LePatner C³ MODEL™

CONSTRUCTION COST CERTAINTY

Providing corporate owners, institutions, developers and real estate investors with a *true*, fixed-price approach to designing and building complex capital projects.

LePatner C³ BLUEPRINT™

LePatner C³ AGREEMENTS™

LePatner C³ PROJECT FORMS™

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CREATED AND PREPARED BY

LEPATNER
CORPORATE CONSTRUCTION COUNSEL

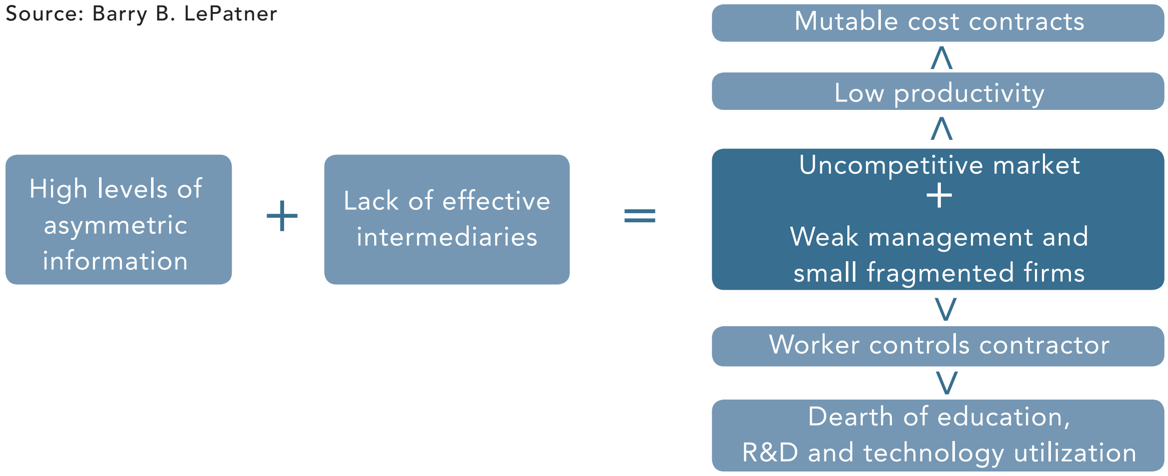
Part I

THE STATE of the CONSTRUCTION INDUSTRY TODAY

We live in an era when economic power has broadly and decisively shifted from suppliers to consumers. The availability of product information and cost has exploded geometrically in recent years. Consumer choices have multiplied greatly. It is not nearly as easy as it once was to get away with peddling expensive junk. Just ask GM and Chrysler, or if you could find them, RCA or Philco. Companies propose. Consumers dispose. Don't like something—no, make that anything—you took home from Wal-Mart or Target yesterday? Take it back tomorrow and an "associate" will refund your money with a smile. We speak here not just of clothing and iPods. Even in citadels of professional privilege like medicine, consumers (patients)—at least in countries like the United States—exercise choice at levels unthinkable a decade or two back, and providers (doctors on down) have no choice at all but to try hard to satisfy them.

If there's anything that Americans are more cynical about than politics, it is construction. And with good reason. In politics at least we get an opportunity to vote and turn out one set of rascals for another—the hope of change anyway. In construction we do not seem to have even that much choice. It always costs more and always takes longer than the owners thought. And always, if they want their building finished owners put-up and pay-up. Like as not, construction is likely to be the only experience where otherwise sophisticated, business savvy owners feel distinctly uncomfortable with the process because of their inability to understand and control it. As seen in the figure below, the fact that the building construction industry is highly fragmented, primarily populated by small business owners continually struggling with cash flow who have little access to credit and are unable to afford significant technologic investments to improve productivity results from a lack of reliable owner intermediaries to level the playing field between owners and contractors.

The Equation of Existing Industry Failure
Source: Barry B. LePatner



This reality reinforces the asymmetry of information which favors the contractor over the owner and ensures that the contractor maintains full control of pricing and scheduling. As a result, contractors shift many project risks they should assume to the owner, operate in an opaque manner, and most importantly, rarely if ever provide the owner with a true fixed price for the project – risks and all.

If owners are going to avoid paying more than they bargained for on their capital projects, it is absolutely essential that they understand the construction industry's history, economic structure, incentives and disincentives. Only when armed with the most powerful weapon in a business arsenal—knowledge—will owners have a fighting chance to get the building it wants, on schedule, for the budget it established and the contract price it agreed upon.

If owners are going to avoid paying more than they bargained for on their capital projects, it is absolutely essential that they understand the construction industry's history, economic structure, incentives and disincentives.

Understanding the structural failures of the industry is one thing. Understanding how a particular project will be built and delivered is another. For example, over the past several decades, Guaranteed Maximum Price contracts and Fast-Track project delivery became the norm for most large scale, complex projects. Construction Managers, who serve as the aggregators of the various subcontractors and materials suppliers for a project, answered owners' and developers' calls to provide them with a building process that, at first look, allowed construction to proceed on an accelerated basis, potentially saving the owner millions of dollars in financing costs and ostensibly allowing it to capture "early" revenue from the completed project. However, owners and developers were slow to recognize a major flaw in the model: GMP contracts and the Fast-Track process were based on incomplete design documents, which invariably led to significant cost overruns.

Despite its name suggesting otherwise, a GMP is misleading. To "expedite" construction, Construction Managers routinely require the owner's architects and engineers to issue incomplete drawings and specifications to contractors as the basis for the GMP. The contractors must infer and make cost assumptions on the "missing" design elements since they are not provided with a full set of information on the project design. GMP agreements ultimately allow for myriad exclusions, allowances, and pricing assumptions based upon the incomplete design. It is no surprise that these pricing and scope assumptions rarely bear out once construction starts, the final design completed, and actual costs determined.

Fast-track projects also fail to provide assurances that projects will be completed within budget and on schedule. Despite fast-track jobs commencing construction while the design is still being finalized, these projects rarely finish sooner than if construction had begun after complete, fully developed construction documents had been prepared and bid. In effect, fast-track often extends the construction schedule, increases construction costs, and ensures the likelihood of even more costly completion delays.

As a result, change orders, claims, and delays to project completion, stemming largely from incomplete design documents, became the norm driving up actual project costs by 20% or more – even 100% at times – over the owner's anticipated project budget. To the nation as a whole, construction cost overruns damage the economy by over $120 billion each year. For many commercial and institutional owners and developers, paying for unexpected overruns and carrying costs out-of-pocket are often catastrophic.

Unanticipated project cost overruns can no longer remain an afterthought or be assumed to be covered by additional financing.

