

# SEEING THE BIG PICTURE:

Best practices for contracting and  
construction risk management for 2021



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PRESENTED BY

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# Statement of Purpose



- » Define and understand the role of CM advisor under agreements such as AIA Document C132-2019.
- » Define and understand the CMAR's role under agreements such as AIA Document A133-209 or A134-2019
- » Identify and protect against construction risks likely to occur
- » Identify
- » Identify and understand insurance applicable to project risks



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# CM Advisor in Construction Administration

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# AIA's 2019 CMA Documents



## » Owner-Contractor Agreement

- A132-2019: Owner-Contractor Agreement
- A132-2019 Exhibit A: Insurance & Bonds Exhibit
- A132-2019 Exhibit B: Cost of Work Determination
- A232-2019: General Conditions
- E235-2019: Sustainable Projects Exhibit

## » Owner-Architect Agreement: B132-2019

## » Owner-CMA Agreement: C132-2019

## » CMA-Specific Forms

- G731-2019 (Change Order, CMA Edition)
- G732-2019 (Application and Certificate for Payment, CMA Edition)
- G733-2019 (CCD, CMA Edition)
- G734-2019 (Certificate of Substantial Completion, CMA Edition)



## Standard of Care

The Construction Manager shall perform its services consistent with the skill and care ordinarily provided by construction managers practicing in the same or similar locality under the same or similar circumstances. The Construction Manager shall perform its services as expeditiously as is consistent with such skill and care and the orderly progress of the Project. C132-2019, §2.2



## » Review shop drawings and other submittals

The Construction Manager shall promptly review all Shop Drawings, Product Data, Samples and other submittals from the Contractors for compliance with the submittal requirements of the Contracts, coordinate submittals with information contained in related documents, and transmit to the Architect those that the Construction Manager recommends for approval... C132-2019, § 3.3.20

## » Review and certify payment applications

...the Construction Manager shall review and certify the amounts due the respective Contractors... C132-2019, §3.3.12.2



## » CMA's certification language is the same as that for a certifying architect

The Construction Manager's certification for payment shall constitute a representation to the Owner, based on the Construction Manager's evaluations of the Work and on the data comprising the Contractors' Applications for Payment, that, to the best of the Construction Manager's knowledge, information and belief, the Work has progressed to the point indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractors are entitled to payment in the amount certified... C132-2019, §3.3.12.3

## » CMA shall provide professional liability insurance for CMA's errors and omissions

The Construction Manager shall maintain the following insurance until termination of this Agreement... Professional Liability covering negligent acts, errors and omissions in the performance of professional services with policy limits of not less than (\$ ) per claim and (\$ ) in the aggregate. C132-2019, §§ 2.8, 2.8.5





## » Maintain daily log of weather, labor force, work performed, issues that arise

The Construction Manager shall keep a daily log containing a record of weather, each Contractor's Work on the site, number of workers, identification of equipment, Work accomplished, problems encountered, and other similar relevant data as the Owner may require. C132-2019, § 3.3.21

## » Handle delivery, storage, security of materials and equipment at the site

The Construction Manager shall arrange for the delivery, storage, protection and security of Owner-purchased materials, systems and equipment that are a part of the Project until such items are incorporated into the Work. C132-2019, § 3.3.23



## » Schedule and coordinate overall construction sequence and allocate on-site storage (lay down) space

...utilizing information from the Contractors, the Construction Manager shall review, analyze, schedule and coordinate the overall sequence of construction and assignment of space in areas where the Contractors are performing Work. C132-2019, § 3.3.7

## » Provide general liability and other coverages

The Construction Manager shall maintain the following insurance until termination of this Agreement... Commercial General Liability with policy limits of not less than (\$) for each occurrence and (\$) in the aggregate for bodily injury and property damage... the Construction Manager shall cause the... policies for Commercial General Liability... to include the Owner as an additional insured... C132-2019, §§ 2.8, 2.8.1, 2.8.6



