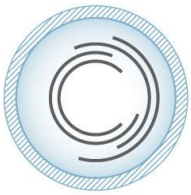
ConsensusDocs™
BUILDING A BETTER WAY

ConsensusDocs Guidebook

ConsensusDocs 500 – Agreement and General Conditions Between Owner and Construction Manager (Where the CM is At-Risk)

August 2013 Edition



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Introduction to the ConsensusDocs Guidebook

ConsensusDocs is the product of leading construction associations, dedicated to identifying and utilizing best practices in the construction industry for standard construction contracts. The 36 participating associations represent Design Professionals, Owners, Constructors, Subcontractors, and Sureties that literally spell the DOCS in ConsensusDocs. ConsensusDocs contracts and forms attempt to fairly and appropriately allocate risks to the Party in the position to manage and control the risk. The practices articulated in the documents are forward-thinking, and may not always represent the status quo, but rather a better path forward to achieve project results. The goal of the multi-disciplined drafters was to create documents that best place the Parties to a construction contract in a position to complete a project on time and on budget with the highest possibility of avoiding claims.

By starting with better standard documents that possess buy-in from all stakeholders in the design and construction industry, you reduce your transaction time and costs in reaching a final Agreement. By using fairer contracts helps eliminate unnecessary risk contingencies and thereby better pricing. In addition, "fill-in-the-blanks" are intended to lead to productive discussions about how particular risks should be allocated on specific projects before a contract is finalized.
Also, the ConsensusDocs catalog includes complete "families" of documents for each project delivery method that provide a coordinated set of Agreements and complimentary administrative forms. There also are short form agreements that address the Owner-Constructor (205), the Owner-Design Professional (245), and the Constructor-Subcontractor contractual relationships in a more abbreviated manner than do the standard Agreements (ConsensusDocs 200, 240, and 750 respectively).

In this Guidebook you will find comments by individual associations regarding particular contract documents. These comments are organized by numeric sequence of the ConsensusDocs contract documents. The overview sections highlight issues and innovative features of the documents generally. Association comments are expressions by an association to its association membership. These comments highlight provisions or alert their membership to consider possible project-specific modifications to a consensus standard Agreement or form. ConsensusDocs contracts covered in this release of this Guidebook include the 200, 200.1, 200.2, 205, 220, 221, 235, 240, 260, 246, 261, 262, 263, 298, 300, 301, 310, 410, 415, 450, 460, 470, 471, 472, 473, 500, 702, 703, 710, 750, 752, and 803.

Please note that there has been a significant number of editing changes and section renumbering between the 2007 and 2011 versions that give the appearance that more substantive changes were made in the 2011 update than is actually the case. Consequently, a highlight sheet of changes was created to better pinpoint substantive changes. The 2011 update highlights sheet can be found here for free on the internet.

Lastly, the ConsensusDocs coalition organizations and ConsensusDocs staff are deeply indebted to the hard work of the many the seasoned professionals who contributed countless hours in the creation of the ConsensusDocs contracts as well as this Guidebook. Their collective experience represents hundreds of years of practical experience in the construction field. Contributor names can be found at the conclusion of this Guidebook.

Comments regarding ConsensusDocs 500*
Agreement and General Conditions Between Owner and Construction Manager (Where the CM is At-Risk)

Exhibits (section 2.3.1.1): Consider, for instance, putting in an exhibit for Labor Relations setting forth any conditions, obligations, or requirements relative to labor relations and their effect on the Project. It is recommended to get legal counsel as appropriate for this issue."

Cooperation With Work of Owners and Others (section 3.5): This section was moved from 3.4.9 to match the order of subsections used in the ConsensusDocs 200.

Section 3.8.3 of the 2007 edition was deleted as the new section 3.11 now covers this issue. The language used in ConsensusDocs 200 is now more consistent with the CD 500.

Date of Commencement (section 6.1): It is common for the scheduled time period of commencement and the Agreement signing date to be different. Parties need to specify if this is the case for this Project. The default Date of Commencement will be the signing date of the Agreement.

Construction Manager's Fee (section 7.3): State whether a stipulated sum or other basis. If a stipulated sum, state what portion of the sum shall be payable each month.

Preconstruction Services (section 7.5): State whether a stipulated sum, actual cost, or other basis. If a stipulated sum, state what portion of the sum shall be payable each month. Preconstruction services are spelled out in article 3, specifically sections 3.2 and 3.3.

No Obligation to Perform (section 9.1.3): This language was taken from section 7.7 of the ConsensusDocs 750, and now appears in other ConsensusDocs agreements.

Cost of the Work Estimate (section 9.2.2): Cost of the Work estimate is subject to 3.6.5, which provides for audit rights and reasonable skill and judgment in preparing such.

