

GMP Contracts What's Really Guaranteed Welcome!

The webinar will begin at 8:00 a.m.

SHERMAN & HOWARD LLC.

ESTABLISHED EXCELLENCE

GMP Contracts

What's Really Guaranteed

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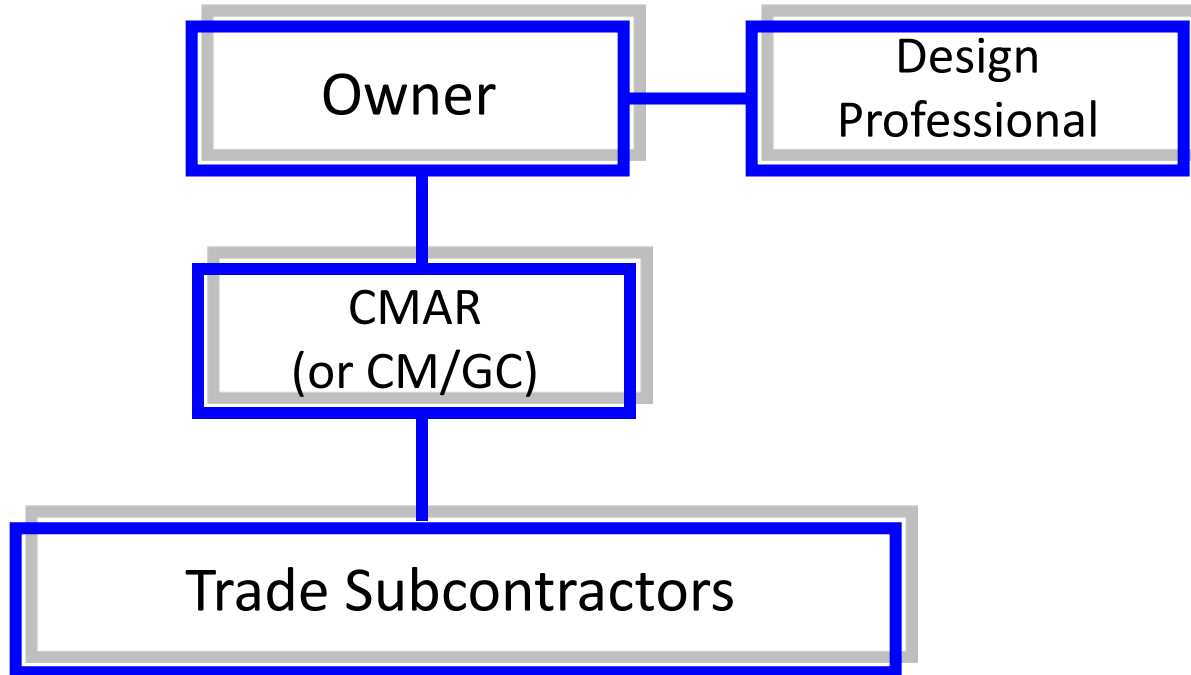
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It's All About Risk

Risk is Inherent

It can be managed but not eliminated

Typical Delivery Model



CM at Risk (CM/GC)

- Provides preconstruction services during design phase
- Provides lump sum or cost-plus GMP pricing for construction
- GMP contracts define what constitutes “cost of the work” and are open book, subject to audit



The Construction Contract

- Primary risk allocation tool
- Defines respective rights/responsibilities
- Disputes arise from:
 - Unexpected or unplanned risk
 - Poorly managed or unmanageable risk

Form Contracts

- American Institute of Architects (AIA)
- Associated General Contractors of America (AGC)
 - ConsensusDocs
- Engineers Joint Contract Documents Committee (EJCDC)
- Design-Build Institute of America (DBIA)

AIA® Document A101™ – 2007
Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum

AGREEMENT made as of the _____ day of _____
in the year _____
(In words, indicate day, month and year)

BETWEEN the Owner:
(Name, address and other information)

and the Contractor:
(Name, address and other information)

for the following Project:
(Name, location, and detailed description)

The Architect:
(Name, address and other information)

The Owner and Contractor agree as follows.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201™–2007, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

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GMP Contracts

- Means “Guaranteed Maximum Price”
- Often means “Generally More than Planned”
- Composed of:
 - Cost of work (opt-in)
 - Contractor’s fee

Establishing the GMP

- Early - Schematic design stage
- Classic - Design development stage
- Late - Design complete

Timing significantly affects risk and
potential for problems



Carefully Define Basis for GMP

What is subject to the "cap"?