## » CMA Performs Functions Traditionally Reserved for Architect

- Receiving prompt reports of any errors, inconsistencies or omissions in the Contract Documents discovered by the Contactor. A232-2019, §3.2.2
- Assessing whether substitutions proposed by the Contractor are acceptable. A232-2019, § 3.4.2
- Investigating concealed or unknown conditions. A232-2019, § 3.7.4
- Receiving certifications from the Contractor's design professional, if any. A232-2019, § 3.12.10.2.
- Reviewing and certifying Applications for Payment or withholding Certificates for Payment. A232-2019, §§ 4.2.7, 9.4, 9.5
- Rejecting Work that does not conform to the Contract Documents. A232-2019, § 4.2.8
- Reviewing the Contractor's submittals. A232-2019, §§ 4.2.10, 4.2.11
- Conducting inspections to determine the date or dates of Substantial Completion and the date of final completion. A232-2019, §§ 4.2.16, 9.8.3, 9.8.4, 9.10.1
- Signing Change Orders and Construction Change Directives. A232-2019, §§ 7.2, 7.3



## » CMA More Involved than Architect in Construction Phase

- Owner shall forward all communications to the Contractor through the CMA. A232-2019, §2.3.8
- ... Contractor shall cooperate with the CMA in scheduling and performing the Contractor's Work... A232-2019, § 3.10.1
- Contractor shall participate with other Contractors, the CMA, and the Owner in reviewing and coordinating all schedules for incorporation into the Project schedule,,, A232-2019, § 3.10.3
- The Contractor shall coordinate the Contractor's operations with, and secure the approval of, the CMA before using any portion of the site. A232-2019, § 3.13.2
- The CMA will schedule and coordinate the activities of the Contractor and other Contractors in accordance with the latest approved Project schedule. A232-2019, § 4.2.4
- Utilizing the submittal schedule provided by the Contractor, the CMA shall prepare, and revise as necessary, a Project submittal schedule...A232-2019, § 4.2.9
- CMA will receive and review requests for information from the Contractor, and forward each request for information to the Architect, with the CMA's recommendation... A232-2019, § 4.2.21.



## » Allocation of CMA and Contractor Responsibility

- CMA plays a role in project safety:
  - » “...The Contractor shall submit the Contractor’s safety program to the Construction Manager for review and coordination with the safety programs of other Contractors...” A232-2019, § 10.1
- But the CMA’s role in safety is secondary:
  - » ...The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures... A232-2019, §3.3.1
  - » The Construction Manager... will not have control over, charge of, or responsibility for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor’s rights and responsibilities under the Contract Documents... A232-2019, §4.2.5

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# CM at Risk (CMAR)

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Owner - Time  
Problem



CMAR - Needs to  
price project  
based on  
incomplete design

# Liability for Exceeding GMP/Excess Costs



To the extent that the Contract Documents are anticipated to require further development, the Guaranteed Maximum Price includes the costs attributable to such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include changes in scope, systems, kinds and quality of materials, finishes, or equipment, all of which, if required, shall be incorporated by Change Order. **A133-2019 § 3.2.2; A134-2019, § 3.2.4**



# New CMAR Preconstruction Phase Responsibilities



## **A133-2019 and A134-2019, § 3.1.14 Other Preconstruction Services.**

Insert a description of any other Preconstruction Phase services to be provided by the Construction Manager, or reference an exhibit attached to this document.

*(Describe any other Preconstruction Phase services, such as providing cash flow projections, development of a project information management system, early selection or procurement of subcontractors, etc.)*

**A133-2019 and A134-2019, § 3.1.3.2** ... The Construction Manager shall consult with the Architect regarding professional services to be provided by the Construction Manager during the Construction Phase.

# New CMAR Preconstruction Phase Responsibilities



**A133-2019 and A134-2019, § 3.1.3.3** The Construction Manager shall assist the Owner and Architect in establishing building information modeling and digital data protocols for the Project, using AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, to establish the protocols for the development, use, transmission, and exchange of digital data.