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* This publication is designed to provide information in regard to the subject matter covered. It is published with the understanding that the publisher, endorsers of ConsensusDocs and contributors to this Guidebook are not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional advice is required, the services of a competent professional person should be sought.

—From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations

Incidental Changes (section 9.6): This language is taken from section 7.9 of the ConsensusDocs 750 Subcontract agreement. This added language provides for greater clarity for the project participants and provides a consistent approach across the ConsensusDocs family of contracts.

Notification of Cancelation Insurance, ACORD Form Change (sections 10.2.1 and 10.2.4): The CD 500 was modified in April of 2012 to reflect updated language which was previously suggested in the ConsensusDocs Guidebook starting in September 2011.

Section 10.2.1 In the 6th line, after the "and broad from property damage." insert, "The Constructor shall maintain completed operations liability insurance for one year after Substantial Completion, or as required by the Contract Documents, whichever is longer.

Generally, construction contracts require that insurance policies include at least 30 days advanced written notice to the owner (or an upstream contractual party) if an insurance policy is canceled or allowed to expire. This has generally been satisfied through certificates of insurance as evidence of compliance. The Association of Cooperative Operations Research and Development (ACORD), the licensing company for insurance forms, has amended their certificate requirements (*e.g.* ACORD 25). Consequently, contractors and subcontractors may no longer be able to received certificates of insurance language that proclaims that the insurance company or insurance broker, should any policies be canceled before the expiration date thereof, "endeavor to mail 30 days written notice to the certificate holder." Therefore, contractual requirements that 30 days advanced notice be included in insurance policies may not be commercially available and altering ACORD forms to purport to do so may run afoul of state law. Consequently, current contract language addressing notice of cancelation for insurance policies no longer reflect the reality in today's construction marketplace.

Consequently, a working group of experts drafted language which reflects reality, while giving the Owner sufficient notice. The language provides an owner timely third-party notification of cancelation by the insurance company as well as creates an obligation on a party to give notice of cancelation to the owner or other upstream party. Lastly, the drafted solution looks to limit costs as well time efficiency issues by allowing for electronic notification by the insurance company or the insurance broker as a designee depending who is in the best position to have such information and can give appropriate notice. In addition, reference to prompt notice is expected to be soon as practical, but in no case longer than 5 days from first learning of cancelation or nonrenewal of an insurance policy without replacement.

The ConsensusDocs proposed contractual solution differentiates between nonrenewal, cancellation, and other changes like lapses in coverage. In the case of active nonrenewal by the insurance company, the company or designee is in the position to provide advanced notice. In the case of cancellation, it is not possible for the insurance company to provide advanced notice so notice would be provided very shortly after cancellation occurs. The most common example is late payment of premium. In this case, the company may cancel if payment is not received, however, if payment is received cancellation would be rescinded and any advanced notices

would also have to be rescinded causing unwarranted confusion and inefficiencies. In other cases such as a lapse in coverage, only the design builder may be aware of the lapse and therefore only the design builders could provide that notice.

The ACORD form change impacts all standard contract documents, including the ConsensusDocs 200 and the AIA A201®, and most manuscripted construction contracts that contractually require insurance policies provide a 30-day advanced notice of cancelation. The ConsensusDocs notice of cancelation solution references where such language should be inserted into ConsensusDocs contracts (ConsensusDocs 200, section 10.2.4). However, the ConsensusDocs proposed solution is equally applicable to other contracts that are now out-of-date due to the ACORD change. The ConsensusDocs Guidebook is being updated to respond to today's changing construction marketplace in a timely fashion and was deemed too pressing to wait until the next revision cycle.

Here is how the language was modified.

Section 10.2.1 In the ___line, after the "and broad from property damage." insert, "The Construction Manager shall maintain completed operations liability insurance for one year after Substantial Completion, or as required by the Contract Documents, whichever is longer.

10.2.4 "~~The policies of insurance required under subsection 10.2.1 shall contain a provision that the coverage afforded under the policies shall not be cancelled or allowed to expire until at least thirty (30) Days' prior written notice has been given to the Owner. The Constructor shall maintain completed operations liability insurance for one year after acceptance of the Work, Substantial Completion of the Project, or to the time required by the Contract Documents, whichever is longer. Before commencing the Work, the Constructor shall furnish the Owner with certificates evidencing the required coverage.~~"

To the extent commercially available to the Construction Manager from its current insurance company, insurance policies required under subsection 10.2.1 shall contain a provision that the insurance company or its designee must give the Owner written notice transmitted in paper or electronic format: (a) 30 Days before coverage is nonrenewed by the insurance company and (b) within 10 Business Days after cancelation of coverage by the insurance company. Prior to commencing the Work and upon renewal or replacement of the insurance policies, the Construction Manager shall furnish the Owner with certificates of insurance until one year after Substantial Completion or longer if required by the Contract Documents. In addition, if any insurance policy required under subsection 10.2.1 is not to be immediately replaced without lapse in coverage when it expires, exhausts its limits, or is to be cancelled, the Construction Manager shall give Owner prompt written notice upon actual or constructive knowledge of such condition."