In the recent past, those unexpected cost overruns were paid to the builders by owners accessing additional lines of credit or by reducing the developer's anticipated profits. In the current economic climate however, unlimited project financing is no longer available. Lending requirements have tightened, typically requiring a 40% to 50% owner equity stake in order to obtain a construction loan. Moreover, mezzanine loans, which financed project overruns that enabled an owner to pay for contractor claims, are a thing of the past. Such costs will now have to be paid by the owner. As a consequence, public and private owners will increasingly demand certainty for their capital project costs in order to protect their equity stake. Unanticipated project cost overruns can no longer remain an afterthought or be assumed to be covered by additional financing.

Yet, standard design and construction agreements, including those generated by or based upon the AIA and AGC models, fail to provide any sense of certainty in these critical areas. In fact, the AIA and AGC agreements are silent on the critical issue of contractor bids based upon incomplete designs and fail to offer any mechanism to anticipate and price "unexpected" conditions. These are precisely the circumstances in which cost overruns and change order claims run rampant through the construction industry.

These precepts are set forth and discussed at great length in Barry B. LePatner's book, *Broken Buildings, Busted Budgets: How to Fix America's Trillion Dollar Construction Industry* (University of Chicago Press, 2007). It has sparked a long overdue debate among owners, design professionals, and contractors on the mutual benefits of construction industry reform, including the need for widespread adoption of true fixed-price contracts.

While *Broken Buildings* explained why the industry operates the way it does and offered industry-wide and individual recommendations for improvement, including use of fixedprice contracts, it did not specify how to go about obtaining a true fixed-price contract. In Part II, we explain how the LePatner C^3 Model helps owners reduce the risk of unwarranted cost overruns while securing greater assurances of timely completion of their projects.

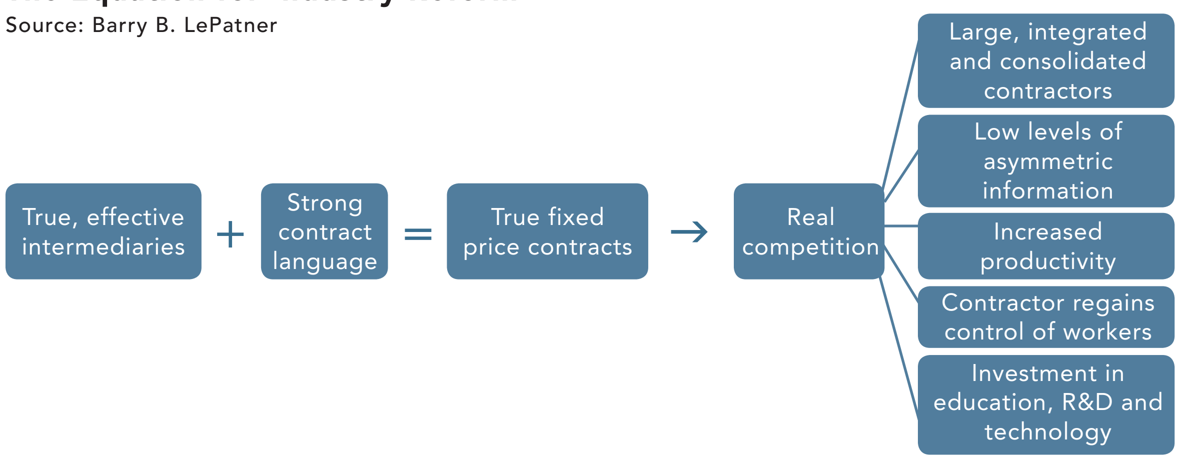
Part II

THE MISSION AND CONCEPT of the LePatner C³ Model™

Building on LePatner's "Equation for Industry Reform" published in the final chapter of *Broken Buildings*, the **LePatner C³ MODEL™** instructs owners how to regain control of its project and rebalance its relationship with the contractor by obtaining, for the first time, a *true* fixed-price contract. LePatner's reform hinges on two fundamental principles: (i) a *true* fixed-price construction contract based upon fully complete and coordinated construction documents; and (ii) a transparent construction process brought about by the introduction of a reliable owner's intermediary to the process, who is able to restore balance to the asymmetric owner-contractor relationship.

The Equation for Industry Reform

Source: Barry B. LePatner



To address these concerns and others, LePatner & Associates has devised and implemented, with input from owners and construction industry leaders, a revolutionary and seamless project management process, the LePatner C³ Model, which incorporates a set of *true* fixed-price contracts. It aligns the often conflicting incentives and objectives of owners and contractors and casts aside misplaced industry assumptions and rigid hierarchies that fail to serve owners, lenders, designers, or contractors. Instead, the LePatner C³ Model is based upon: (i) thorough upfront project planning and design preparation; (ii) an equitable accounting and allocation of project risks between owners and contractors; (iii) a transparent process for owners and builders to exchange information on project pricing and market conditions; and in return, (iv) it ensures a built-in *fair* profit for contractors when the project is completed "on time and on budget" and without fear of time-consuming and costly claims procedures.

In developing the LePatner C^3 Model, LePatner undertook a comprehensive review and analysis of (i) how commercial, institutional and development projects are currently designed and built in the United States; (ii) the most recent 2007 AIA and AGC form agreements (presently regarded as the construction industry standard); and (iii) LePatner's own project agreements prepared on behalf of owners/developers with their contractors, construction managers, and design professionals. For over twenty years, LePatner contracts have provided owners/developers with a more complete set of project protections that more accurately reflect the complexities of the modern construction processes than AIA agreements.

Now, with an improved set of construction contracts and a well-defined project management process, LePatner raises the bar again for design and construction counsel and advisory services.

The LePatner C^3 Model™ is designed for corporate and institutional owners, developers, and real estate investors as a complete capital project process guideline from start to finish. It will, for the first time, provide owners with a project strategy as well as powerful contract tools that provide strong assurances that their projects will be completed for a true fixed price without unwarranted cost overruns. The LePatner C^3 Model™ is comprised of three interrelated components presented in the accompanying documents:

The LePatner C^3 Model

- C^3 BLUEPRINT™
- C^3 AGREEMENTS™
- C^3 PROJECT FORMS™

1. C^3 Blueprint. This is a dynamic outline of the entire LePatner C^3 Model™, describing in detail the tasks, responsibilities, and step-by-step undertakings by the members of the project team during each phase of the project. See Part IV.

2. C^3 Agreements. While applicable to any size project, these agreements anticipate the special requirements of complex projects costing $25 million or more. They depart markedly from standard form agreements by establishing the conditions to avoid unwarranted cost overruns. The primary project agreements are between:

- owner and construction manager/ contractor/vendors,
- owner and pre-construction manager, and
- owner and architect / engineer / other design service providers

These can be edited and shortened as needed to address smaller projects.

