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AIA Publishes Updated Construction Manager Constructor Agreement

Paul S. Sugar
410-347-7318
pssugar@ober.com

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**AIA Publishes Updated
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On April 30, the American Institute of Architects published new document A133, Standard Form of Agreement between Owner and Construction Manager as Constructor, where the basis of payment is the cost of the work plus a fee with a guaranteed maximum price, which replaced the A121 CMc 2003 edition. Unlike the 2003 edition, the new Construction Manager Agreement is compatible with the 2007 version of the A201 General Conditions. It is also compatible with the B103, 2007 edition, Agreement Between Owner and Architect for a Large or Complex Project. If you are licensed to use the AIA software program, you will have to learn to use the A133 because AIA will not support the A121 CMc after May 31, 2010.

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Jackson B. Boyd

Raymond Daniel Burke

David L. Cole, Jr.

James E. Edwards, Jr.

Ian I. Friedman

David G. Kinzer

Joseph C. Kovars, Co-chair

John F. Morkan III, Co-chair

Sylvia Ontaneda-Bernales

For those who dislike change, the A133 is good news. While there have been some modifications, the essence of the A121 CMc remains. There are still the preconstruction and construction phases and the memorialization of the guaranteed maximum price with Amendment A. The twophase process of the Construction Manager Agreement continues to allow the document to be modified to be used on fast track projects. The allocation of risk among the Owner, Construction Manager and Architect remains largely unchanged, so if you don't like the way the risk is allocated, modifications will continue to be necessary.

There are some changes from the previous edition. If the Construction Manager awards a subcontract on a cost plus fee basis, the Construction Manager is required to provide in the subcontract for the Owner to receive the same audit rights with regard to the subcontractor as the Owner receives with regard to the Construction Manager (2.3.2.3).

The Owner's duty to provide reasonable evidence to the Construction Manager that the Owner has made financial arrangements to fulfill its obligations under the contract is more restrictive than the old edition. Under the old edition, the Construction Manager could request evidence of financial arrangements as a condition precedent to starting work and at any time thereafter during the project. The A133 still permits the Construction Manager to request the evidence prior to the start of work but now limits his ability to request the

Eric Radz, Editor

information to those circumstances where the Owner may fail to make payment, and subjectively, if a change in the Work "materially" changes the Contract Sum, or the Construction Manager identifies in writing a "reasonable" concern regarding the Owner's ability to make payment when due (3.1.2).

Michael A. Schollaert

Peter F. Stine

Paul S. Sugar

Anthony F. Vittoria

M. Hamilton Whitman, Jr.

Article 5, Compensation for Construction Phase Services, contains a new provision to describe the method of adjustment of the Construction Manager's fee for changes in the work (5.1.2). Also, there is a new provision which allows the parties to assert limitations on a subcontractor's overhead and profit for increases in the cost of its portion of the Work (5.1.3) and provisions to insert rental rates for Construction Manager owned equipment based on a percentage of the standard rate paid at the place of the Project (5.1.4).

John Anthony Wolf

There have been some changes to Article 6, Cost of the Work for the Construction Phase. For example, several cost reimbursable categories now require the Construction Manager to obtain approval from the Owner prior to incurring a cost. This includes bonuses and other incentive compensation and legal fees. "Miscellaneous costs" now includes a category for the Construction Manager to be reimbursed for self-insurance coverage required by the contract (6.6). Also, there is a reimbursable section for electronic equipment and software (6.6.6).

There is a new section on related party transactions (6.10). The term "related party" is defined. If any costs to be reimbursed arise from a transaction with a related party, the Construction Manager is required to notify the Owner of the specific nature of the transaction including the identity of the related party and the anticipated cost to be incurred to obtain the Owner's approval. If the Owner authorizes the proposed transaction, then the Construction Manager may proceed to procure the work from the related party; otherwise, if the Owner does not authorize a transaction, the Construction Manager has to procure the work from some other party.

Like other 2007 edition AIA documents, the Construction Manager Agreement offers a menu for dispute resolution. The parties may select either arbitration, litigation, or "other." (Article 9). The dispute resolution provision also allows the parties to select an Initial Decision Maker to make initial determinations on claims that may be filed by either party (9.3). The Architect serves as the Initial Decision Maker if no one else is selected.

The 2007 edition of the A201, General Conditions, encourages parties to establish protocols governing the transmission of digital data on a project. The A133 now enumerates the AIA E201 – 2007, Digital Data Protocol Exhibit, and E202 2008, Building Information Modeling Protocol Exhibit (12.2). These documents are effective only if the parties complete them.

The A133 is good news for those who like its predecessor, the A121 CMc. If you didn't like that form, unless the minor changes perk you up, there is probably nothing in the new form which will change your mind.

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