Insurance Coverage Acceptance of Liability (section 10.3.2): Insurance coverage implies that there is a positive indication that there is an acceptance of liability for the loss.

Payment Delay (section 10.5): Note that subsection 10.2.1 defines payment due date.

AGC comments for ConsensusDocs 500:

(Additional comments by AGC can be found on AGC's website at members only page of http://www.agc.org/galleries/members-only/AGC-only_ConsensusDocs_Guidebook.pdf for many of the ConsensusDocs documents.)

Design Authority and Responsibilities (section 2.3 and 3.1.6): Under the *Spearin Doctrine*, the Party responsible for furnishing the completed design impliedly warrants its sufficiency and adequacy. *United States v. Spearin, 248 U.S. 132 (1918)*. Contractors need to carefully consider the effect of specifying any design responsibilities in this fill-in-the-blank section. Also, a Construction Manager should pay particular attention to the ramifications of performance specifications, equipment selections, preparation of shop drawings, and the like in the context of section 2.3. Similarly, post-award actions such as Construction Manager initiated value-engineering changes may alter the Parties' responsibilities for the adequacy of the design of a particular system on the Project. These actions may shift risk for design responsibilities to the Construction Manager. In addition, Construction Managers should be weary of modifications that add disclaimers to shift the risk of design flaws to a Party that was not responsible for the preparation of the design.

Definition of Overhead (sections 2.4.10 and 3.8.3): The definition of "Overhead" includes cost incurred on any insurance policy and costs related to the correction of defective work. Under many standard industry contract forms, these costs are considered Cost of the Work, subject to the Guaranteed Maximum Price. The Contractor may consider altering this provision if its cost structure does not classify this type of cost as an overhead cost.

Constructability Review (section 3.2.5): The Construction Manager should be aware of its obligation to perform a conscientious constructability review of the drawings and specifications and report any errors or omissions it discovers in the drawings or specifications.

Preconstruction Services (sections 3.3.1 and 7.5): The Agreement provides the cost of reconstruction Services is not included in the Guaranteed Maximum Price, but is to be paid as a separate payment. Often, Owners would prefer to have Preconstruction Services included in the Guaranteed Maximum Price and paid when the Project financing closes. The manner in which Preconstruction Services will be paid for should be addressed during the negotiations and the Agreement should be reviewed or modified to confirm that it is consistent with the treatment of payment for Preconstruction Services agreed to between the Parties.

Clarifications and Assumptions (section 3.3.4): This provision requires the Owner to cause the Design Professional to revise the drawings and specifications to the extent necessary to reflect the clarifications, assumptions and allowances on which the GMP is based. The Construction Manager should diligently ensure these revisions are made to avoid confusion concerning the scope of the Work included in the GMP.

Anticipation of Design Development (section 3.3.5): The Construction Manager should be aware of the obligation imposed by this provision to provide in the GMP for further development of the Contract Documents if the Contract Documents are not complete when the GMP proposal is submitted.

Allowances (section 3.3.7): Allowances include the cost of materials, equipment and installation, but not Overhead and profit. Therefore, the Construction Manager should be aware that no mark-up will be allowed on the cost of allowance work.

Submittals (section 3.4.7): This provision calls for the Owner to review and approve Submittals. If the Owner is going to authorize the Architect/Engineer to review and approve Submittals, this provision should be modified to provide for that process.

As-Built Drawings (section 3.4.8): The Construction Manager should be aware of the requirement to designate the format to be used to prepare the as-built drawings called for by this provision.

Correction of Defective Work (section 3.7.4): The Construction Manager is to be notified of defective work discovered by the Owner following the expiration of the warranty period, but prior to the expiration of the applicable limitations period, and given the option to correct the defect in the Work or allow the Owner to proceed to correct the defect and charge the Construction Manager for the cost of correction.

Professional Services (section 3.16): When taking on design responsibility (See section 2.3), the Construction Manager should also consider the provisions of section 3.16 that obligate it to obtain professional services from licensed design professionals and to require the design professionals to stamp the design and carry E&O insurance as specified in section 11.8.

Digitized Documents (section 4.6.1): Electronic documents are increasingly being used by the industry. If electronic documents are to be the primary source of design documents for the Project, this provision may need to be modified to accurately describe the manner in which Contract Documents are to be provided. This provision requires a protocol to be established relating to the use of electronic documents. Construction Managers are strongly encouraged to use the protocol set forth in ConsensusDocs 200.2 to ensure that the risks associated with the use of electronic documents are clearly understood by all the Parties to a contract. At a minimum, the 200.2 can allow Construction Managers to rely upon e-mails and faxes, if the document is completed to indicate such a desire.