The C^3 Agreements arose from LePatner's detailed comparative analyses of the 1997- and 2007-AIA, 2007-AGC, and 2008-LePatner agreements. See Part V.

3. C^3 Project Forms. A sampling of key forms is listed in Part VI. They are to be used by the Owner and its design and construction consultants to properly manage the project and ensure that the C^3 Agreement provisions are complied with.

Comparing Project Approaches

Traditional Project Construct	The LePatner C³ Model™
The traditional project process is an opaque process (even with a CM "open-book" project) that hides the true costs of construction from the owner. Bids / GMPs are based on incomplete and uncoordinated CDs, which provide loopholes for change orders and claims during construction.	The LePatner C³ Model is a transparent process that demands above-board cooperation, collaboration and honesty in exchange for a fair profit and avoiding the typical project conflicts. Contracts mandate complete and coordinated CDs for bidding, which the CM/GC must review and certify are complete prior to award– or provide notice to the owner and revise its bid.
CM/GC pricing is value-priced, charging what the market will bear. • Little or no owner negotiation is possible since the owner does not have an informed basis to challenge pricing. • CM/GC protects itself against all project risks not spelled out on the bid documents. Traditional contracts are silent on these issues. Guess who bears the risk? • CM/GC builds in hidden profit centers to supplement its bare bone base contract fee: > General conditions > Insurance > Sub "buys" > Change orders	Pricing is based on actual costs plus a fair, negotiated "pure" profit for CM/GC. • Owner's "team" knows the cost of trades and construction – a unit price list and/or schedule of values is presented to the CM/GC to accept or not. Only their profit is negotiated. • LePatner convenes a Risk Allocation Workshop™ to identify all likely project risks, assign, and price them to create a Risk Contingency for the project. This can be folded into the fixed price or left as a contingency. • No hidden profit centers are allowed. CM/GC records are fully auditable if investigation is warranted. CM/GC efficiency and good management is rewarded if completion is achieved faster than the schedule established by the owner's team.
Design consultants are in constant fear of being sued over errors and omissions in their incomplete drawings that they are forced to issue prematurely.	Design consultants can rest assured that once their CDs are certified as being fully complete and coordinated, they will be largely insulated from CM/GC claims arising from the CDs.

Who Wins?

✔ **Owners** will not face uncertainty over final costs, undisclosed risks, or uncertain completion dates.

✔ **Lenders** will have certainty that their construction loans will cover all completion and contingency costs.

✔ **Design consultants and CM/GCs** will no longer need to play the claims game. Instead, they can focus on completing the project on time and on budget in a less acrimonious atmosphere.

Who may still object?

Contractors and construction managers whose entrenched, inefficient (and perhaps unscrupulous) ways make them reluctant to change and who are more than comfortable with the status quo.

Part III KEY COMPONENTS of the LePatner C^3 Model™

The LePatner C^3 BLUEPRINT™

The LePatner C^3 AGREEMENTS™

The LePatner C^3 PROJECT FORMS™

As the financial crisis abates in 2010 and credit availability enables construction projects to move forward, construction overruns will no longer be affordable, nor should they be tolerated by owners. As corporations, institutions and developers plan new construction projects, they will find that lenders will require 40-50% owner equity to qualify for financing. In addition, experts predict that there will be few, if any, mezzanine lenders willing to fund cost overruns. To make matters more challenging, after several lean years of low-bidding projects just to keep their doors open, contractors will be looking to resume business as usual. The traditional low-bid process embraced by the industry, where contractors routinely bid low (often without profit) to get the job then count on change orders and claims to make a profit, routinely mandates that owners' project budgets must confront unexpected cost overruns. Hence, it has become increasingly imperative for owners to recognize the critical importance of utilizing true fixed-price construction contracts as a means to preclude costly construction overruns.

Inspired by Barry B. LePatner's successful book, *Broken Buildings, Busted Budgets*, which highlighted the economic harm to our nation caused by the inefficiencies of the construction industry, LePatner & Associates is pleased to announce the LePatner C^3 Model™, the first ever *true* fixed-price model for design and construction that assures project cost certainty. It lays out in detail the process and criteria for owners to obtain fixed-price contracts, where the risk of unwarranted cost overruns is minimized, if not outright eliminated.

A fundamental principle of this model is that it calls for the entire project team (architects and engineers, contractors, construction manager, etc.) to coordinate its activities from the outset of the project and generate, review, and acknowledge fully complete and coordinated design documents for final bidding prior to commencing construction. Upfront project planning is strongly emphasized where decisions are made that can ensure savings of millions, if not tens of millions of dollars throughout the design and construction process. Specifically, the C^3 Agreements™ state:

1. Design service providers shall provide *fully* complete and coordinated construction documents for final bidding by the contractor (and not as a series of addenda after the owner-contractor agreement has been executed);

2. Contractors / construction managers shall undertake a thorough review of the site and construction documents before they bid;

3. Contractors / construction managers, as constructability experts, must (a) identify and advise the owner and architect of any observable errors and omissions in the construction documents; (b) certify that the construction documents are in fact fully complete and coordinated at the time it submits its final Project bid, or (c) agree to waive any claims related to errors or omissions that the contractor / construction manager should have inferred or recognized.

Unparalleled in typical project planning, the LePatner Model™ requires a **Risk Allocation Workshop™** between the short-listed construction manager/contractor and owner. The meeting serves to identify, equitably assign, and quantify potential "unforeseen" risks and conditions that may arise over the course of the project so that pricing for such contingencies becomes part of the fixed-price contract. These are itemized and valued through an agreed-upon "Project Risk Contingency." The owner and contractor can then negotiate one of two outcomes for the Project Risk Contingency:

1. The owner holds the funds for the Project Risk Contingency. If, and only if, these risks materialize during the Project and are verified by the owner will the amounts agreed upon in that Risk Contingency be paid to the contractor. No amount in excess of the funds held for that Risk Contingency shall be incurred by the owner;

OR

2. The Risk Contingency funds are added to the "base" Project price determined by the complete and coordinated construction documents to create the project's maximum cost. If verifiable risks materialize, the contractor is paid from the Project Risk Contingency following owner approval. If the total verifiable cost of the risks encountered exceeds the Project Risk Contingency funds, the contractor pays the full difference – the owner pays nothing. The owner's upside risk is limited to the maximum cost. However, if some or all of the Risk Contingency items do not materialize, then the owner and contractor may share on a sliding scale the remaining Risk Contingency funds. In this Option 2, the owner knowingly pays a "risk premium" (the cost saving / sharing with the contractor, in percentage terms - likely 5-7%) above the basic scope specified in the complete/coordinated construction documents. But this up front "insurance" may represent a potential savings and/or cost avoidance of 15, 20, 30, 50% or more – the amount of an average project's cost overruns.