Typical GMP Language

AIA Document A102 – 2007

ARTICLE 5 CONTRACT SUM

§ 5.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum is the Cost of the Work as defined in Article 7 plus the Contractor's Fee.

§ 5.1.1 The Contractor's Fee:

(State a lump sum, percentage of Cost of the Work or other provision for determining the Contractor's Fee.)

§ 5.2 GUARANTEED MAXIMUM PRICE

§ 5.2.1 The Contract Sum is guaranteed by the Contractor not to exceed [] (\$ []), subject to additions and deductions by Change Order as provided in the Contract Documents. Such maximum sum is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Contractor without reimbursement by the Owner.

(Insert specific provisions if the Contractor is to participate in any savings.)

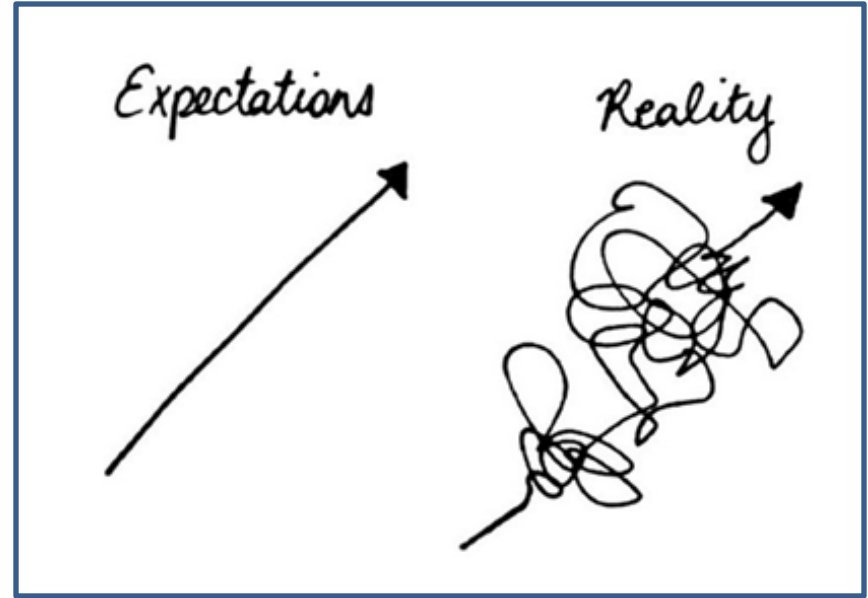
Defining the GMP

- Scope definition
- Specification/drawing requirements
- Assumptions
- Qualifications
- Conditions



Adjusting the GMP

- Changes in scope
- Reconciliation of allowance items
- Changes in GMP assumptions
- Development of incomplete plans



GMP Problem Areas

- Compensable changes and delays
- Sacrificing quality
- Scope creep
- Contractor waste
- Requirements v. assumptions



Recovering Costs of the Work

Incurred v. Reimbursable?

Typical “Cost of Work” Language

AIA Document A102 – 2007

ARTICLE 7 COSTS TO BE REIMBURSED

§ 7.1 COST OF THE WORK

§ 7.1.1 The term Cost of the Work shall mean costs necessarily incurred by the Contractor in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with prior consent of the Owner. The Cost of the Work shall include only the items set forth in this Article 7.