Labor Relations (section 5.4): This provision calls for the insertion of any special provisions that apply to labor relations for the Project. This provision should be completed to address the labor relations situation that will apply to the Project.

Schedule of the Work (section 6.2): This provision requires submission of Schedule of the Work prior to submission of the first application for payment. Depending on the size and complexity of the Project, it may not be feasible to prepare a complete Project Schedule prior to submission of the first application for payment. In that event, this provision should be modified to require submission of an interim 90 or 120 schedule prior to submission of the first application for payment, and a reasonable time for submission of the complete Project schedule.

Liquidated Damages (section 6.6): Section 6.6 is an optional liquidated damages provision, which allows the Parties to elect whether to provide for liquidated damages. Although AGC members generally view liquidated damages negatively, and AGC advises Construction Managers to take extreme caution before electing to provide any liquidated damages in this section, liquidated damages are generally a better risk management arrangement than leaving the Construction Manager potentially exposed for actual damages related to delayed completion, which can be highly speculative and excessive. Liquidated damages are intended to compensate the Owner (and serve as a substitute for) the Owner's actual delay damages, such as lost revenues. Thus, a contract that allows the Owner to recover liquidated damages, but otherwise bars both Parties from collecting consequential damages, is not truly mutual. If liquidated damages are elected, the Construction Manager should recognize that the limited mutual waiver of consequential damages provision contained in section 6.7 is not truly mutual. To make the provision truly mutual, it can be modified to also provide for a stipulated payment to the Construction Manager for delays in completion of the Project caused by the Owner. In addition, Construction Managers should not agree to liquidated damages measured from final completion because the Owner generally does not suffer delay damages following Substantial Completion because the Owner has beneficial use of the Project following Substantial Completion.

Note that this section contains blanks for the Parties to fill in to establish the appropriate dollar amounts (one tied to substantial completion and one tied to final completion) to be paid for each day completion is delayed if the Parties elect to provide for liquidated damages. If liquidated damages are included in the Contract, the Construction Manager may want to include a cap to the total amount of liquidated damages that may be assessed, which should be no more than a percentage of the fee to be earned by the Construction Manager.

Limited Mutual Waiver of Consequential Damages (section 6.7): The Parties agree to waive claims for consequential damages except for items specified in section 6.6. A mutual waiver of consequential damages benefits the Construction Manager if the waiver is truly mutual, meaning that liquidated damages are not specified in section 6.6. Regardless of whether liquidated damages are included in the Contract, the waiver of consequential damages claims is beneficial to eliminating the potential for speculative unlimited claims that may be asserted relating to late completion or other problems that may develop with the Project. The waiver of consequential damages claims also benefits the Owner by eliminating potential claims by the Construction

Manager for lost profits or the ability to pursue other work that may be caused by an Owner-caused delay to the Project.

Interim Directed Change (section 9.2.2): An Owner is required to pay 50% of cost estimate if dispute occurs over the cost to be incurred in performing an Interim Directed Change. This provision allows for payment of an important balance for a Construction Manager during the process of agreement on the cost to be incurred in performing an Interim Directed Change issued by the Owner.

Disputed Change (sections 9.3.3 and 9.3.4): If there is a dispute over whether certain work is included in the scope of the Project, these provisions indicate that the Owner must direct the Construction Manager in writing to proceed with the disputed Work, and must pay the Construction Manager 50% of the Construction Manager's estimated cost to perform the disputed work, pending resolution of whether the work is extra work. These provisions allow the Construction Manager some financial relief while the work is being performed, and create an incentive for both Parties to promptly resolve the question of whether the work is required.

Retainage (section 10.2.4.1): This provision is important so that Construction Managers may ensure that payment flows in a fair and equitable manner. The Owner is required to release retainage applying to work of early finishing Subcontractors upon acceptance of such work. Once the work is 50% complete, the Owner shall not withhold any additional retainage.

Retention Bond (section 10.2.4): This provision allows for the issuance of a retention bond or other security in lieu of retention. Retention bonds are not commonly used and would impose an additional cost to the Project. Depositing securities in escrow in lieu of retention is often used on state and municipal projects, and may be a viable vehicle for the elimination of retention.

Adjustment of Construction Manager's Payment Application (section 9.3.7): This provision allows an Owner to withhold payment if a third party files a claim, unless a Construction Manager furnishes the Owner with adequate security in the form of a Surety bond, letter of credit or other collateral or commitment sufficient to discharge such claims if established. Construction Managers should provide more specificity regarding adequate security. If there is a bond in place, no additional security should be required besides consent to payment by the Surety after acknowledging the existence of the claim. If it is a lien claim, the Construction Manager should be required to bond around the lien in accordance with applicable statutory requirements.

