Establish** mitigation measures, and
 3. **Prepare** a site-specific safety plan for the project site.

It will be the **CM's responsibility** to **ensure** employees read, understand, and follow the safety plan requirements.

Safety planning

❑ **Regardless** of the **contractual role**, a CM will likely encounter the following **CM safety planning roles and responsibilities**:

❑ A CM (as a representative of the owner) is responsible for **establishing** a safe work environment for **employees**, including **ensuring** individuals are properly equipped and trained based on the **work hazards** present on the job site.

❖ The CM may also have the responsibility to **review** the contractor's safety plans to ensure

1. It meets regulatory requirements and
2. It incorporates any owner-directed safety policies or procedures.

❖ **Contract documents** should state that **CM's review** of the contractor's safety program shall not relieve the **liability** of the **contractor** for safety on the project.

Safety planning

❑ **Regardless** of the **contractual role**, a CM will likely encounter the following **CM safety planning roles and responsibilities**:

❖ The CM must **ensure employees** shall not be required or knowingly permitted to work in an **unsafe environment**

except for the purpose of making safety corrections, and then

only after proper precautions have been taken for their protection.

Safety planning

❑ **Regardless** of the **contractual role**, a CM will likely encounter the following **CM safety planning roles and responsibilities**:

❖ The CM is responsible to **ensure employees**

know and **abide** by the rules and regulations that are

1. Applicable to their job tasks and
2. For reporting any observed or potential hazards to their immediate supervisor.

✓ If the **hazard** is **not corrected**,

the **affected employee** will report the unsafe condition to

the **site safety personnel** for further actions to **minimize** the hazardous condition.

Safety planning

- Typically, **safety** will be a topic **discussed** in **all** construction progress meetings.

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Liabilities

- ❑ CMs face many of the **same types** of potential liabilities as **owners**,
regardless of the nature of the **legal relationship** between the owner and CM.
- ❖ This **section** focuses on areas of a CM's potential liability, both to
 1. The owner and
 2. Other project participants,including contractors and on-site workers.

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❑ To build a **broad base** of functional knowledge,

CMs should perform their **due diligence** by

1. **Researching** applicable case laws and precedents and
2. **Educating** themselves on all necessary rules and regulations.

❖ In addition, any contracts and other legal documents should

be **reviewed** by a legal professional to ensure that the **CM** has a **solid understanding** of its contents.

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- ❑ For each of these potential liabilities, an **appropriate standard of care** for the CM services involved will **generally apply**

Code of Professional Conduct

The CMAA Code of Professional Conduct is voluntarily agreed to by members of the association and represents the aspirations of the profession relative to clients, owners, colleagues, and the public.

“CMAA Members” as used in this Code is a term that applies to all members in performance of their services for construction programs and projects. CMAA Members provide a broad range of services to their clients and employers that encompass program, project, and construction management and also serving as owner advisors or representatives.

The code is rooted in the historical values of the profession and linked directly to the CMAA Statement of Values and Policy Framework.

Four fundamental principles form the foundation of the code: Ethical Practice, Professional Excellence, Responsibility to the Public, and Client-Centered Practice.

As a member of CMAA, I/we agree to the following Code of Professional Conduct:

<https://www.cmaanet.org/about-us/code-professional-conduct>



Liabilities

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بخش هفتم: خطرات ایمنی و مسئولیت در مدیریت ساخت

1. Liability for design defects

2. Liability for cost estimates

3. Liability for scheduling and coordination

4. Liability for inspection

5. Liability for review or certification of contractor payment applications

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Liability for design defects

❑ Because many contracts require the CM to **provide some input** into the **design** of the project,

the CM may be **exposed to liability** for damages resulting from design defects.

❖ The CM is **not expected** to replace the designer **but may**

1. **Review** the designer's plans and drawings and

2. **Provide** recommendations as to

- ✓ construction feasibility,
- ✓ selection of materials,
- ✓ building systems, equipment, and
- ✓ time requirements for installation and construction.

Liability for design defects

- ❑ In assessing the **CM's potential liability** for design defects, the **amount of control** that the CM has over the design is the **primary factor**.
- ❖ The CM's potential liability does **not appear great** due to the CM's limited control over the final design.
 - ✓ The CM's common design-related role in providing **only advice** and **recommendations** generally will **not vest enough control** in the CM to **render it liable** for design defects.

Liability for design defects

The CM should **not be liable** for

making **suggestions** or **recommendations**

that result in design changes or for prescribing alterations to the design

unless the contract documents require that such **suggestions** or **recommendations**

be followed or give the CM some **right** of **supervision** such that

the **designer** is **not entirely free** to do the **work** its **own way**.

Liability for design defects

- ❑ A **related source** of **potential liability** for the CM arising from defective design is the CM's failure to discover a design defect or other design problem.
 - ❖ The **liability** in this situation would **not arise** from the defect itself, but from the CM's failure to **discover** the defect.
 - ✓ Although the **designer** retains ultimate responsibility for project design,
 - the CM may be **expected to review** the plans and drawings and to **coordinate** the documents.