In essence, only owner-elected scope changes shall be considered valid change orders to the agreed upon total fixed price. Although the owner may pay a premium above the initial project cost in the event a Project Risk Contingency eventuates, the owner can rest assured that it will not be subject to unwarranted change order claims, which often adds substantially to the original contract price as well as delay the anticipated scheduled completion of the project.

No longer will the Construction Manager be permitted to incorporate a straight percentage for general conditions and insurance, without itemizing what is included. Vague general conditions can often added hundreds of thousands, if not millions of dollars in unauditable costs to a project without clear identification of where these monies were spent. The LePatner C³ Model™ provides for strict but fair agreement provisions that itemize general conditions and insurance costs, which must be fully documented as bought and expended on the project by the contractor. The contractor is subject to comprehensive financial controls and audit provisions that permit the owner quick access to books and records if a dispute arises and an investigation is required.

The LePatner C³ Model™ offers a fully transparent construction process for the owner's and contractor's mutual benefit.

The contractor earns a fair, "clean" profit / fee for the job. The LePatner C³ Model™ discourages and prevents hidden profit centers and incentivizes the contractor with higher fees and opportunities for shared cost savings.

Experienced, efficient and well-managed contractors will undertake projects where this methodology is incorporated because they are the ones who, along with the owner, will recognize that a more transparent project approach benefits them by providing a reliable, fair profit and by avoiding the distraction, animosity, and costs of playing the "claims game."

The LePatner C³ Model™ will require comprehensive up-front planning and ongoing monitoring by the project participants. The LePatner C³ Blueprint™ is generally structured as follows, as is further detailed in Part IV.

1. Strategic Planning Stage. Prior to commencing design services, the owner's business priorities and goals are defined, stakeholder input obtained, and the pros and cons of appropriate project delivery models are debated. Budgets and schedules are established, and due diligence is conducted to pre-qualify prospective consultants and contractors.

2. Scope Refinement and Design Stage. LePatner-prepared RFPs fully define the scope of work and services for each consultant, and specimen C³ Agreements are included to ensure that each architect, engineer, subcontractor and the Construction Manager is fully aware of the contract requirements when submitting proposals. The RFP and C³ Agreements clearly state the responsibility of the design service providers to prepare fully complete and coordinated Construction Documents for final contractor bidding, and allow them the additional time and fee required to do so, if necessary.

Project costs are monitored and controlled during the design process by an independent cost estimator / pre-construction consultant, who provides detailed estimates and constructability checks at crucial design milestones. With design costs being on average ten percent of construction costs, the additional effort made during the design phase far outweighs the effort and cost needed to correct design errors and omissions during the construction phase.

3. Bidding Phase. When construction documents are issued for competitive contractor bidding, the owner's cost estimator prepares a final cost estimate as a baseline control for leveling and negotiating the contractor bids received. Risk allocation meetings are convened with short-listed consultants / contractors to identify and quantify the common, and uncommon, risks that may give rise to change orders and additional project costs, e.g. subsurface conditions, delivery delays, strikes, subcontractor defaults, etc. The parties agree on a Project Risk Contingency, which remains in the owner's control and caps the client's cost for such risks.

4. Construction Administration. Project costs continue to be closely monitored during the construction phase by procedures and controls established in LePatner's C³ Agreements and C³ Project Forms. Payment is always based on earned value for work in place and verifiable documented costs and is only given in exchange for lien waivers from the Construction Manager and each subcontractor.

Potential changes are flagged through an early warning procedure (outlined in the C³ Agreements) that brings the parties together quickly to devise a solution that mitigates cost and delay. If the change is determined to be legitimate (either an owner-elected scope change or one of the contemplated Risk Contingency items), a process is in place to establish fair cost plus profit (verified by the independent cost estimator) to integrate the work seamlessly into the project schedule.

If a dispute arises over the validity of a change order or claim, the C³ Agreements' quick-dispute resolution provision provides the procedure necessary to reach a solution within weeks, not the months or years that arbitration or litigation can take. Legal fees and costs are kept to a minimum for such disputes. The owner may access the contractor's books and records, including the original electronic files, at any time, which further incentivizes the contractor to settle any dispute quickly.

The LePatner C³ Model™ provides an owner a level of assurance that project costs will not exceed a pre-determined budget, unless it elects to increase the scope of work contained in the contract documents. Unwarranted and unwelcome cost overruns will be a vestige of the past for those owners who choose to move past the construction industry's blandishments that entice owners into open-ended cost agreements. Instead, owners can embrace the peace of mind and bottom-line benefits that the LePatner C³ Model™ delivers.

Part IV LePatner C^3 BLUEPRINT™

LePatner's C^3 Blueprint was visualized in mind-mapping software, where the hundreds, and potentially thousands, of project tasks, responsibilities, and interconnections can be recognized instantly. The six key phases of the C^3 Blueprint are summarized below:

No.	Phase	Key Players	Primary Tasks
1.	**Strategic Evaluation & Planning**	Client, LePatner	1) Identify goals / objectives 2) Project delivery options 3) Determine risk profile
2.	**Develop Project Management Plan (PMP)**	LePatner	1) PM Controls 2) Design/Construction QA/QC 3) Project Organization, Roles, Tasks 4) Site Management Plan 5) Risk analysis
3.	**Project Team Assembly**	LePatner	1) Team selection criteria 2) Prepare RFPs 3) Review and level bids
4.	**Design Process Oversight**	LePatner, Team, Client	1) Roles and responsibilities 2) Design process 3) Owner's Independent Cost Estimator 4) Filings and approvals
5.	**Contractor Selection, Bidding, & Award**	LePatner, CM, Team, Client	1) Pre-qualification 2) Prepare and issue RFP 3) Analyze and level bids 4) CM interviews and negotiations
6.	**Construction Administration & Close-Out**	LePatner, CM, Team, Client	1) Pre-construction planning 2) Construction Administration 3) Close-out tasks 4) Post-Occupancy

LePatner C^3 AGREEMENTS™

There are three primary LePatner C^3 Agreements. These will serve as the baseline agreements from which we will create additional consultant agreements and smaller project and limited scope agreements.

The primary agreements are:

Owner – Construction Manager

Agreement for Construction Services Resulting in a Complete Project Price

Owner – Architect

Agreement for Architectural Services

Owner – Pre-Construction Consultant

Agreement for Pre-Construction
Consulting Services

As noted in Part III, the C^3 Agreements are seamlessly intra-coordinated in order that all parties are subject to the same key provisions, including: providing complete and coordinated construction documents for bid pricing; providing detailed complete, fixedprice breakdowns, including prices and/or allowances for project risks determined in the Risk Allocation Workshop; procedures for approving owner-initiated changes; payment procedures; and dispute resolution forums.

