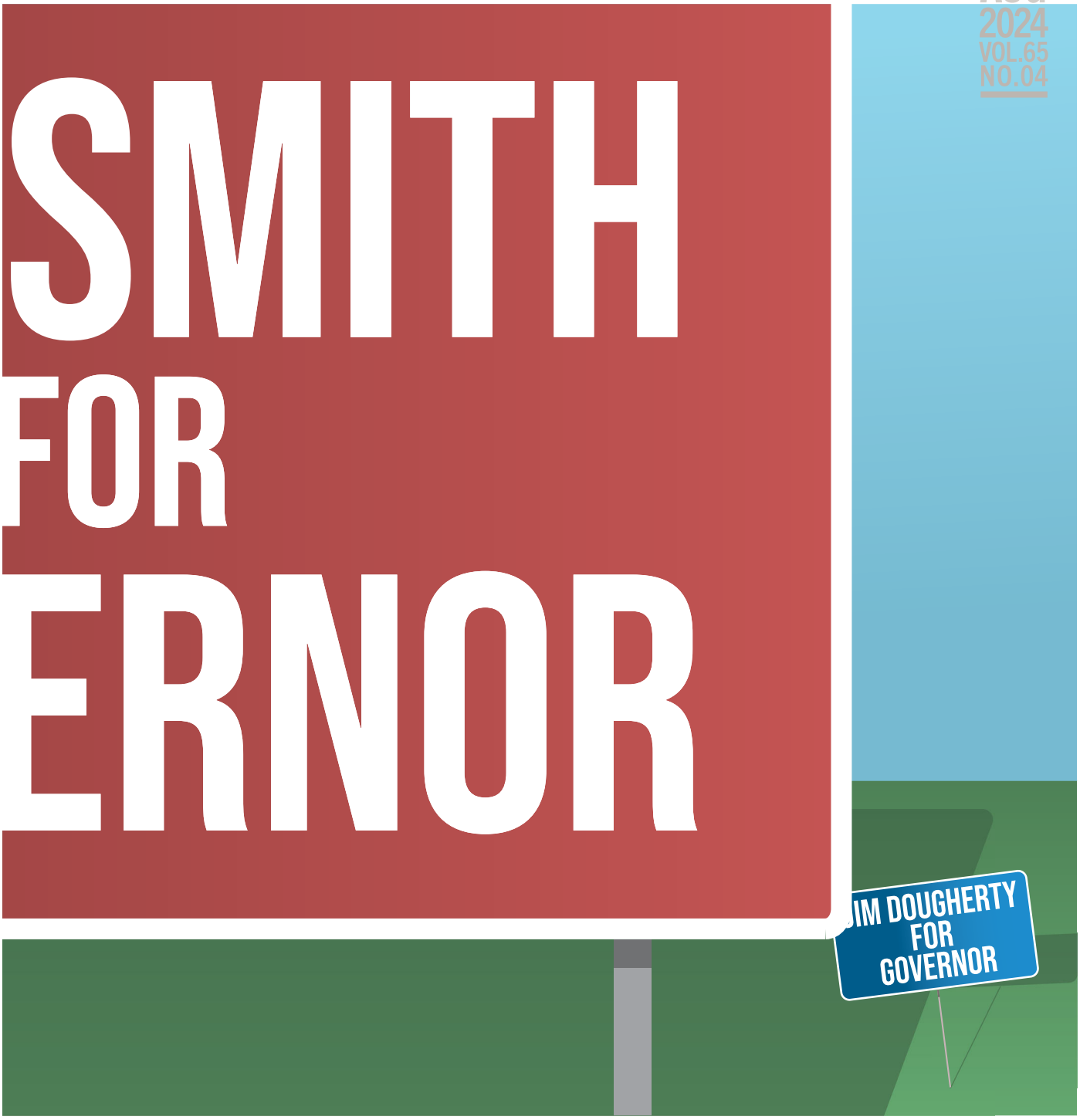
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By: Eric Shytle, General Counsel, Municipal Association of South Carolina, Columbia, South Carolina and Sean Scoopmire, Planning and Law Associate, White & Smith LLC, Greenville, South Carolina

The parameters of First Amendment barriers to content-based sign ordinances continue to evolve in the wake of *Reed*. As our national electoral season approaches, a review of the permissible limits on political signage is in order. Our authors assess the current state of sign law and propose a content-neutral taxonomy.