Liability for design defects

- ❑ The **CM's failure** to properly **perform these services** may cause the owner to incur delays and excess costs arising from design defects that the **CM's proper review** would have discovered.
 - ✓ Therefore, the CM **may be liable** along with the designer for **certain design defects**.

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Liability for cost estimates

- ❑ **CM contracts** commonly **shift** project cost estimating responsibilities, in **whole** or **in part**, from the designer to the **CM**.
- ❖ **To the extent** that the CM **assumes** the designer's responsibilities, the CM faces the **same liability** as similarly situated designers.

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Liability for cost estimates

- ❑ The **first step** in **evaluating** the CM's liability is to **determine** whether
 1. The parties have established a fixed limit of **construction cost** and
 2. The CM has warranted its **cost estimate**.
 - ❖ **In the absence** of both a limit on construction costs and a warranty for the accuracy of the cost estimate,
the CM, like the designer, may be **able to receive its fee**
despite project cost overruns.

Liability for cost estimates

1. Designers generally have been found **entitled** to **their fee** where no “design-to-budget,”

i.e. the **fixed limit** of construction cost,

has been **established** if the **difference** between the estimate and actual cost is **not excessively unreasonable**.

2. Where the **CM** has agreed to a fixed limit of construction cost,

the **CM** may **nevertheless** be entitled to its fee

if the **actual costs** do **not exceed** the **fixed limit** by a substantial amount.

❑ **Some courts** have in the latter situation, however, **denied** the designer its fee

where the **actual construction costs** **exceed** the fixed limit by any amount.



Liabilities

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Liability for scheduling and coordination

- ❑ The **CM's performance** of its scheduling and coordination of work responsibilities **may expose** the CM to **liability** to the owner for the **delay**.
- ❖ The CM **may be liable** for
 1. Delay suffered directly by the owner or
 2. Delay damages incurred by **trade contractors** for which the owner may be liable.

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Liability for scheduling and coordination

- ❑ Both types of **delay** damages involve similar issues.
 - ❖ The **CM's liability** depends on the **degree** to which the **owner** has **delegated** scheduling, coordination, and enforcement to the CM.
 - ❖ The **amount of delegation varies** widely from
 - ✓ the CM **merely advising** the owner on scheduling and coordination of the work to
 - ✓ **delegating** to the CM **full responsibility** for the timely completion of the project.

Liability for cost estimates

❑ **Forfeiting its fee** is only **one risk** the **CM** faces for **underestimating** construction costs.

❖ The CM also is **potentially liable** to the owner for **foreseeable damages**

1. if **actual costs** **exceed** the fixed limit or,
2. if **no limit** has been established,
if **actual costs** are not reasonably within the non-guaranteed estimate.

Similar actions by **owners** against **designers** have met with varying levels of success.

Liability for scheduling and coordination

- ❑ Where the **CM acts only** as the owner's **advisor**, its liability is generally **limited**.
- ❖ Liability likely would **result only** from
 - ✓ The **preparation** of **faulty** schedules,
 - ✓ A **failure** to **detect** scheduling or coordination of work **problems**, or
 - ✓ A **failure** to **notify** the owner promptly of such problems so the owner could minimize any losses, correct, and enforce the schedule.

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Liability for scheduling and coordination

❑ Where the CM has been **delegated greater** scheduling and coordination of the work responsibilities,

the **CM's liability** to the owner for project delay will **likely extend** to delay for any cause

except

1. force majeure or
2. **defaults** of the owner or of the designer.

1. Liability for design defects
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Liability for inspection

❑ Services provided by CMs may include an **inspection**.

❖ The **extent of inspection** responsibilities can **range** from

1. **limited “construction observation”** to determine, in general, if the work is being performed in **accordance** with the **requirements** of the **contract documents**, **similar** to the service typically provided by **designers**, to
2. **full** inspection and testing services.

❑ The CM’s **liability increases** based on the extent of its inspection responsibilities.

Liability for inspection

❑ When providing **construction observation** services,

1. The **scope** of this **service** and
2. The **CM's attendant** liability

closely resembles that of the **designer**.

❖ Based on the **contract specifications**, the CM is typically expected to exercise **reasonable care** and **diligence**.

✓ **Failure** to perform to **this standard** of care may expose the **CM to liability** to the **owner**

for **any damages** proximately caused by the **CM's breach**.

Liability for inspection

❑ **Although** the CM's inspection may be **comparable** to the designer's, the CM's obligations may place them in **greater contact** with the **actual construction work**.

❖ Therefore, **although** the CM, like the designer, is **generally not required** to

conduct **exhaustive** or **continuous** inspections of the work,

it is **arguable** that the CM's inspection duties and liability **exceed** those of the designer.