**A133-2019 and A134-2019, § 3.1.8** The Construction Manager shall provide recommendations and information to the Owner and Architect regarding equipment, materials, services, and temporary Project facilities.

**A133-2019 and A134-2019, § 3.1.9** The Construction Manager shall provide a staffing plan for Preconstruction Phase services for the Owner's review and approval.

**A133-2019 and A134-2019, § 3.1.10** If the Owner identified a Sustainable Objective in Article 1, the Construction Manager shall fulfill its Preconstruction Phase responsibilities as required in AIA Document E234™–2019, Sustainable Projects Exhibit, Construction Manager as Constructor Edition, attached to this Agreement.

# New CMAR Preconstruction Standards of Care and Insurance Requirements



## **A133-2019 and A134-2019, § 3.1.1 Extent of Responsibility**

The Construction Manager shall exercise reasonable care in performing its Preconstruction Services. ...

## **A133-2019 and A134-2019, § 14.3.1 Preconstruction Phase Insurance**

- » CGL
- » Automobile
- » Worker's Compensation
- » Professional Liability
- » Other



## Preconstruction

- Advise and provide input into design, cost, constructability, scheduling, etc.

## Construction

- Fabrication of long lead items
- Site preparation
- Exploratory investigation
- Limited construction

# New Option to Start CMAR Construction Phase



The Construction Phase shall commence upon the Owner's execution of the Guaranteed Maximum Price Amendment **or**, prior to acceptance of the Guaranteed Maximum Price proposal, **by written agreement of the parties. The written agreement shall set forth a description of the Work to be performed by the Construction Manager, and any insurance and bond requirements for Work performed prior to execution of the Guaranteed Maximum Price Amendment.**

**A133-2019, § 3.3.1.2; A134-2019, § 3.3.1.2.** (approval of Control Estimate in lieu of acceptance of GMP proposal and execution of GMP Amendment)

# **\*\*NEW CMAR FORM FOR 2021 \*\***



## **G735-2021 - Authorization to Proceed with Early Release Work**

- » Executed after Owner-CM Agreement, but prior to agreement on GMP or approval of Control Estimate
- » Contains fill points for parties to address specifics of Early Work being released
- » Adopts terms and conditions from Owner-CM Agreement

# General CMAR Construction Phase Updates



## » Key 2017 revisions:

- New termination fee provision
- New fill points for liquidated damages and incentives
- More streamlined project communications
- New retainage section

## » Generally conform with A102-2017 and A201-2017 revisions:

- For detailed look at 2017 revisions, please visit [www.aiacontracts.org/learn](http://www.aiacontracts.org/learn)

# The *Spearin* Doctrine – Implied Warranty



“if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications” *United States v. Spearin*, 248 U.S. 132, 136 (1918).





*Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co.*, 36 N.E.3d 505 (Mass. 2015)

- » CMAR may benefit from implied warranty only:
  - Where it acted in good faith reliance on design; and
  - Acted reasonably in light of CMAR's own design responsibilities
- » Court looks at:
  - Level of participation in design phase of project; and
  - Extent to which contract delegates design responsibility

# Extent to which A201 delegates design responsibility



A201-2017, § 3.12.10.1 If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. The Contractor shall cause such services or certifications to be provided by an appropriately licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional. Shop Drawings, and other submittals related to the Work, designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy and accuracy of the services, certifications, and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor the performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review and approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

# **\*\* New Cost of the Work Payment Applications for 2021\*\***



- » **G702 GMP-2021 - Application for Payment where the basis of payment is Cost of the Work with a Guaranteed Maximum Price**
- » **G702 CW-2021 - Application for Payment where the basis of payment is Cost of the Work**
- » **G703CW-2021 - Cost of the Work Continuation Sheet**

[illegible]

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# Claims and Insurance

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- » Defective design
- » Defective construction
- » Changes and cost overruns
- » Delays
  - Force majeure
  - COVID-19



- » Liability limits
- » Causes of loss sublimits
- » Property insurance sublimits
- » Other coverages
- » Specifics of optional coverages
- » Coverage durations if other than specified

# Required Provisions to be Completed



- » Commercial general liability limits (§ B.3.2.2)
- » Automobile liability limits (§ B.3.2.3)
- » Employer's liability limits (§ B.3.2.6)

**AND IF**

Contractor's work involves...