Some Construction Managers report abuse of the right to withhold payment, even after adequate security has been provided.

Punchlist Holdback (section 10.6.4): The Construction Manager may want to consider reducing the amount of the punchlist holdback to a lesser percentage, in the range of 125–150% of the cost of completing the punchlist work following Substantial Completion.

Indemnity (section 11.1): The Parties' indemnity obligation is limited to the extent of the Parties' negligence and covers only insurable risks, i.e., personal injury (including death) and property damage. Either Party is entitled to reimbursement of defense costs paid in excess of that Party's percentage of liability for the underlying claim. Construction Managers should be vigilant during contract negotiations, and should only agree to broaden risks covered (if requested by the Owner) with full knowledge and understanding of the impact of a broader standard on the Construction Manager's anticipated profitability and fee.

Indemnitees also include the Architect/Engineer, and "Others." The term "Others" should be defined or stricken if not defined, from the Construction Manager's standpoint, as it represents a potential broadening of the indemnity obligation to persons or companies who the Parties may not have actually intended to benefit from the indemnity.

Duty to Defend (section 11.1–11.3): Given the reciprocal indemnity obligations in the ConsensusDocs forms, and the pure comparative causation standard, there is not a duty to defend. A Construction Manager who is liable under the indemnity provision is obligated to reimburse the indemnified Party for that Party's legal fees to the extent of the Construction Manager's percentage of liability (which may as a practical matter create a willingness to defend). But as a matter of contract obligation, there is no duty to defend of the Construction Manager vis-à-vis the Owner, or of a Subcontractor vis-à-vis the Construction Manager. For some Construction Managers, the desire to invoke a Subcontractor's duty to defend will outweigh the Construction Manager's desire not to have to defend the Owner. Construction Managers will need to assess this aspect of the indemnity carefully, and discuss it with their risk managers or brokers, in order to assure themselves that the proper stance is taken on this issue relative to the Construction Manager's insurance program.

Terrorism Coverage (section 11.3.2.1): This provision authorizes the Construction Manager to obtain insurance coverage to cover the risk of physical loss resulting from Terrorism, if the Owner declines to provide the coverage. As an alternative, the Contract can be modified to shift to the Owner the risk of physical loss resulting from Terrorism.

Additional Liability Coverage (section 11.5): An Owner should decide whether to require the Construction Manager to purchase additional insured coverage for the Owner. If so, the Owner can then decide whether it wants to choose additional insured coverage or Owners' and Contractors' Protective Liability Insurance ("OCP"). If an Owner selects OCP coverage, an Owner may desire additional insured protection for completed operations in addition to OCP coverage. If agreed upon by the Construction Manager, this should be accomplished by striking "operations" in this section and then checking both boxes.

Any additional cost incurred by the Construction Manager for purchasing additional insured or OCP coverage shall be paid by the Owner and should be included in the Guaranteed Maximum Price.

Owner's Termination for Convenience (section 11.4): If an Owner elects to terminate for convenience there is a premium payment. This payment is not a penalty, but rather reflects a Construction Manager's lost business opportunity. This section is carefully crafted to balance Construction Managers' and Owners' interests and risks.

Dispute Mitigation and Resolution (article 13): This article focuses on mitigation of claims by directing direct discussions between the Parties. It then allows the Parties to use either a previously selected Project Neutral or a dispute review board. If the Parties decide not to use a Project Neutral or dispute review board, the issue then goes to mediation followed by a binding dispute resolution process of the Parties' choosing. If the process goes this far, any decision made by the Project Neutral or the dispute review board can be introduced as evidence at a binding adjudication of the matter.

Work Continuance and Payment (section 13.1): The Parties must continue to perform their obligations under the contract, pending resolution of any dispute. Thus the Construction Manager continues to perform its work under the contract and the Owner continues to make payments to the Construction Manager for those amounts not in dispute during the pendency of any dispute resolution proceedings.

Direct Discussions (section 13.2): In the event the Parties cannot reach an Agreement about the matter in dispute, they are obligated to engage in "good faith" negotiations at the next level in a multiple step approach which moves from field representative to those representatives with greater authority in an effort to resolve the dispute. If resolution is not achieved within five business days of the first discussion, it moves to the next level of senior executives, and if resolution fails within 15 days of the first discussion, it moves to mitigation.

Mitigation and Mitigation Procedures (section 13.3): Initially the Parties have the option to select either a Project Neutral or Dispute Review Board for the mitigation procedure. The Project Neutral/Dispute Review Board is subject to a separate retainer Agreement between the Parties and is obligated to issue nonbinding finding(s) within five business days of referral of the dispute. If Parties do not check either of the fill-in-the-blank options, then the procedures provided in this section are not required.