Liability for inspection

- ❑ The **critical issue** in judging the CM's performance is
whether the construction **defect** or **nonconformity** should have been
discovered by the CM
in the exercise of **reasonable care** and **diligence**.
- ❖ As with designers,
the CM is not held to a **standard of performance** that would
require **discovery of every defect** or **nonconformity**,
but only those that are **“reasonably discoverable.”**

Liability for inspection

- ❑ The CM is **generally liable** to the owner for **damages**
arising from its **failure** to **detect** obvious defects or non-conforming work
regardless of the frequency or level of inspection or examination
conducted.
- ❖ The CM who **fails** to perform minimal inspections will **not** be able to
avoid liability to the owner
where the **damage incurred** by the owner arises from defective
or non-conforming work
that **would have been obvious** had the **CM minimally**
performed its **contractual duties**.

Liability for inspection

- ❑ An **interesting paradox** may exist for the **CM** who performs **more than the minimal** inspections just to satisfy contract requirements because they may be held to a **higher standard** than those who only perform the **minimal inspections**.
 - ❖ That is because **through** more extensive or more regular on-site investigations, the CM **may reasonably** be expected to **detect** less obvious problems than one who only performed minimal inspections.

Liability for inspection

- ❑ This does **not mean**, however, that the CM **should minimize** inspection services to **avoid** some **nebulous** higher standard of care.
- ❖ The CM may **still** be held **liable** for **failing** to detect obvious defects that would have been discoverable **by only the minimum exercise** of its duties to satisfy its **contractual obligations**.
- ❖ This **determination** of what level of performance is reasonable is **difficult**.
- ❖ The **best advice** is to exercise reasonable care and diligence **without regard** to the **possibility** of liability for **ramifications** for exceeding minimum contract requirements.

Liability for inspection

A cost-benefit analysis clearly **weighs** in favor of **exceeding**
minimum contract requirements
rather than
risking falling short of the applicable standard of care
by **not discovering** obvious defects.

Liability for inspection

- ❑ Finally, the **liability** of the CM for inspection will also **depend** upon **other entities** with **inspection responsibilities** on projects such as full-time, third-party inspectors.
- ❖ The **CM's liability** for **inspection** will be significantly reduced since there is an **entity**,
independent of the CM, which is **dedicated** to the function of inspection.

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Liability for review or certification of contractor payment applications

- ☐ The CM often replaces or assists the designer in **reviewing** contractor applications for **progress payments** and **final payment**.
- ☐ The **CM's potential liability** arising from the performance of this duty arises from **failure** to act in a manner **consistent** with what the CM knew or should have known about the **realities** of the project **compared** to the **payment application**.

Liability for review or certification of contractor payment applications

❑ *For example, if the CM knows or should know*

*that the **contractor** is **not current** on labor or material bills on **work already performed** and*

*for which it **has been paid**,*

*the CM would likely have a **duty to inquire** further and **resolve** the problem **before issuing** a certificate for payment.*

❑ A CM may also have liability to **third parties** affected by negligent approval or denial of a pay application.

❖ Peerless Ins. Co. v. Cerny & Assoc., 199 F.Supp. 951 (D. Minn. 1961).

Liability for review or certification of contractor payment applications

- ❑ As is true with other aspects of the CM's services,
legal principles applicable to designers are **equally** applicable to the CM in the performance of this service.
- ❖ However, the CM's obligations and liability may **exceed** those of the designer
considering the CM's alleged expertise and closer proximity to the Work.
- ✓ It has been suggested that **risk allocation analysis** shows that the CM is in the **best possible position** of all construction team members to **make the ultimate determination** on payment applications.
(W. Sneed, *The Construction Manager's Liability in Construction Litigation* 379-80 (K. Cushman ed. 1981))

Third Party Liability Issues

Third party liability issues

☐ The **third parties** to whom

1. The **CM** may **owe** various duties and
2. The CM may be liable for breach

are **primarily**

1. Trade contractors and
2. Construction site personnel.

CM liability to these parties may **exist**

despite the **absence** of any contractual connection between them and the CM.

Third party liability issues

1. **Contractor claims against the CM for project coordination & scheduling**
2. Construction personnel claims against CM for personal injury

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Contractor claims against the CM for project coordination & scheduling

❑ CMs **acting** as owner's agent and those at-risk

both face **potential liability** to trade contractors arising from
the performance of project **coordination** and **scheduling** duties,
albeit from different legal theories.

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Contractor claims against the CM for project coordination & scheduling

- ❑ The **basis** of the **liability** of the at-risk CM who **contracts** with trade contractors is for **breach** of contract with the trades.

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Contractor claims against the CM for project coordination & scheduling

❑ The agency CM who has **only contracted** with the **owner** and lacks **privity of contract** (which prevents third parties from taking legal action) with the trades is

potentially liable to the trades **only**

1. In tort (meaning negligence) or
2. In some instances, in contract if the trade contractor is an intended third-party beneficiary of the owner-CM contract.