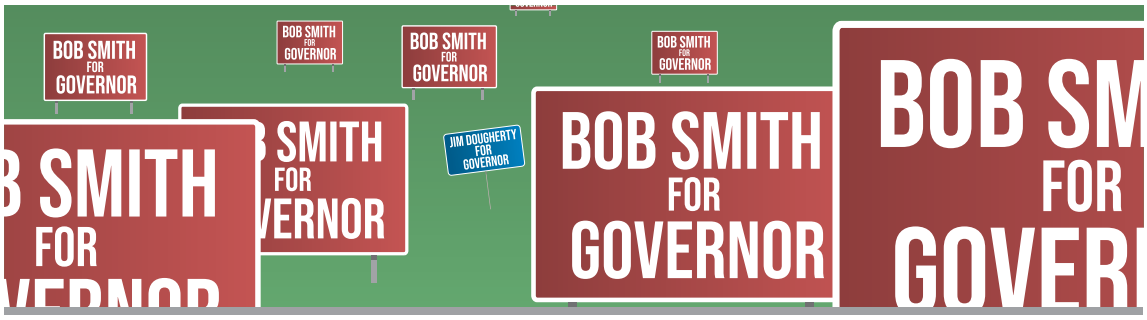
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By: Michelle White, Employment Law Associate Attorney, Lloyd Gosselink, Austin, Texas

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CONSTRUCTION

By: JENNIFER DECURTIS,
Senior Assistant City Attorney,
City of Irving, Texas

Use of Construction Manager-at-Risk Contracts

A Construction Manager-at-Risk (CMAR), if available in the jurisdiction, may benefit public projects that are large in scope, or may benefit public entities that do not have enough internal resources to project manage or audit invoices. A CMAR is an alternative delivery method for the construction, rehabilitation, alteration, or repair of a public project and as such, usually has state specific requirements. The benefits include having a contractor involved in value engineering and constructability during the design of a project, controlling costs, and providing project management. Further, a public entity should take advantage of this method if there are too many projects being developed at one time, since each CMAR will be able to provide individualized attention to that particular project.

Generally, a design professional must be designated concurrently with or prior to the award of a project to a CMAR. Jurisdictions may allow for a two-step process, using an RFQ method whereby qualifications are first examined and then price negotiated; or, a one-step process, using an RFP based on best value for the entity, which would include a negotiation of the CMAR management fee and general conditions fee. Some states require a certain number of finalists from which to negotiate in the two-step process.

CMAR projects are usually structured into phases such as pre-construction and construction phases. In the pre-construction phase, the CMAR is responsible for cost estimates, schedules, and further development of the design documents in order to comment on value engineering/cost reductions, and constructability. In value engineering, the CMAR analyzes the building features and systems, the equipment used, and the material selections to achieve desired functions and a reduction in cost over the life of the project. For example, if a CMAR determines that the materials the architect wants to use are not going to work in practical construction, the CMAR may suggest a cheaper alternative that is more flexible to value engineer the project and analyze constructability. This method may be contrasted with a design-build project where the contractor has its own design professional. The public entity in that case would be able to have a constructability review but would not have as much control as they would have using a separately bid design professional. The CMAR method would allow cost and schedule advantages over the design-build approach. It is worth noting that some jurisdictions even limit the number of design-build contracts that a public entity may have within a one-year period. It is a best practice for the CMAR to provide estimates during the pre-construction phase when the design development is at least at 30% and 60% completion so that the public entity may ensure that the original project budget estimate has not fluctuated in a dramatic way. Additionally, the contract should provide that any cost savings must accrue to the public entity.

Some jurisdictions include the pre-construction phase and the construction phase in one agreement, but others have two separate agreements. A benefit of a separate agreement for each phase is clarity on any bonds required; however, some courts have reviewed cases where terms were not able to be agreed upon for the construction phase after a contracted for pre-construction phase is completed, and yet a portion of the construction has already started. In those cases, courts such as New York and Georgia, have analyzed these cases based on a theory of *quantum meruit*. Either method will allow costs to be bid out for both phases. The pre-construction phase is usually bid as one lump sum.