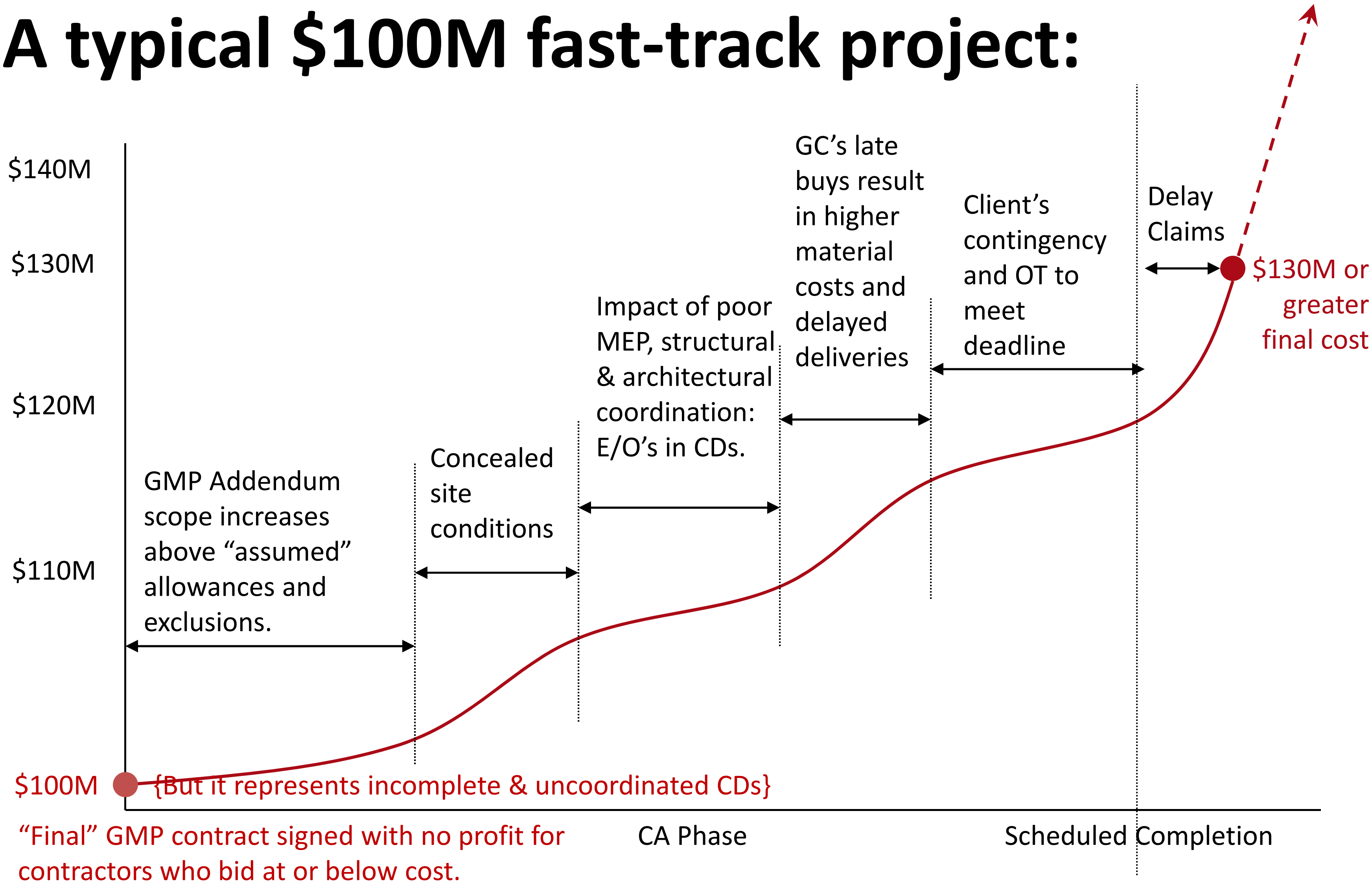
Part VI LePatner PROJECT FORMS™

LePatner's C³ Project Forms complement the C³ Agreements. They provide a standardized way for professional and non-professional (client) project managers alike to ensure that the terms and provisions of the LePatner C³ Agreements are followed and implemented properly to ensure a true fixed-price project outcome.

Where appropriate, the forms and checklists reference the specific C³ Agreement provision in order to provide additional clarity and guidance to the process. More forms and checklists will be developed and added to reflect the needs and requirements of specific projects in the future. Current forms and checklists include:

- Request For Proposal: Architectural Services
- Request For Proposal: MEP / LS Engineering Services
- Request For Proposal: AV / IT / Security Design Services
- Request For Proposal: Pre-construction Consulting Services
- Request For Proposal: Code / Zoning Consulting Services
- Request For Proposal: Civil Engineering Services
- Request For Proposal: Structural Engineering Services
- Request For Proposal: LEED Consultant Services
- Request For Proposal: Commissioning Agent Services
- Request For Proposal: Landscape Architectural Services
- Request For Proposal: Interior Design / Lighting Design Services
- Request For Proposal: Construction Manager
- Request For Proposal: General Contractor
- Request For Proposal: Owner's Vendor and/or Supplier
- Bid Proposal Forms: [for each of the above]
- Bid Leveling Form
- Consultant / Contractor Interview Checklist
- General Conditions Costs Form
- Owner's Project Insurance Checklist
- Project Management Plan
- Project Kickoff Meeting Checklist
- Project Meeting Record Form
- Pre-Construction Kickoff Meeting Checklist
- Architect / Engineer / Consultant
- Application for Payment
- Architect / Engineer / Consultant Additional Service Request
- GC / CM Application for Payment Checklist
- GC / CM Application for Payment and Schedule of Values
- GC / CM /Subcontractor Conditional Partial Waiver of Lien and Release
- GC / CM / Subcontractor Conditional Final Waiver of Lien and Release
- GC / CM Affidavit of Payment and Lien Search Results
- Contractor Weekly / Monthly Reports Checklist
- Action Items Checklist
- Early Warning Form
- Field Change Authorization
- Request for Change / Change Order
- Change Order Checklist
- Change Order Approval Form
- Project Closeout Checklist
- RFI Form

A typical $100M fast-track project:

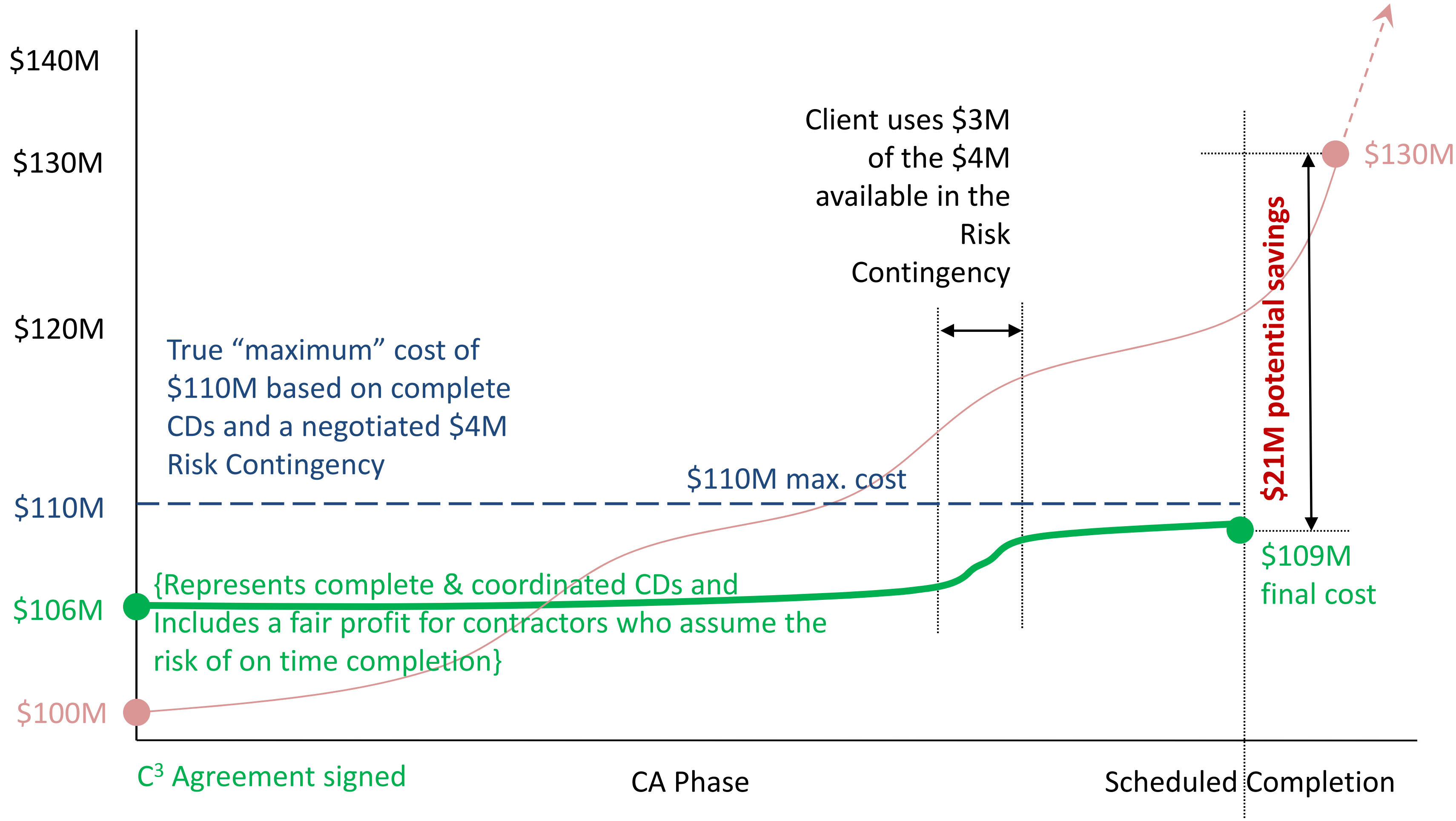


This scenario provides no cost certainty for the client.

By the end, client could pay **$30 million or more than anticipated**.

The client has borne the risk of the contractors.

$100M project using the LePatner C³ Model:



Client suffers no unexpected overruns or carrying costs for delays.

In this example, client could secure a savings of $20M or more.

LePatner C^3 Model™ FAQs

1. What is the LePatner C^3 Model?

The LePatner C^3 Model is a project management process developed by LePatner & Associates LLP, a leading construction law firm best known for representing and advising owners on complex construction projects. C^3 stands for "Construction Cost Certainty," and the C^3 Model is our proprietary solution for providing owners who are building capital projects with a true fixed-price construction cost. The C^3 Model combines the best practices in strategic planning, team selection, and design and construction phase coordination with customized design/construction contracts that fairly allocate project risks between the owner, designer, and builder to ensure a true fixed-price for construction.

2. What services does the C^3 Model provide?

The C^3 Model provides premium construction advisory and project management services, ideally implemented at the inception of a project. LePatner C^3 LLC provides project management services including management of the RFP process and team selection, assisting the owner to establish the budget and schedule, and overseeing and coordinating the design/construction phases, to the close-out and occupancy of the project. LePatner & Associates LLP brings its 30 years of legal expertise to the table in preparing and negotiating the design and construction contracts, and advising on assembling the right insurance package for the project. The seamless, coordinated combination of legal and project management services provides owners with state of the art protections not offered by current standard contracts and methodologies of construction.

3. What kind of owners and projects would benefit from utilizing the C^3 Model?

Any owner who must operate within a fixed project budget and who will not have access to additional funding needs to consider the benefits and peace of mind that the C^3 Model delivers. Hospitals and major healthcare facilities, universities, museums, libraries, school systems, non-profits, and government agencies would strongly benefit. Corporate owners who don't build frequently, and even experienced developers and real estate investors can benefit greatly from the best practices and "owner first" protections in the LePatner C^3 Agreements™.

4. Why use C^3 Agreements instead of the industry standard AIA agreements?

In today's economy, owners and lenders can no longer accept the well recognized risks that standard industry contracts expose them to, unexpected and unwarranted cost overruns of 20%, 30% or more. AIA form agreements are drafted by trade associations representing design professionals and contractors; their provisions are biased against the Owner and favor the architect and especially the builder. Standard AIA and AGC industry contracts are silent on cost overruns and simply do not provide key protections that the LePatner C^3 Agreements provide. C^3 Agreements are specially tailored for each client and project to provide that client and those financing it with construction cost certainty. This is achieved through unique provisions in the design agreements and construction agreements that require fully complete and coordinated final construction documents for bidding, identification and pricing of anticipatable project risks, and elimination of standard contractor "hidden" profit centers in exchange for a fair, clearly delineated profit without the need for a protracted "clams/change order" process.

5. Why is the LePatner C³ fixed-price model better than a guaranteed maximum price "GMP" or traditional Lump Sum contract?