Recovery by a trade contractor from a CM under a **third-party beneficiary theory** is **difficult**,

as owner-CM contracts **commonly include**

express provisions stating that the **CM's contractual obligations** are solely for the **benefit of the owner**.

Contractor claims against the CM for project coordination & scheduling

❑ The CM's coordination and scheduling duties may be broadly divided into three components:

1. Preparing the schedule.
2. Updating the schedule.
3. Ensuring compliance with the schedule.

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Contractor claims against the CM for project coordination & scheduling

❑ If there is a **trade contractor**

that the **CM** has **no contractual relationship** with,

the **most common liability** issue is **negligent performance** of the CM's project coordination duties (as contained in the owner-CM contract).

❖ In most cases, **if** there is **no contract** between the CM and the economically injured contractor,

that will **not bar** the contractor's tort action **against** the **CM** arising from the **CM's negligent performance** of its contractual duties.

The **CM's performance** of contractual obligations **may result in** the benefit of contractors with whom the **CM** has **no privity of contract**

because the contractors may be considered **members of a limited class** whose reliance upon the **CM's ability** is **foreseeable**.

Contractor claims against the CM for project coordination & scheduling

❑ The **third component** is the most likely source of **most claims**

by **trade contractors** against the CM.

❖ In addition to **recovering damages** from

1. CMs for negligent supervision and
2. Project coordination,

contractors have also been **successful** in **claims** based on acceleration and interference by CMs.

For more information on liability legal precedence,
see Appendix II Liability Legal Cases.

Liability Legal Cases – Appendix II

- ☐ The basis of a non-privity trade contractor's claim being one in tort rather than in contract is illustrated by the following two cases.

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Liability Legal Cases – Appendix II

- ❑ In Gateway Erectors v. Lutheran General Hospital, 430 N.E.2d 20 (Ill.App. 1981), the appellate court held that the trial court acted properly in dismissing a contractor's breach of contract claim against the CM.
- ❑ The court held, however, which the trial court erred in dismissing the contractor's claim that the CM was liable to the contractor in tort for its negligent performance of its contractual obligations.
- ❑ The court found that, despite the absence of a contractual relationship between the contractor and the CM, the CM owed the contractor a duty to use reasonable care in the performance of its duties to avoid causing the contractor to incur additional expenses in the performance of its work.

Liability Legal Cases – Appendix II

- ❑ Similarly, a New York appellate court in *James McKinney & Son v. Lake Placid 1980 Olympic Games, Inc.*, 461 N.Y.S.2d 483 (A.D. 1983) held that a contractor lacked a cause of action for breach of contract against a project manager but may have an action in tort.
- ❑ The court reasoned that the contractor had a **potential tort claim** because the project manager's contractual obligations (as stated in its contract with the owner) could reasonably be expected to inure to the benefit of the contractor as a member of a limited class whose reliance upon the project manager's ability was clearly foreseeable.

Liability Legal Cases – Appendix II

- ❑ **Not all such third-party claims** against CMs meet with success. For example, in *Bagwell Coatings, Inc. v. Middle South Energy, Inc.*, 797 F.2d 1298 (5th Cir. 1986), the Fifth Circuit Court of Appeals **recognized**, generally, the existence of a tort cause of action **but found no liability** for the CM to a trade contractor.
- ❑ The court held that liability of the CM toward a trade contractor, who incurred only economic losses, depended on there being a breach of a duty the CM owed the owner. The owner was held liable to the trade contractor for damages caused by the CM's managerial decisions, but the CM was insulated from liability.
- ❑ The court observed that the CM was “the owner's agent and alter ego, and its role was clearly to act for the owner, indeed as the owner, across the board; the owner, in practical effect, simply disappeared, and [the CM] took its place for purposes of effectuating the construction.” (Id. at 1311, n). 19.)

Liability Legal Cases – Appendix II

- ❑ A second possible bar to a contractor's recovery in tort from a CM is by application of the economic loss rule.
- ❑ In some jurisdictions, a party is unable to pursue a tort action against a second party for the recovery of damages for purely economic losses.
- ❑ Under this rule, tort actions are confined to situations involving physical harm or property damage, as distinguished from purely economic loss for which a breach of contract action would be appropriate.
- ❑ In the absence of privity of contract, however, no breach of contract action would be possible. For example, California is increasingly following this trend.
- ❑ *Ratcliff Architects v. Vanir Constr. Mngmt., Inc.*, 88 Cal. App.4th 595 (2001); *Aas v. Superior Court*, 24 Cal. 4th 627 (2000), *Erlich v. Menezes*, 21 Cal. 4th 543, 552 (1999).

Liability Legal Cases – Appendix II

- ❑ In the CM context, the application of this rule may bar actions for purely economic losses by contractors against the CM with whom they lack privity of contract.
- ❑ Such economic losses may occur where the CM's alleged negligence causes contractors to incur additional construction or overhead costs.
- ❑ The economic loss rule would bar the contractors' tort action; and the absence of privity of contract between the CM and the contractors would generally bar any breach of contract action.
- ❑ See *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 479 N.E.2d 476 (Ill. App. 1985), *aff'd*, 503 N.E.2d 246 (Ill. 1986) (subcontractor was denied recovery in tort of damages from a construction supervisor for economic losses it incurred allegedly arising from the supervisor's negligence).