Mediation (section 13.4): If the Parties do not select a mitigation procedure in section 13.3, disputes that are not resolved through the direct discussions called for under section 13.2 shall be submitted to mediation. The Parties have the option of using the Construction Mediation Rules of the American Arbitration Association, or selecting another set of mediation rules, which may be more convenient than using those of the American Arbitration Association.

Binding Dispute Resolution (section 13.5): In previous AGC contract Agreements, the dispute resolution section was a separate exhibit. The ConsensusDocs includes this section in the contracts and includes fill-in-the box options. If mediation fails to resolve a dispute, the Parties submit the matter to binding dispute resolution using either the current Construction Industry Rules of the American Arbitration Association or litigation in a state or federal court. The

Parties, however, are free to select another set of rules. The costs of the binding dispute resolution process are to be borne by the non-prevailing Party as determined by the Neutral.

Venue (section 13.5.2): Binding Dispute Resolution procedures shall be at the location of the project unless the Parties agree they shall be elsewhere.

Multi-party Proceedings (section 13.6): Appropriate provisions are to be included in all other contracts relating to the Project to provide for joinder or consolidation of such dispute resolution procedures.

Lien Rights (section 13.7): Nothing contained in the dispute resolution procedures is to limit any lien rights unless expressly waived.

Shared Savings (proposed new section 2.1 for Amendment 1 to ConsensusDocs 500):

2.1 Shared Savings

2.1.1 If the final Contract Sum (Cost of the Work plus Construction Manager's Fee) is less than the Guaranteed Maximum Price (as may be adjusted by Amendment or Change Order), such savings ("Savings"), shall be distributed as follows:

- On the first ten million dollars ($10,000,000) of Savings, eighty percent (80%) shall be retained by Owner and twenty percent (20%) shall be paid to Construction Manager as a Shared Savings Bonus;
- On the next ten million dollars ($10,000,000) of Savings (i.e., Savings dollars $10,000,001 through $20,000,000), seventy percent (70%) shall be retained by Owner and thirty percent (30%) shall be paid to Construction Manager as an increase of the Shared Savings Bonus;
- On the next ten million dollars ($10,000,000) of Savings (i.e., Savings dollars $20,000,001 through $30,000,000), sixty percent (60%) shall be retained by Owner and forty percent (40%) shall be paid to Construction Manager as an increase of the Shared Savings Bonus; and
- On any Savings above thirty million ($30,000,000) (in addition to the Shared Savings Bonus of $9,000,000 applicable to the $30,000,000 in Savings (20% of the first $10,000,000, plus 30% of the second $10,000,000, plus 40% of the third $10,000,000), ninety-six percent (96%) shall be retained by Owner and four percent (4%) shall be paid to Construction Manager as an increase of the Shared Savings Bonus (to reimburse Construction Manager for the diminished Construction Manager's Fee as a result of the additional Savings).

Notwithstanding the foregoing, Construction Manager shall not be entitled to participate in any savings resulting from the actual Cost of the Work for an allowance item being less than the allowance amount for that item or any savings resulting from or associated with scope decreases.

COAA Comments for ConsensusDocs 500:

(Additional comments on this document can be found at COAA's website, www.coaa.org, in the members-only area.)

Relationship of Parties (section 2.1): COAA recommends adding the following new paragraph 2.1.5: "The Construction Manager accepts the fiduciary relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate and exercise the Construction Manager's skill and judgment in furthering the interests of the Owner. The Construction Manager represents that it possesses the requisite skill, expertise, and licensing to perform the required services."

Architect/Engineer (section 2.3): COAA recommends replacing the first sentence with: "The Owner, through its Architect/Engineer, shall provide all architectural and engineering design services necessary for the completion of the work, except as otherwise provided in the contract documents."

Definitions (section 2.4): COAA recommends adding the following definitions to section 2.4:

> Construction Cost—The total cost to construct the Project including all building costs, allowances, contingencies and field management and general conditions costs.
>
> Construction Cost Limit—The Owner's limit on the funds available to construct the Project including all building costs, allowances, contingencies and field management and general conditions costs.
>
> Interim Directed Change—A document issued by the Owner or its Architect/Engineer that directs a change in the Work prior to reaching agreement with the Construction Manager on the adjustment, if any, in the GMP or the Date of Substantial Completion or Date of Final Completion.

General Responsibilities (to be section 3.1.7): COAA recommends adding a new section 3.1.7: In a format acceptable to the Owner, the Construction Manager shall provide a monthly report showing the status of the Construction Cost, trade contracts awarded, allowances and contingencies in this contract, allowances and contingencies in trade contracts, payments made by the Owner to the Construction Manager, projected payments by month to completion, Requests for Information log, submittals log, Architect/Engineer's Supplemental Instructions log and Proposed Change Orders log.