- Professional services (professional liability limits) (§ B.3.2.8)
- Transport or use of pollutants (pollution liability limits) (§ B.3.2.9)
- Maritime/aviation risks (limits for such insurance) (§§ B.3.2.11 & 3.2.12)



# CGL – What Must Not Be Excluded or Restricted



- » CGL policy shall not exclude or restrict coverage by way of:
  - Insured vs. insured exclusion
  - Elimination of subcontractor exception (completed operations hazard)
  - Broad employee exclusions (e.g. independent contractors)
  - Elimination of insured contract exception to the contractual liability exclusion (employee injuries)
  - Prior work endorsements
  - Prior injury endorsements
- » (§ B.3.2.2)

# Builder's Risk – Causes of Loss



- » “All-risks” ≠ coverage for all risks
  - » Exhibit prohibits certain exclusions
    - Fire, explosion, theft, vandalism, malicious mischief, collapse, earthquake, flood, or windstorm
  - » Exhibit permits adjustment of coverage limits
    - Prompts specifying sublimits
  - » Must provide coverage for ensuing loss
    - Resulting from bad design or construction
- (§ B.2.3.1.1)

# Insurance for Existing Structures (§ B.2.3.3)



- » When work involves remodeling an existing structure or constructing addition to existing structure...
- » Owner must purchase all-risks property insurance protecting the existing structure against same causes of loss to which builder's risk policy would respond
- » Must maintain until expiration of period for correction of Work

# Optional Property Coverage Extension



- » Loss of use, business interruption, delay in completion (§ B.2.4.1)
- » Ordinance or law insurance (§ B.2.4.2)
- » Expediting cost insurance (§ B.2.4.3)
- » Extra expense insurance (§ B.2.4.4)
- » Civil authority insurance (§ B.2.4.5)
- » Ingress/egress insurance (§ B.2.4.6)
- » Soft costs insurance (§ B.2.4.7)

# GL Coverage for Specific Scopes of Work



- » Residential or habitational exclusions
- » Roofing exclusions
- » EIFS exclusions
- » Earth movement exclusions
- » XCU exclusions

(§ B.3.2.2.2)



# Excess or Umbrella Insurance



- » Contractor can secure liability limits through any combination of primary and excess or umbrella insurance
- » Excess insurance, however, may not dictate exhaustion of the underlying limits only through actual exhaustion (must permit functional exhaustion)



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# Questions

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**Jeremy S. Baker**, a Chicago-based construction attorney, founded Baker Law Group LLC after nearly fifteen years at Schiff Hardin LLP, where he was a partner and a member of its national Construction Law practice. As an Adjunct Professor of Law at The John Marshall Law School, he taught an elective Construction Law course through its Center for Real Estate Law (2016, 2017, 2018). Jeremy's practice involves project structuring across many project delivery methods, plus contract review and negotiation. He has prosecuted and defended lawsuits in over 30 state and federal court venues, but he prefers to help clients complete challenging projects by emphasizing dispute avoidance and early, cost-efficient resolution of claims. Jeremy is a graduate of the Tulane University Law School (2002) and the University of California, Santa Barbara (1999).

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Ms. Banks focuses her practice in all areas of construction law, from contract drafting and negotiation to pre-litigation dispute resolution and complex construction disputes involving mechanics liens, payment bond claims, and construction defect claims. She represents clients across the construction spectrum, including design professionals, owners, construction managers, contractors, subcontractors, and suppliers. In addition to her construction practice, Ms. Banks serves as an associate outside legal counsel to the AIA Contract Documents Committee.