Liability Legal Cases – Appendix II

- ❑ A third legal barrier may prevent a contractor's recovery from the CM.
- ❑ The presence of a no-damage-for-delay clause in the owner-contractor contract may bar a contractor's recovery of damages from a CM even though the CM is not a party to that contract.
- ❑ For example, in *L.K. Comstock & Company v. Morse/UBM Joint Venture*, 505 N.E.2d 1253 (Ill.App. 1987), the court held that the no-damage-for-delay clause in the owner-contractor contract was intended to benefit the CM in order to allow the CM to use its best judgment for the owner's interest.
- ❑ The court stated that, if the contractor could bring a claim for delay damages against the CM, the CM would likely seek indemnification from the owner, thus, defeating the purpose of the no-damage-for-delay clause.

Liability Legal Cases – Appendix II

- ❑ The no-damage-for-delay clause may not in all cases bar the contractor's recovery of delay damages from the CM.
- ❑ The Illinois court in L. K. Comstock upheld the application of the no-damage-for-delay clause to the contractor-CM dispute, but also recognized exceptions to applicability of the clause.
- ❑ The court noted exceptions for CM actions taken in bad faith and for delays of unreasonable duration and allowed the contractor to pursue claims against the CM that were within these exceptions.

Liability Legal Cases – Appendix II

- ❑ In another case, a court restricted the application of a no-damage-for-delay clause by classifying the contractor's damages as '**hindrance damages**' rather than **delay damages**.
- ❑ In John E. Green Plumbing & Heating Co. v. Turner Construction Co., 742 F.2d 965 (6th Cir. 1984), the court distinguished between true delay damages and damages arising from the hindrance of the contractor's performance.
- ❑ According to this court, 'delay' meant time lost when the contractor could not perform for some reason out of its control, and the damages incurred were in the nature of the cost of an idle work force.
- ❑ What the contractor in this case sought to recover, however, was for damages allegedly caused by obstacles created by the CM that did not stop the contractor's performance but made it more costly and difficult to perform.

Third party liability issues

1. Contractor claims against the CM for project coordination & scheduling
2. Construction personnel claims against CM for personal injury

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Construction personnel claims against CM for personal injury

❑ The CM, because of its **central role** in both the planning and management of the project,

is positioned to **address** and **assume** some responsibility for **job site safety**.

❖ **Courts** increasingly have been **willing to hold CMs** liable for injuries to **construction personnel** based on

1. the CM's negligent performance of its **contractual safety services**,
2. the CM's assumption and negligent performance of these services in the **absence** of any contractual safety obligations, and
3. the obligations imposed by **statute**.

Construction personnel claims against CM for personal injury

- ❑ Liability for job site accidents can be significantly limited by a state's workers' compensation laws. (Privette v. Superior Court, 5 Cal.4th 689 (1993); Toland v. Sunland Housing Group, 18 Cal.4th 253 (1998)). However, even in such jurisdictions, there are numerous exceptions, driven by the particular facts surrounding the injury, which may still allow a CM to be responsible for a job site injury to another company's employee. (Kinsman v. Unocal Corp., 37 Cal.4th 659 (2005); McKown v. Wal-Mart Stores, Inc., 27 Cal.4th 219 (2002))

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Dispute Resolution

Dispute resolution

❑ An **important element** of a CM's role is
project and contract administration.

❑ The CM as part of its standard duties is often able to

1. Recommend,
2. Review, or
3. Even draft

proposed contract documents or provisions in the **various contractual agreements** that are used to implement a project.

❖ This can encompass the **determination** of **methods** of resolving disputes.

Dispute resolution

- ❑ Further, the CM has a **major role** in preventing disputes.
- ❖ The CM's role is to **implement** a successful project to be completed within pre-established schedules and budgets.
 - ✓ **Unfortunately**, and occasionally **despite** the CM's best efforts, construction projects often end up in **litigation**.

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Dispute resolution

❑ This section will identify some causes of disputes and specify the means of preventing them in

1. contract development and
2. negotiation

phase of the project.

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Proximate causes of disputes

❑ Typically, **troubled projects** experience

1. Restrictive budgets,
2. Limited performance time, and/or
3. Extraordinary operational needs.

❑ While these characteristics are present in private business, they are **even more common** in the public sector:

a project can be **delayed** due to a lack of funds, political, environmental or other problems

to the point that it **desperately needs** to be placed in **service** and then design and/or construction period must be **compressed** to the **shortest time possible**.

Proximate causes of disputes

❑ In addition, since **public funds** are involved,

1. **expenditures** are often closely and publicly **scrutinized**, and
2. **funding beyond** the original contract amounts can be **difficult to obtain**.