A GMP, or "Guaranteed Minimum Profit" as cynically referred to by most builders, is an illusory "guarantee" that the total construction price of the project will not exceed a certain amount. But the GMP is often combined with fast-track project delivery, which requires the design team to issue bid packages before they have been fully completed and coordinated. Therefore, the GMP is a "best guess" based on the builder's assumptions utilizing incomplete scope information. Buried within the language of every GMP contract is a list of exclusions, which sets forth all the items of work not included in the GMP. These exclusions provide the basis for the contractor to change orders and claims upon issuance of the remainder of the design documents leading to that far exceed the GMP. Traditional lump sum contracts are similarly ill-fated because there is no guarantee that the lump sum is based on fully complete and coordinated construction documents. Anything not shown on the drawings automatically becomes a change order and a potential delay claim.

The LePatner C³ Model is premised upon fully complete and coordinated construction documents issued for final contractor bidding. With our total oversight, the contractor, through a coordinated effort with the owner and design professionals, represents, prior to executing its agreement with the owner, that the construction drawings are in fact complete; if they are not, the contractor is obligated to advise the owner and design team, who will revise the documents and reissue them for revised pricing before the owner-builder contract is executed. During the design and bidding phase, the owner, architect and builder will identify certain risks in the construction process and allocate negotiated prices (lump sum or unit cost), which will be totaled in a Project Risk Contingency, controlled by the owner. In this manner, the contractor and owner are assured of a true maximum fixed-price for the completion of the project, with the exception of any scope increases authorized by the owner.

6. Why would Construction Managers, General Contractors and Design Consultants be willing to work within the LePatner C³ Model when the current system seems to suit them just fine?

The LePatner C³ Model is a process that ensures transparency, cooperation, collaboration and trust in exchange for fair profits and avoiding costly project conflicts. Because a fundamental principle of the LePatner C³ Model calls for the entire project team (architects and engineers, contractors, construction manager, etc.) to coordinate its activities from the outset of the project and generate, review, and acknowledge fully complete and coordinated design documents for final bidding prior to commencing construction, there are fewer if any, errors/omissions change orders and claims. Similarly, our Risk Allocation Workshop™, conducted between the owner and builder prior to signing the construction agreement, establishes pricing up front for anticipatable concealed conditions and other likely project risks. By taking the time to review these issues before contracts are signed, conflict is avoided during construction, allowing the builders to focus on completing the job efficiently without distraction from acrimonious change order and claims arguments with the design team and owner.

The C³ Model will be welcomed by design professionals who can rest assure that once their construction documents are certified as being fully complete and coordinated by the CM/GC, they will no longer be in an adversarial relationship with the construction team or face the prospect of claims arising from the construction documents. Not only does LePatner advise the owner on the benefits of paying the design team a fair fee and provide the design team with sufficient time to adequately prepare the construction documents, but no longer will design professionals worry about spending their professional liability deductible on a C³ project.

The LePatner C^3 Model discourages and prevents hidden profit centers often used by contractors and incentivizes the contractor with higher fees and opportunities for shared cost savings. The C^3 Model will be welcomed by experienced, efficient and well-managed contractors because they will recognize that a more transparent project approach, fully complete and coordinated construction documents, and fair risk allocation allows them to build the project efficiently, while providing a reliable, fair profit and avoiding the distraction, animosity, and costs of playing the “claims game.”

7. Doesn’t fast-track delivery help the owner complete a project faster and save money?

For the owner who has a budget to stick to, the answer is no. Fast-track initially caught on with owners who were looking to save financing costs and/or realize “early” business revenues that appeared to outweigh the risk of construction cost overruns. However, CMs soon realized that they could convince more typical owners that fast-track would offer savings also. Nothing could be further from the truth. Fast-track and GMPs doom an owner to cost overruns because they are based on construction documents that are typically only 75% - 85% complete. The CM often convinces an owner that its management skills will allow it to efficiently manage early work, such as foundations and superstructure, while still overseeing the design team’s completion of the construction documents for the rest of the buildings. It requires the design team to issue incomplete and uncoordinated construction documents for pricing, which becomes the basis for the overall GMP. When the inevitable design changes force a change in the already completed work, change orders and delays quickly overtake the project.

In today’s market, a fast-track project is an open invitation for contractors to low-bid the project at or below cost (to win the project), knowing that the fast-track nature of the job will result in inevitable and costly changes to the contract. These change orders and claims become the anticipated “profit” on the overall project at great cost to the owner.

8. How does a "fast track" project cost an owner more than a C^3 project?

Over the years, Guaranteed Maximum Price (“GMP”) contracts and fast-track projects have become the standard for most large scale projects. Construction Managers responded to owners’ requests for a building process whereby construction proceeded on an accelerated basis, potentially saving the owner large amounts of money in financing costs and presumably permitting owners to acquire revenue from the completed project at an earlier date. Owners and developers, however, have failed to recognize that GMP contracts and the fast-track process were based on incomplete design documents. Incomplete design documents invariably led to massive cost overruns and completion delays.

By fast-tracking the project, Construction Managers customarily require the architects and engineers to issue incomplete drawings and specifications to contractors as the basis for the Project “bids” by the various subs and suppliers. The contractors must make cost assumptions on the missing design elements because they are not provided with a full set of information on all elements of the project design. The Construction Manager’s contract allows for exclusions and allowances based upon the incomplete design. These exclusions and allowances almost always increase the Project’s GMP.

Change order claims and delays in project completion, as a result of incomplete design documents, escalate actual project costs over the owner’s anticipated project budget.

Moreover, since fast-track jobs begin construction while the design is still being finalized, these projects hardly ever finish sooner than if construction had begun after complete construction documents (which may require two to four months more) had been prepared.

9. Why don't owners recognize the pitfalls and inefficiencies of the construction industry?

As a rule, most owners don't build regularly enough to fully understand and control the construction process. Builders work hard to perpetuate the pervasive asymmetry of information that favors them over the owner. This imbalance ensures that the builder maintains full control of pricing and scheduling. Owners may object now and then to contractor pricing, but how are they truly to know when the contractor tells them that the project will cost $100 million, that the real cost is not $92 million – or $109 million?

Owners lose control of their projects because there are few reliable owner intermediaries to level the playing field between owners and contractors. In fact, most owners do not see the obvious conflict of interest in hiring a CM during the design phase (or prior to it) and turning control over establishment of the project budget to the Construction team.

Contractors tend to be small mom-and-pop businesses with little savings and an even smaller appetite for risk. They reflexively shift all project risks to the owner that are not clearly shown on the construction documents. Therefore, they are rarely able or willing to provide the owner with a true fixed price for the project. The LePatner C³ Model rebalances the owner-builder equation to give the owner more control while simultaneously taking common project risks off the table.