Schedule of the Work (section 3.2.3): COAA recommends revising the first sentence to read: "Within 30 days of execution of this agreement, the Construction Manager shall prepare a preliminary Schedule of the Work for the Architect/Engineer's review and the Owner's acceptance."

Estimates (section 3.2.4): COAA recommends replacing existing paragraphs 3.2.4.1 through 3.2.4.4 with the following paragraphs 3.2.4.1 through 3.2.4.5:

Estimates (section 3.2.4.1): The Construction Manager may involve trade contractors in estimating the cost of the evolving design, but without the Owner's approval, shall not initiate any relationship with any trade contractor during the pre-construction phase that will inhibit the competitiveness of pricing on any bid package.

Section 3.2.4.2: For all estimates of Construction Cost, an allowance shall be used for all work identified in the Owner's Program that lacks sufficient definition in the design documents to accurately estimate. Construction Cost estimates shall include specific line items with appropriate costs for:

a) Construction Manager general conditions

b) Construction Manager Overhead and Profit

c) Trade contractor general conditions

d) Trade contractor overhead and profit

e) Subcontractor bonds and insurance

f) Construction Manager contingency

g) Design contingency

h) Owner contingency

Section 3.2.4.3: Upon receipt of the schematic design documents and again upon receipt of the design development documents, the Construction Manager shall prepare detailed estimates of the Construction Cost. If the schematic design estimate or the design development estimate exceeds the Construction Cost Limit, and without assuming any design liability, the Construction Manager shall make recommendations to reduce scope or quality, use alternate construction means or methods or modify the design to achieve a Construction Cost that is equal to or less than the Construction Cost Limit. Each recommendation shall be accompanied with an estimate of the savings it would produce should the Owner accept it. If directed by the Owner, the Construction Manager shall participate in a formal value engineering exercise to generate additional cost-reduction ideas. The schematic design estimate and design development estimate shall be updated to reflect all cost-reduction ideas accepted by the Owner and shall be submitted to the Owner for approval.

Section 3.2.4.4: At its sole discretion, the Owner may direct modifications to its program or the design documents at any time. At regular intervals during their development, the

Construction Manager will update its Construction Cost estimate based on the design, systems, materials and equipment described in the evolving design. The Construction Manager will promptly notify the Owner in writing any time the Construction Manager determines that the design is likely to adversely affect Construction Cost or schedule. The Construction Manager will develop and recommend cost savings and sequencing necessary to offset such impacts, while contributing to meeting Owner's expressed vision, program, budget, quality, schedule and overall Project goals. Whenever directed, the Construction Manager shall submit to the Owner an updated Construction Cost estimate.

Section 3.2.4.5: Prior to release of the first bid package for trade contractor pricing, the Construction Manager shall submit to the Owner a bid package estimate that itemizes all bid packages to be bid and awarded and which includes the Construction Manager's estimate of the cost of each bid package. If permitted by the Owner, the bid package estimate shall include line items for work self-performed by the Construction Manager. Construction Manager general conditions, Construction Manager overhead and profit and contingencies for Construction Manager, Owner and design shall be identified in separate line items. The total of the bid package estimate shall equal the Construction Cost on the Construction Manager's most recent estimate.

Basis of Guaranteed Maximum Price (to be section 3.3.2.8): COAA recommends adding the following new paragraph 3.3.2.8: "The GMP proposal shall include a list of all bid packages and purchase orders the Construction Manager anticipates awarding." In addition, article 1 of the form Amendment 1 to ConsensusDocs 500 should be amended to add "Exhibit H: List of Bid Packages and Purchase Orders to be Awarded by the Construction Manager".

Tests and Inspections (section 3.4.14.3): COAA recommends replacing the existing paragraph with the following: "If the procedures described in Clauses 3.4.14.1 and 3.4.14.2 indicate that portions of the Work fail to comply with the Contract Documents, the Construction Manager shall be responsible for the costs of correction, retesting and re-inspection.

Correction of Work Within One Year (section 3.7.2): The second sentence specifically notes that the correction period is not extended for work corrected during the correction period. So if a piece of equipment fails and is replaced in the 11th month after substantial completion, the new piece of equipment effectively has only a 1-month warranty. Corrective work performed during the correction period ought to re-start the one-year warranty.

COAA recommends striking the second sentence in paragraph 3.7.2 and replacing it with the following:

"Upon completion of any corrected Work pursuant to this article, the one-year correction period shall be renewed and recommence. The Construction Manager's obligations under this article shall cover any repairs and replacement to any part of the Work or other property caused by the Defective Work."

ConsensusDocs 500 assumes that no hazardous materials are being remediated by the Construction Manager as part of its scope of work. If that is true, COAA finds the language acceptable as drafted. If the Construction Manager is required to remove known hazardous materials (asbestos, PCBs, lead paint, etc.) as part of its scope, COAA recommends modifying paragraph 3.11 as follows:

Hazardous Materials (section 3.11.1): Modify the second sentence to read: "Unless otherwise required by the contract documents, the Construction Manager shall not be obligated …"

Sections 3.11.2 through 3.11.6: Whenever it occurs, replace the term "Hazardous Material" with the term "unforeseen Hazardous Material".