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Proximate causes of disputes

- ❑ Some of these problems arise due to the **unique physical characteristics** of the project.
 - ❖ The impacts of changed site conditions are probably the **least avoidable**,
though much can be done to **minimize** the consequences through capable engineering and project planning.
- ❑ The **remaining circumstances** described above **arise out of**
 1. The planning and administrative process,
 2. The format and content of contract documents used, and
 3. The established relationships among participants in the construction process.

Proximate causes of disputes

❑ The **most prominent conditions** that can lead to disputes are as follows:

- ❖ The owner's staff is not adequate to meet project needs.
- ❖ Scope of services or work is not clearly defined.
- ❖ An inappropriate project delivery method has been selected.
- ❖ The design is not sufficiently complete.
- ❖ Contract documents are deficient.
- ❖ Estimates are not accurate.
- ❖ Bids are too low.
- ❖ Project management is not effective.
- ❖ Unanticipated site conditions are discovered.

Proximate causes of disputes

❑ The **most prominent conditions** that can lead to disputes are as follows:

- ❖ Unexpected environmental issues arise.
- ❖ Uncontrollable events interfere (force majeure).
- ❖ The CM, designer, or contractor has performance problems.
- ❖ The owner initiates numerous changes.
- ❖ Inadequate insurance coverage exists.
- ❖ The contractor's (and owner's) claims are not properly managed and controlled.
- ❖ Inappropriate dispute resolution procedures exist.

Alternate Forms of Dispute Resolution

Alternate forms of dispute resolution

☐ Alternative dispute resolution clauses can be

1. Incorporated in contract documents or
 2. Drafted during the life of a contract when a dispute occurs.
- ❖ Others do **not need** formal documentation but that can be **agreed** to by the **parties** as a vehicle to put negotiations back on track.

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Alternate forms of dispute resolution

- ❑ Numerous methods fall under the general description of alternative dispute resolution procedures.
- ❑ These include:
 - ❖ Arbitration
 - ❖ Mediation
 - ❖ Mini-trial
 - ❖ Dispute Review Board
 - ❖ Mediation/arbitration

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❑ The **first alternative** to litigation utilized within the construction industry was **arbitration**.

❖ **In 1966**, a committee of engineers, architects, and contractors developed construction industry arbitration rules for use specifically within the construction industry to be administered by the American Arbitration Association (AAA).

✓ This committee, the **National Construction Dispute Resolution Committee (NCDRC)**,

remains in **existence** and **continuously** reviews and updates these rules.

○ The **AAA rules** and **procedures** are the **most utilized** within the industry.

➤ They are **incorporated by reference** in most standard construction documents, including those issued by CMAA as well as by AIA and AGC.

❑ Arbitration, like litigation, is an **adversarial procedure**.

❖ Parties **contractually agree** to submit their dispute to

1. A single arbitrator or
2. An arbitration panel

whose decision is usually **binding** and **court-enforced**.

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❑ A **typical contractual clause** is as follows:

Any controversy or claim arising out of or related to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its construction industry arbitration rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof

❑ **Although** arbitration is often **effective** in resolving some construction disputes, it is a **formal** and **structured** proceeding.

In large cases, the time and cost of arbitration can be as **great** as that of a **court proceeding**.

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❑ **More than 50 AAA rules** pertaining to construction disputes include

1. How to initiate a claim, administrative conferences, and preliminary hearings,
2. The qualifications and appointment of the arbitrator(s),
3. The required disclosures of the designated arbitrator(s),
4. Procedures on conduct of the hearing, and
5. The duties, and responsibilities of the arbitrator including the award.

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Arbitration

❑ Although an arbitration hearing can be **informal**,

it is still a **structured proceeding** and in larger cases is **comparable** to a court hearing.

❖ However, arbitration hearings are **not governed** by **rules of evidence** like a **court proceeding**.

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- ❑ **Witnesses** are sworn in and **testify** under oath.
- ❑ **Testimony** of experts is utilized, and **provisions** can be made for a stenographic record.
 - ❖ In a court, **trial parties** and **attorneys** must meet the schedule and calendar.
 - ❖ In arbitration, the arbitrators have **outside activities** and the parties may have **conflicting trial schedules**, which all **must be coordinated**.

Consequently, there can be a **passage of time** between hearing days, resulting in **delays** in bringing the arbitration to **closure**.

Arbitration

- ❑ In addition, as **contrasted** with a court's decision,
an **arbitration award** is usually final and **not** subject to appeal.
- ❖ A **court's decision** can be appealed to the next highest court based upon both the **factual record** and **claimed errors of law**.
- ❖ The **grounds** for appealing and overturning an **arbitration award**, recognized by the courts, are for **very limited reasons**, such as
an arbitrator's misconduct, fraud, or unethical conduct.
 - ✓ This is the reason arbitration is often described as “binding.”
- ❑ A **court rarely**, if ever, **re-examines** the factual grounds for an arbitrator's decision.
 - ❖ However, because of its accepted historic usage,
arbitration remains the most frequent alternative method of dispute resolution.