10. How are C³ services distinct from a CM at risk or a CM as agent for the owner?

Whether a CM at risk (who holds subcontracts and is responsible for the timely completion of the work), or a CM acting as agent for the owner (who acts solely as a coordinator of the work), CMs have an inherent conflict of interest in "representing" the owner's best interests. First, the owner doesn't truly know the efficacy of the cost proposals that CMs use to establish the project's budget. Second, CMs often work with the same group of subcontractors, so their ultimate loyalty may be to keeping them happy and "being fair" to them in the event of disputes. The CMs economic interest is pegged directly to the increased cost of construction, not reduction or control of costs.

LePatner is a dedicated advisor to owners. We do not represent contractors. Our interests are never conflicted and are always completely aligned with the owner's project goals.

11. What distinguishes LePatner from a typical Owner's Rep, and isn't C³ just another add-on to the owner's cost of construction?

Owner's Reps come from many backgrounds. Some come from the design and engineering world – we often find that these lack solid experience in the field. Some come from the construction world – we find that they often still operate with a contractor's mindset regarding pricing and claims. Most are able to adequately monitor what happens on a project; but the real test should be how good they are at anticipating issues, risks, and costs – and how well they bring the design and construction team's focus to bear on the solving the owner's critical business objectives for each project.

LePatner's C³ Model sets forth in great detail the hundreds, if not thousands, of steps and moving parts that require coordination in a complex construction project. Our greatest differentiator from standard owner's reps and project managers is that we combine state of the art project management practices and construction legal advisory services. No other owner's rep offers such a combination backed by over thirty years of experience.

Hiring LePatner is not just another project cost. When LePatner is retained and its C^3 Model for true fixed-price contracts is employed, the cost of our services is far outweighed by the avoidance of unexpected and unwarranted cost overruns that plague most projects by 20%, 30% or more. In the C^3 Model whitepaper there are two charts that compare a typical $100M GMP project vs. a similar $100M C^3 project. The charts show how implementing the C^3 Model could potentially save the owner 10% to 30% or more in cost overruns.

12. Don't bonds protect against contractor claims?

Bonds are often required by lenders or public agencies, and tend to give owners a false sense of security. Depending on the size of the project, they may be a worthwhile investment – they typically cost about 1% of the construction cost. However, our experience with bonds is that a) builders with good reputations that don't really need to be covered by a bond, can get them, while those who are not well-rated can't get bonded; and b) sureties and bonding companies don't step up unless the defaulting contractor goes bankrupt. Further a performance bond does not protect against claims by the contractor (or the subsequent surety) for work and payment allegedly not included in the Construction Drawings. Nor do performance bonds provide any coverage to protect the Owner when faced with delay claims of other subs that ensue after a default.

The LePatner C^3 Model minimizes the risk of having to trigger coverage from a performance bond, which in any event provides little protection for the Owner. The LePatner C^3 Model minimizes contractor change order claims by ensuring that they bid on a fully complete set of construction drawings and are given a fair profit for its performance on the project. If such measures are taken, there will be much less concern of contractor default and limited need for bonding.

13. There are always errors and omissions in drawings, no matter how careful the design team may be. And the client is always entitled to make changes. How does the C^3 Model address this?

The C^3 Model advocates careful, detailed project planning from the outset. It encourages owners/clients to consult with all user-groups for input and approval throughout the design process. LePatner facilitates user-group meetings with the design team and provides a framework for transferring program information into the final design. LePatner provides a collaborative framework that allows the design team sufficient design, production, and coordination time to prepare complete and coordinated construction documents for bidding. LePatner encourages the design team's use of BIM software and utilizes its own online project management site dedicated to each client's project that the client and project team can access 24/7 to view documents, contracts, invoices, cash flow analysis and other reporting firms.

Owner changes and design errors/omissions represent a major share of change orders on any given project, and proper planning will all but eliminate change orders based on these reasons. However, if a client must change the design during construction, they should expect a change order. However, C^3 Agreements will require that pricing be consistent with similar base contract work and any time extensions must be presented with the change order, not "reserved" for submission at a later date.

14. Does LePatner guarantee me a fixed price when I purchase C^3 services?

LePatner is retained as an agent for the owner/client in all circumstances. As such, we cannot "guarantee" specific outcomes. The C^3 methodology affords them the most cost-effective and comprehensive protections against unexpected and unwarranted cost overruns. With the C^3, (i) the design team is required to produce fully complete and coordinated documents; (ii) the CM is required to certify the completeness of those documents while waiving all rights to assert Claims for deficiencies; and (iii) the risk allocation workshop identifies and prices foreseeable risks due to concealed conditions and material price increases. Further, the CM is contractually obligated to accept risk and responsibility for the timely performance of all its subcontractors, the timely ordering and delivery of materials, and labor harmony. The C^3 leaves little to chance except for the client making changes and force majeure.

15. Can LePatner use the C^3 Model after I've already contracted with the design team?

The C^3 Model is optimally implemented during the initial project planning stages, or before the primary design consultants are contracted. This is because an integral component of the C^3 Model is securing fully complete and coordinated construction documents from the design team.

If the design team is already hired, then LePatner can work with the client and the design team to either amend their agreements or provide the additional direction and time needed to provide the required fully complete and coordinated construction documents for contractor bidding.

16. Can I use C^3 Agreements without using the C^3 Blueprint?

Unlike standard form agreements which are signed and filed away, the LePatner C^3 Agreements and associated project management documents are seamless integral components of our project management process. While the C^3 Agreements contain the protective provisions necessary to enable the client to obtain a true fixed price, LePatner ensures that there is an experienced project management team in place who is familiar with the content of the C^3 Agreements and can make sure those provisions are faithfully implemented, then the client may not reap the full potential benefits of the C^3 Agreement.

17. I have my own trusted internal project management team – can they implement the C^3 Model on our next project?

For owners/clients who already have a project management team in place or are geographically distant from LePatner's offices, LePatner can license the C^3 Model to an owner's project managers and owners' representatives. The licensing fee includes access to and assistance in developing a customized C^3 Project Blueprint, C^3 Agreements, and C^3 Forms for the specific project. It would also include training and setting up a unique online project web site.

18. Does LePatner use its C^3 Model on every project it is retained for?

While we will strongly advise our clients on the benefits of implementing the C^3 Model, it may not necessarily work for all clients. For those who choose to manage their construction projects with their own team, LePatner always stands ready to provide traditional construction legal services. Depending on when LePatner is brought into the project, we may even be able to incorporate some of the key C^3 provisions in the contracts prepared for your project. In all cases, a LePatner agreement will be far more comprehensive and protective of the owner's goals, budget, and schedule than a standard form design or construction agreement.

If you have additional questions on the LePatner C^3 Model or LePatner's services, please contact founder Barry LePatner at blepatner@lepatner.com or Director of Project Strategy, Brad Cronk at bcronk@lepatner.com.