“Cost of Work” Standard

- Contract definition of “Cost of the Work” controls
 - Necessarily (v. reasonably) incurred
 - Proper (v. actual) performance of Work
 - Opt-in v. Opt-out
- Incurring and/or billing \neq reimbursable
- Incurred costs are subject to audit
 - Potential disgorgement

Defining Cost of the Work

- Align with GMP budget
 - Identify items of required and contributing cost
 - Include all costs in “Cost of the Work” definition
- Reconcile/Eliminate inconsistencies
 - Requires drafting precision/clarity

Disputed Cost items

- Contractor supervision/labor costs
 - Actual v. scheduled rates
 - Surrogate costs v. convenience for interim billing
 - Labor burden (rates, components)
- Contractor-owned equipment

Disputed Cost Items

- General conditions
 - Fixed v. estimated
 - Extended (actual v. daily rate)
- Insurance
 - Deductibles
 - Subcontractor default insurance

Disputed Cost Categories

- Correction of defective work
- Contractor contingency
- Allowances
- Shared savings
- Self-performed work
- Price escalation



Correction of Defective Work

AIA Document A102 – 2007

§ 7.7.3 Costs of repairing or correcting damaged or nonconforming Work executed by the Contractor, Subcontractors or suppliers, provided that such damaged or nonconforming Work was not caused by negligence or failure to fulfill a specific responsibility of the Contractor and only to the extent that the cost of repair or correction is not recovered by the Contractor from insurance, sureties, Subcontractors, suppliers, or others.

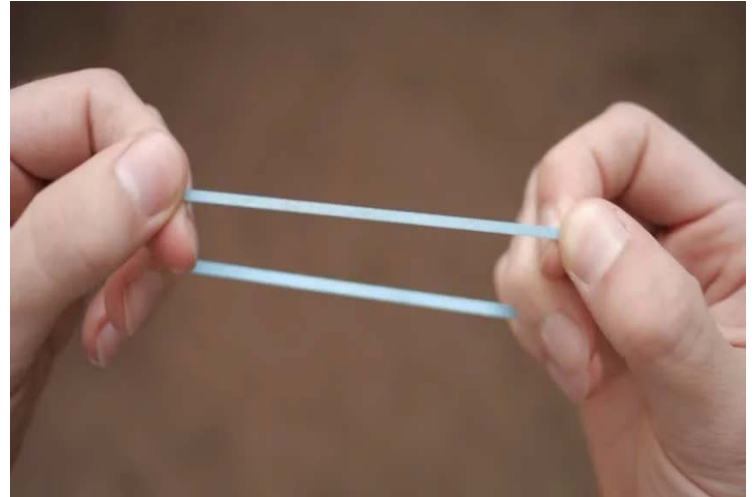
- Policy issue – paying twice?
- Ambiguity of “negligence”
- Effort required to pursue cost recovery?

Contractor Contingency

- Typical in GMP Pricing
- Not typically addressed in form contracts
- Contractual issues
 - Purpose and approved use
 - Sources
 - Control of account
 - Reporting requirements
 - Right to audit account

Allowances

- Plug numbers in GMP estimate
- Elastic component of GMP
- Material cost only (default)
 - Can be structured to include labor, overhead, profit, etc.
 - Can be structured to cover broader categories of work
- Reconciled by Change Order



Shared Savings

- Purpose and incentives
- Basis for calculation
 - Original GMP only?
 - Adjusted GMP with approved change orders?
 - Contingency included?
- Time for reconciling/sharing savings
 - Post-reconciliation costs
 - Subsequent warranty or repair costs

Self-Performed Work

- Not typically addressed in form contracts
 - Related party transactions (A102 § 7.8)
- Need to control critical work
- Fixed price?
- Controls to consider
 - Separate mark-ups and general conditions
 - Third-party bid requirement
 - Specific contract authorization

Price Escalation

- Not typically addressed in form contracts
 - Risk on contractor by default
- Contingency or change?
- Assumed in original GMP?
- Specific escalation provision
 - In prime contract
 - In subcontracts



Other Reimbursement Issues

- Contractor's Fee
 - Items excluded from calculation
 - Challenges to hidden “fee” beyond stated percentage or lump sum

Other Reimbursement Issues

- GMP Subcontracts
 - Flow-down “cost of the work” provisions
 - Listing, notice, approval requirements
 - Reimbursable as defined in subcontract

Other Reimbursement Issues

- Fixed-price arrangements
 - Agreed labor/equipment charging rates
 - Agreed labor burden rate
 - Lump sum change orders

Audit Rights/Concerns

- Scope of audit
 - Fixed-price arrangements
- Timing of audit
- Shifting cost of audit
- Auditor selection
- Confidentiality of audit

Q&A

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