- ❑ Mediation is a voluntary process that requires that the parties to a dispute be willing
 - (1) to seek a negotiated solution; and
 - (2) to attempt an “alternate” approach, preferably prior to filing for arbitration or instituting legal action.

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- ❑ A third party, an **impartial neutral mediator** assists the parties to resolve their dispute.
- ❑ The parties can seek **mediation at any time** during the life of a project or at **any time** during arbitration or lawsuit.
 - ❖ It does **not require** a contract provision, because the essence of mediation is **voluntary**.
 - ✓ The mediation hearing is conducted in **private**, and **absolute confidentiality** of all information **disclosed** to a **mediator** is observed.

- ❑ The mediator does **not impose** agreements or settlement terms upon the parties.
- ❖ The mediator **assists** the parties in reaching an acceptable agreement on their own terms.

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❑ It is important that the **selected mediator** be

1. Not only a professional in the **mediation** field

2. But be knowledgeable in the **construction industry**.

❖ As **contrasted** with the **arbitration**, the **parties** have full control over the **selection** of the designated mediator.

❖ In **arbitration**, parties can strike names from a **proposed list** of arbitrators, but the **final selection** is by the **AAA** under the AAA rules.

❖ **Other selection** methods in arbitration are for each party to select one arbitrator and those two designated arbitrators to select the **third neutral party**.

✓ In **mediation**, the parties select the **neutral party**.

- ❑ **Another significant** element of the mediation process is that all the information that is **disclosed** to the **mediator** during a proceeding is maintained in **confidentiality**.
 - ❖ This is **important** and significant because
 - if there is **no negotiated settlement**,
 - none of the settlement** offers, admissions, or proposals made during the proceedings may be **utilized** in a later **judicial proceeding**.

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☐ In addition,

although it is desirable to include a **clause** in the contract providing for **mediation**,

it is **not necessary** for the parties to **agree to attempt** mediation in the event of a **post-contract dispute**.

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❑ The CM **may wish** to **recommend** and **incorporate** a contract clause in the trade contract that is administered under the CM's jurisdiction.

❖ Such a clause would read as follows:

- ✓ *If during this contract, the parties are unable to resolve the dispute or controversy among themselves, they shall at first endeavor to settle such a dispute in a non-binding, voluntary manner by referring same to (name of the individual or dispute resolution firm) prior to filing for arbitration or having recourse to a judicial forum.*

☐ Mediation is often used because of the following:

- ❖ Negotiations fail
- ❖ To gain agreement
- ❖ A need for outside influence, a catalyst
- ❖ To give both parties an idea of how their position looks to a third party (impartial person)
- ❖ The proceeding is cost-effective
- ❖ All disputes must end at some point

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Mini-trial

❑ A **mini-trial** has been described as a structured settlement procedure.

❖ In a mini-trial proceeding, **each side presents** its case

before a neutral advisor and/or senior executives of each of the parties **involved** in the matter.

✓ They **either**

1. **Resolve** the dispute or

2. **Formulate** a voluntary settlement.

✓ A mini-trial can be voluntary or contractually mandated.

○ If **successful**, it will result in a negotiated settlement.

The AAA has formalized the **procedure** and the **US Army Corps of Engineers** has used mini-trials with success for **multi-party** and **complex cases**.

Mini-trial

❑ The essential elements of a mini-trial are as follows:

❖ The **mini-trial process** is governed by a written agreement between the parties and **consists** of information exchange and settlement negotiation.

✓ This agreement can be

1. **Incorporated** in the contract or

2. **Developed** as a separate document,

in case the parties elect to **use a mini-trial later**.

❖ Each party is represented by **legal counsel** who **prepares** and **presents** the party's case at the **information exchange**.

❖ Each party is represented by a senior executive with **settlement authority**.

□ The essential elements of a mini-trial are as follows:

❖ The **neutral advisor** is always involved.

✓ The **process** can be structured with the trial being **administered** by

1. A single neutral advisor or

2. A neutral advisor with a senior-designated representative for each side (a panel of three).

○ The **neutral advisor** is selected by **both sides**.

❖ The **procedure** and **structure** of the mini-trial including

1. a preliminary exchange of documents and

2. the length of the hearing

is as **agreed** to by the parties.

□ The essential elements of a mini-trial are as follows:

❖ After the presentations,

the neutral advisor and senior executive representative

caucus and **attempt** to **formulate** a voluntary settlement.

❖ If there is **no voluntary settlement** agreed to by the parties,

the **neutral advisor** renders an advisory opinion.

✓ The **advisory opinion** includes

1. Identification of issues of law and
2. Fact critical to the disposition of the case and
3. Recommendations as to resolution.