Once 100% of the construction documents are completed, the

guaranteed maximum price (GMP) may be established through an amendment to the contract if there is one agreement for all phases. The GMP is the total cost of the project, beyond which the CMAR absorbs the extra costs. The total cost of the project includes any of the direct costs to include labor performed by the CMAR, labor performed by subcontractors, and materials and equipment used to complete the work. CMARs, unlike other construction manager agents, are often allowed to do part of the work themselves which would be billed as a direct cost and not part of the management fee. A management fee is generally allowed which is represented by a percentage of the total project budget. This percentage goes by industry standard and is not regulated in many jurisdictions; however, some places such as Nevada put a range on the percentages that may be paid.

Further, CMARS may seek reimbursement for general conditions up to a fixed percentage of the project budget. General conditions are usually the operational indirect costs that are not direct costs to construction but are essential to the project, such as work vehicles, temporary cooling and heating, project site facilities, etc. This is *not* home office overhead. Once the CMAR with the best value for the public entity (or other standard as required by that particular jurisdiction) is identified, an entity must establish and/or negotiate the percentages of management and general conditions fees prior to award. Oftentimes a CMAR will not bid onsite project managers in the management fee, so the general conditions fees tend to be much higher than the management fee.

CMARs are at *risk* for any costs over the GMP to include any costs over their CMAR management fee and general conditions fee; provided that overruns are not caused by the owner. Because the CMAR bids out and enters into the subcontracts instead of the public entity, they are also potentially at risk for defective work as it pertains to a sub's labor. For defective designs, some cases in the United States hold that the public entity provides an implied warranty of the accuracy of plans and specs in favor of a contractor, called the "Spearin Doctrine"; however, a CMAR can generally only take advantage of the Spearin Doctrine if they relied on the plans and specs in good faith since that method is so similar to a design-build method due to the participation in the design. Since this is an implied warranty, it can be waived by contract. Generally, the CMAR is in the best position to detect defects because the CMAR is on site often during the construction phase.

Another area that should be carefully reviewed is any bond required by statute for those areas authorizing the use of the CMAR delivery method. Many statutes require the CMAR to provide performance and payment bonds at the time of the initial contract (through the relevant Little Miller Act statute); however, some statutes either only require one of those bonds or none at all. Some states, such as Texas and California, require performance and payment bonds in the amount of the entire project budget at the time of the initial contract. (Review the relevant state's Little Miller law). Some CMARS express dissatisfaction in providing bonds for the entire project amount at the pre-construction phase (in the case of one contract for all phases) when they may not be reimbursed for costs until the next phase. Fortunately, some states, such as Texas, allow for an alternative security bond to be set in place during the pre-construction phase and then payment and performance bonds to be required at construction. Each jurisdiction has its own requirements on the bonding.

Other CMAR challenges have been primarily those of regular construction claims. However, overall, the CMAR delivery method is a tool that should be considered for public entities if it is authorized as a delivery method in that jurisdiction. Larger and/or multiple projects can benefit from the use of this delivery method due to value engineering and scheduling. The project management functions that a CMAR provides is often critical for smaller cities or cities with few project managers and too many projects, or even larger cities with very large projects. Overall, each public entity must determine which delivery method is best for its particular type of project. ML



Jennifer DeCurtis serves as a Senior Assistant City Attorney for Irving, Texas, where she handles a variety of matters for the city involving real estate, eminent domain, construction, development, housing, and purchasing, also serving as the staff attorney for the Capital Improvements Advisory Committee. Previously, Jennifer worked for the City of Dallas where she handled extensive litigation involving code, land use, fair housing, and criminal nuisance cases. She has also worked as an attorney for the City of Denton and the City of Arlington, as well as working in private practice with a boutique municipal law firm.Jennifer has lectured at several conferences and training seminars and has co-authored papers on a broad range of topics concerning government entities. Jennifer is an IMLA Local Government Fellow and certified as a municipal lawyer by the TCAA. She is a graduate of the University of Texas at Dallas and earned her J.D. from Texas A&M University School of Law.