Concealed or Unknown Worksite Conditions (section 3.13): Delete the current paragraph and in its place insert the following:

"CONCEALED OR UNKNOWN WORKSITE CONDITIONS If the conditions at the Worksite are (a) subsurface or other physical conditions which are materially different from those indicated in the Contract Documents, or (b) unusual and unknown physical conditions which are materially different from conditions ordinarily encountered and generally recognized as inherent in Work provided for in the Contract Documents, the Construction Manager shall give immediate written notice of the condition to the Owner and the Architect/Engineer. Upon receipt of the Construction Manager's written notice, the Owner will investigate the conditions. If the Owner determines that a concealed or unknown site condition exists, the Owner will issue an Interim Directed Change providing the Construction Manager direction on how to proceed. If the Owner determines that a concealed or unknown site condition does not exist, the Construction Manager shall continue with the Work as shown in the Contract documents. Any change in the GMP, estimated Cost of the Work, Construction Manager's Fee, Date of Substantial Completion or Date of Final Completion and, if appropriate, the Compensation for Preconstruction Services as a result of the unknown condition shall be determined as provided in article 9. The Construction Manager shall provide the Owner with written notice of any claim as a result of unknown conditions within the time period set forth in paragraph 9.4."

Confidentiality (section 3.15): COAA recommends adding, to the beginning of this paragraph, the following customary language regarding compelled disclosure:

"Unless compelled by law, a governmental agency or authority, an order of a court of competent jurisdiction, or a validly issued subpoena, the Construction Manager shall treat as confidential..."

Strike the last sentence of paragraph 3.15 and add instead:

"In the event of a legal compulsion or other order seeking disclosure of any non-public Project information, the Construction Manager or the Owner shall promptly notify the other party to permit that party's timely legal objection, if necessary."

Binding of Subcontractors and Material Suppliers (section 5.3): COAA recommends adding, at the end of paragraph 5.3: "including but not limited to record keeping requirements as provided in section 3.4.5."

Contingent Assignment of Subcontracts (section 5.5.1.2): COAA recommends adding, to the end of this paragraph, the words: "as of the effective date of such assignment."

Delays and Extensions of Time (section 6.3.1): COAA recommends that this be conformed to read like the 6.3.1 of the 200.

Notice of Delay Claims (section 6.4): From the first sentence, COAA recommends striking "or an equitable adjustment in Contract Price."

Limited Mutual Waiver of Consequential Damages (section 6.7): The ConsensusDocs mutual waiver of consequential damages provision represents a positive departure from similar provisions found in other contract forms commonly used in the industry. Consequential damages are one of the most important subjects for an owner to be familiar with in the construction context. COAA highly recommends that every owner seek the advice of competent local construction counsel prior to executing this contract containing waivers of consequential damages. Owners should assess the consequential damages risks associated with each project. Potential outcomes of the assessment could include but are not limited to a decision that the risks are small and consequential damages can be waived, that the risks can be captured through liquidated damages or that the risks are such that the Owner is not willing to waive consequential damages.

Adjustment in the Construction Manager's Fee (section 7.4.3): COAA recommends striking the last subparagraph of 7.4.

Cost Items (section 8.2.8): In the last sentence, COAA recommends replacing the word 'value' with the term 'fair rental value.'

Section 8.2.12: COAA recommends replacing the current language with the following: "Losses, expenses or damages, to the extent not compensated, provided that such losses, expenses or damages did not arise from the fault of the Construction Manager."

Claims for Additional Cost or Time (section 9.4): COAA recommends adding the following to the end of the paragraph: "Thereafter, the Construction Manager shall submit written documentation of its claim including appropriate supporting documentation, within twenty-one

(21) Days after giving notice, unless the Parties mutually agree upon a longer period of time. The Owner shall issue a final decision, in writing, no later than fourteen (14) Days after receipt of the Construction Manager's claim. Any change in the Contract Price or the Contract Time resulting from such claim shall be authorized by Change Order."

(To be section 9.5): COAA recommends adding the following new paragraph: "With respect to any claim asserted by a subcontractor for additional time or cost, the Construction Manager shall

first fully review and certify the validity of the claim and the Construction Manager's liability to the subcontractor under existing contractual agreements before presentation to the Owner."

Dispute Mitigation and Resolution (article 13): The word "mitigation" is a term of art relating to damages due to breach of contract and is not appropriate in this context and may cause confusion and further litigation rather than helping avoid it. COAA recommends striking the word "Mitigation" and reformulating the paragraph into binding and nonbinding procedures.