- ❑ **Mini-trials** are a useful procedure in **larger** and **complex cases**, especially if there are **several parties involved**.
- ❑ They have been **utilized with success** by **public agencies** with pioneering use by the **US Army Corps of Engineers**.
- ❑ They are a **useful vehicle** in which **subcontractor claims** can be incorporated as part of the **dispute resolution process**.
- ❑ If a **mini-trial** is **attempted early** in a potential litigation situation, it can be **cost-effective**.
- ❑ **Unfortunately**, many times parties have already incurred **substantial litigation preparation costs** such as
 1. The taking of depositions and
 2. The preparation and answering of interrogatories before a mini-trial is attempted.
 - ❖ Even then, it can be a useful and viable process and procedure.

Dispute review board

❑ **Provisions** for a dispute review board (DRB) are made in the contract between the parties.

❖ The **DRB** is growing in popularity as it has been successfully used on heavy construction projects such as dams, highways, and transit work.

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Dispute review board

❑ The **DRB** does **not supplant** the **owner's contractual dispute settlement procedure**.

❖ It is

- ✓ an earlier,
- ✓ non-binding,
- ✓ intermediate step

directed at avoiding the need to

resort to later, more expensive, and more time-consuming procedures.

Dispute review board

- ❑ Each contracting party elects one member, and the **third-party neutral** either is
 1. Selected by these two members or
 2. Designated from a list pre-determined prior to the contract.
- ❑ All DRB members are selected for their knowledge and technical expertise about the **type of project** to be constructed.
 - ❖ The **rules governing** the conduct, responsibility, and power of the DRB are **outlined in the contract documents**.

Dispute review board

❑ The **DRB** is **organized shortly** after the **contract is awarded**.

❖ It is essentially a **committee**

that is **in place** during **project implementation** to

air disputes in an informal and to provide recommendations for
timely dispute resolution. communicative atmosphere

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Dispute review board

- ❑ Normally the contract provides for the **DRB to meet** at the **job site** on a **regular basis**.
- ❖ The **purpose** of these meetings is for the board members to **stay abreast** of the **construction activity**.
 - ✓ They are **briefed** by the project managers as to the **progress** of the work.

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Dispute review board

❑ In the **event of a dispute** the parties cannot resolve,
the dispute is **presented** to the **DRB**.

❖ The **board** does **not make decisions**

but gives the parties

1. its **recommendation** in writing and
2. the **reasons** for the conclusions reached.

❖ In this manner, any **dispute** that occurs can be **handled**
expeditiously.

Dispute review board

- ❑ Although the **recommendations** of the board are **not binding**,
experience has shown that **such recommendations** are accepted in **nearly all**
instances.
- ❖ Thus, just the **existence** of a **DRB** has acted as an **encouragement** to parties
to **resolve disputes** between themselves
without having to **resort to arguing** the matter
before the **impartial DRB**.

Dispute review board

❑ The American Society of Civil Engineers (ASCE) publication Avoiding and Resolving Disputes During Construction:

- ❖ Successful Practices and Guidelines, documents projects where DRBs have been utilized.
- ❖ Of significance, in **over 100 projects listed**, there were only a small number of disputes that were heard by a DRB.

Moreover, no disputes resulted in litigation.

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Mediation/Arbitration

❑ Although not commonly utilized,

mediation/arbitration is a **procedure** that is **adaptable** to construction disputes.

❑ **Mediation/arbitration** combines elements of both mediation and arbitration.

❖ Normally, it is **structured before** work begins with a **neutral** being selected to **hear disputes** that may arise **during construction**.

✓ The **neutral** acts as the mediator and functions in a **similar manner** as a **DRB**.

✓ As an **expert** in the **construction field**, the neutral will be familiar with

the **job progress** and thus is able to work with the parties to **resolve disputes** when and if they occur.

Mediation/Arbitration

❑ **Only if the mediation process fails** does the designated neutral, by agreement of the parties, **act as an arbitrator.**

❖ Consequently, the **neutral** makes a **determination** rather than a **recommendation.**

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Mediation/Arbitration

❑ There are **conflicting opinions** on this procedure.

❖ In favor, it is **argued** that it is **fair** and **cost-effective**;

the individual being **familiar** with the project and having been **selected by the parties** in the first instance

is in the best position to make a **reasoned decision** if mediation fails.

❖ The **opposing view argues** that giving the **same individual** the **powers** of an arbitrator **restricts** the normal give-and-take found in **mediation**.

✓ If the **same individual** is known to also have an **arbitrator's power** (namely to make a **binding decision**),

the parties could well be **hesitant** at making full disclosure or making their best offer during the **mediation** process.

Mediation/Arbitration

- ❑ There can be **variations** on this process.
- ❖ One approach would be that the **designated neutral** would **only be given** the **final arbitration power**
 - if **both parties agreed** to it should the **mediation fail**.
 - ✓ This would **address** one of the **major objections** to this process.

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موسسه مهندسی و مدیریت ساخت علوی پور (ACEMI)

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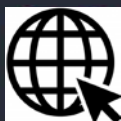
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