Ms. Banks frequently presents on topics including updates to, and analysis of, AIA Contract Documents and risk management for design professionals, construction managers/contractors, and owners. Ms. Banks has also been published in the Construction Law Handbook, 4<sup>th</sup> Ed. (Stanley A. Martin and Leah A. Rochwarg, eds. 2020) and the Maryland State Bar Association Deskbook, 2<sup>nd</sup> Ed. (Joseph C. Kovars and Michael Schollaert, eds. 2017) as well as in other books and professional publications.

Ms. Banks has been recognized by U.S. News - Best Lawyers in America for Construction Law in Maryland (2020-present) and Maryland Super Lawyers in Construction Litigation (2021) and is a member of the American Bar Association Forum on the Construction Industry, Maryland State Bar Association, and District of Columbia Bar Association, and an Allied Member of the National American Institute of Architects.

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# Patrick J. O'Connor, Jr.



Mr. O'Connor is a partner with the international law firm of Faegre Drinker Biddle & Reath LLP in its Minneapolis, Minnesota office. He received his B.A. degree from Hamline University in 1975 and his JD degree from The American University in 1981. He was law clerk to Miles W. Lord, Chief Judge of the Federal District Court for the District of Minnesota. Mr. O'Connor's practice focuses on construction, suretyship and insurance. He has served as litigation or coverage counsel for contractors, owners, design professionals, and product suppliers in disputes venued in over 25 states and Canada. He also acts as a mediator, arbitrator and expert witness in construction and insurance disputes. Mr. O'Connor is co-author of *Bruner & O'Connor on Construction Law* (West Group 2002), a twelve-volume construction law treatise. He was an adviser to the American Law Institute's Restatement of the Law Third, Suretyship and Guaranty. He works closely with a number of industry organizations on Building Information Modeling and Integrated Project Delivery initiatives. Mr. O'Connor is former Co-Chair of the BIMForum's Legal Subforum. Since 2007, Mr. O'Connor has counseled the AIA's Documents Committee in connection with numerous contract forms. Mr. O'Connor has held LEED AP (New Construction) certification through the U.S. Green Building Council. He is a Fellow, former member of the Executive Committee, and Past-President of the American College of Construction Lawyers. Mr. O'Connor is also a former member of the Governing Committee for the ABA Forum on the Construction Industry. Mr. O'Connor is listed in "The Best Lawyers in America," "International Who's Who of Construction Lawyers," and "Minnesota Super Lawyers."

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# Claramargaret H. Groover



Claire Groover is Florida Bar Board Certified in construction law and has practiced law in Central Florida since her admission to The Florida Bar in 1988. Claire served on the Governing Committee of the American Bar Association's Forum on Construction Law and she chaired its Division 12- Owners & Project Finance. She currently serves on the Forum's Publications and Marketing Committees. She also is a member of The Florida Bar Construction Law Committee and chairs its Subcommittee on Construction Transactions.

Claire focuses her practice on owner and developer representation. She is a Florida Certified Circuit Civil and Appellate Mediator, is a Panel Arbitrator with the American Arbitration Association, and she is qualified to serve in Florida court-appointed and voluntary arbitration proceedings. She is a member of Thomson-Reuters' Practical Law Magazine Real Estate Advisory Board and frequently writes and speaks on claims avoidance and construction risk management. She was in-house counsel to Universal Orlando in its \$2.5B theme park development in the late 1990's and she was Senior Counsel to Signature Flight Support Corporation in the years following 9/11's impact on the aviation industry. She has been selected as a Florida Super Lawyer each year since 2009 and she is a Fellow of the Construction Lawyers Society of America. Claire is of counsel to Becker's construction practice group which has been rated "Band 1" by Chambers USA every year since inception of its global law firm rankings.

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