



Federal Highway Administration Publishes CM/GC Notice of Proposed Rulemaking

08.20.2015 | By [Ann-Therese Schmid](#)

On June 29, 2015, the Federal Highway Administration ("FHWA") issue a Notice of Proposed Rulemaking ("NPRM") related to the construction manager/general contractor ("CM/GC") method of contracting.¹ The NPRM is a long-awaited step from the FHWA to institutionalize a contracting method that has been used in the United States' transportation industry since the early 2000s. The FHWA's authority to promulgate regulations related to CM/GC contracting was set forth in the last transportation authorization, Moving Ahead for Progress in the 21st Century (or, MAP-21).² Comments on the NPRM are due to the docket no later than August 28, 2015.

Generally under the CM/GC contracting method, a designer is procured using a traditional Brooks Act (or mini-Brooks Act) procurement, with the CM/GC contractor coming on board sometime early in the design process. The CM/GC contract is procured via a single procurement to obtain both pre-construction and construction services under one contract, typically with a construction contractor. The CM/GC contractor is often procured during preliminary design of a project in order to maximize the opportunity for the contractor to provide input and innovation early in the project's development. The CM/GC contractor may be procured prior to the completion of the National Environmental Policy Act ("NEPA") process, but if so the construction of the project may not be awarded to the contractor until after the final environmental determination has been made.

Douglas D. Gransberg, Professor of Construction Engineering at Iowa State University, has identified concerns regarding the interaction between the owner, designer, and CM/GC contractor and the silence of the FHWA's NPRM to address the three-party relationship. Specifically, Gransberg states that "the rule is silent regarding the changes that CMGC necessitates in the consultant design contract to ensure that the designer will cooperate with the contractor during precon. I feel strongly that the consultant be permitted to include hours for coordinating with the CMGC on constructability reviews, value engineering analyses, and material selections to gain the benefits for the agency. In the case studies that we did, the only

'unsuccessful' CMGC projects were ones where the DOT either assumed that telling the designer that this would be a CMGC project or converted a DBB project to CMGC late in the design and in all cases, the consultants refused to play friendly because they had no billable hours in their fee."³

To be sure, for both the designer and the CM/GC contractor, it is very important that the cultural differences between working on a CM/GC project versus working on a more traditional project are made clear, and are accounted for in the contracts with each. For example, the designer must open its design process to review by and collaboration with not only the owner, but also with representatives from the CM/GC contractor. Similarly, the CM/GC contractor must work collaboratively with both the owner and designer to review design solutions and, frequently, open its books for the cost estimation process. More so than with other more traditional methods of contracting, adversarial positions must be left at the door.⁴

During pre-construction services, the CM/GC contractor can provide constructability reviews, value engineering support, schedule and sequencing analysis, cost estimation, and scope packaging. The pre-construction services are priced separately from the construction services. Pre-construction services can be priced as unit priced/hourly, lump sum, or cost plus fixed fee, or a combination of pricing structures depending on the specific activity. It should be noted that during pre-construction services, the CM/GC contractor is not providing design and engineering services, but rather is providing construction-related services during design and engineering.

A critically important aspect of the CM/GC contracting method is the ability of the parties to the CM/GC contract to agree to the price for construction services. Best practices dictate that the construction services price not be included as part and parcel of the initial solicitation in order to better control risk and contingency aspects of the pricing. Instead, most parties undergo some form of negotiated pricing for the construction services under a CM/GC contract at some point during pre-construction services, whether the negotiation is closed-book, open-book, or a formal price bid/proposal submission. The price for construction services under the CM/GC contracting method is typically a guaranteed maximum price ("GMP") or a lump sum. When negotiating the GMP or lump sum price for construction services, the negotiation entails review of and agreement on the following general categories:

- Direct expenses (such as, labor, materials, and equipment);
- Indirect expenses (including, overhead, permitting, and insurance and bonding);
- Contingency; and
- Fee.

Unit pricing can also be used to price construction services under a CM/GC contract, but is used with less frequency and is more administratively burdensome on very large projects.

Failure to negotiate the construction services (price, scope, schedule, and/or contractual terms and conditions) results in the cancellation of the CM/GC contract and, most often, the solicitation of a hard bid for the construction of the project.

The FHWA attempts to address many industry best practices, as well as complications of using innovative contracting on federal projects, in its NPRM. The proposed regulations are broken out into four basic areas: (1) CM/GC contracting procedures; (2) FHWA concurrence in procurements; (3) FHWA authorization of federal funding; and (4) the relationship of the CM/GC contracting method to NEPA. The proposed regulatory structure appears to allow state transportation agencies, and their subrecipients and contractors,

the latitude to solicit CM/GC contracts in a variety of ways (including through letters of interest, requests for qualifications, or requests for proposals); to provide construction work packages under the contract (allowing "fast-tracking" of work either through early work packages or through multiple construction services contracts); and to award the contract as determined appropriate for the particular project (such as, based on qualifications, experience, or a best value analysis).

Potential users of the FHWA's proposed CM/GC regulation should pay special attention to the FHWA's proposals for concurrence in CM/GC procurements, timing of funding authorization, and relation to the NEPA process. Due to the CM/GC contracting method's non-traditional time lines, issues may arise from attempts to fit an alternative project delivery process into procedures established for linear, design-bid-build projects.

¹ Construction Manager/General Contractor Contracting, 80 Fed. Reg. 36939 (June 29, 2015).

² Moving Ahead for Progress in the 21st Century § 1303, 23 U.S.C. §112(b)(4).

³ E-mail correspondence between D. Gransberg and N. Smith, dated August 3, 2015.

⁴ Two comprehensive studies related to the CM/GC contracting method have been conducted by the National Cooperative Highway Research Program at the Transportation Research Board: NCHRP Report 787, "Guide for Design Management on Design-Build and Construction Manager/General Contractor Projects" (2014) and NCHRP Synthesis 402, "Construction Manager-at-Risk Project Delivery for Highway Programs" (2010).