Under Fire – Covering Liability through Contracts and Insurance

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AIA Quality Assurance

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Questions related to specific materials, methods, and services will be addressed at the conclusion of this presentation.
Learning Objectives

1. Manage clients’ performance expectations using proper documentation
2. Define common clauses & phrases used in Cx contracts
3. Describe how to ensure scope is clearly defined in contract documents
4. Explain how to mitigate risk & liability by modifying contract language
Learning Objectives
The Problem

- To date, few claims have been made against design professionals associated with commissioning.
- While a growing service, caution is warranted.
- Clients may not comprehend the scope and intent.
- Clients may believe that commissioning might actually serve as a guarantee.
- Clients may not understand that these services are not part of your basic scope of services.
Make certain you contemplate the additional time in your fee or provide by contract that they will be compensated as additional services.

“The Consultant shall be compensated as Additional Service for all time spent to prepare for, review, and respond to the recommendations of the CxP, and to incorporate recommended commissioning changes into the Consultant’s reports, drawings, specifications, bidding, or other documents. The Consultant’s time for performance of those services shall be equitably adjusted.”
If the Consultant objects to any recommendations made by the CxP, it shall so state in writing to the Client, along with the reasons for objecting. If the Client, in spite of the Consultant’s objections, requires the incorporation of changes in the Construction Documents, the Client agrees, to the fullest extent permitted by law, to waive all claims against the Consultant and to indemnify and hold harmless the Consultant from any damages, liabilities, or costs, including reasonable attorneys’ fees and costs of defense, which arise in connection with or as a result of the incorporation of such design changes required by the Client.
Do not certify or warrant anything

Insist on a good contract and a well-defined scope of services that sets forth the service you will and will not provide.

If you are performing services as a stand-alone service, you will want both a waiver and indemnity. If you can not get a waiver include a Limitation of Liability
In consideration of the Consultant performing a Commissioning review of the Project, the Client agrees that the Consultant shall be entitled to rely upon the completeness and accuracy of all information provided by the Client to the Consultant. The Client further agrees that the Consultant shall not be responsible in any way for errors or omissions contained in any drawings or specifications prepared by others or for errors, or omissions by others in incorporating the Consultant’s recommendations into the reports, drawings, or specifications. The Client also agrees that the Consultant shall not be responsible in any way for damage or failures of systems during functional testing by the Client’s Contractor(s). In addition, the Client agrees to waive all claims against the Consultant arising from the services performed by others on the Project or from the services to be provided by the Consultant under this Agreement, except for the sole negligence or willful misconduct of the Consultant.

In addition, the Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant from all damages, liabilities, or costs, including reasonable attorneys’ fees and defense costs, arising or allegedly arising from the services performed by others on the Project, or from the services provided by the Consultant under this Agreement, except for the sole negligence or willful misconduct of the Consultant.
Red Flag Words

- Administer
- Advise
- All
- Any
- Approve
- Assure
- Attest
- Best

- Certify
- Complete
- Control
- Direct
- Ensure
- Equal
- Every
- Final
More Red Flag Words

Full
Guarantee
Inspect
Insure
Maximize
Minimize
None
Optimize
Oversee
Periodic
Safe

• Shall
• Sufficient
• Suitable
• Supervise
• Total
• Warrant
• Will
To prove Negligence, these four elements must be present

• Duty (Legal relationship has been established)
• Breach of Duty (Standard of Care not Performed)
• Damages (Injury of Damage actually sustained)
• Causation (Injury or Damages caused by Breach of duty)
Types of damages

- Bodily Injury
- Property of others
- Your own property
- Consequential / Economic
Consequential / Economic damages

• Those losses incurred which are not necessary to correct the error. Examples: delay costs, interest costs, lost opportunity costs, lost profit

• Usually only a breach of contract claim can be brought – rather than a claim for negligence

• By far – the most dollars paid by insurers on behalf of design professionals are for economic damages
# Insurance (General / Auto / Umbrella)

This is to certify that the policies of insurance listed below have been issued to the insured named above for the policy period indicated. Notwithstanding any requirement, term or condition of any contract or other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies. Limits shown may have been reduced by paid claims.

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<tr>
<th>INSR LTR</th>
<th>TYPE OF INSURANCE</th>
<th>ADDL INSR W/O</th>
<th>POLICY NUMBER</th>
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<th>POLICY EXP (MM/DD/YYYY)</th>
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Each occurrence:
- DAMAGE TO RENTED PREMISES (Excluding premises): $2,000,000
- MED EXP (Any one person): $300,000
- PERSONAL & ADJ. INJURY: $10,000
- GENERAL AGGREGATE: $2,000,000
- PRODUCTS - COMPLIANT AGG: $4,000,000
- COMBINED SINGLE LIMIT (Excluding premises): $1,000,000
General Liability Insurance

- Primary liability protection for contractors and owners
- Not primary protection for A/E/E firms
- Owners/clients/contractors and their attorneys often think of A/E/E firms as contractors
  - They ask for things on your insurance policy that you cannot provide
  - They ask you to assume risk you cannot insure
General Liability, Con’t.

- Covers bodily injury and property damages
- Does not cover economic damage
- Does not cover pollution claims unless special arrangements made
- Usually written as a package with your business personal property and your tools and equipment
- Most policies exclude services performed by design professionals
Common GL Insurance Requirements

Allowed:
• Additional Insured Status
• Primary and Non-Contributory
• Waiver of Subrogation
• Severability of Interest/Cross Liability
• Per Project Aggregate
• Contractual Liability Coverage (But…..)
Business Automobile

- Owned Autos: Full coverage for all Owned Autos

- Non-owned: Vicarious liability. Autos that firm does not own, lease, hire rent or borrow that are used in connection with firm business. This includes autos owned by employees or partners or members of their households but only used when used in firm business.

- Hired: Only those autos the firm leases, hires, rents or borrows. This does not include any auto the firm leases, hires, rents or borrows from employees or partners or members or their households. *(See Non-Owned)*
Business Automobile: Common Q’s

Driving for Business (Personal Car): Individual Policy is always primary.

Renting Cars:

• Policy covers: *Liability & Damages to Rental Vehicle*

• Policy does **not** cover: *Loss of Use, Diminution in Value, Personal Effects, Cars with Values over $500,000.*

• Gray Areas:
  • Combining Rental Cars for Business & Personal Use
  • Renting in certain jurisdictions (Hawaii, Internationally except Canada)
Policy Type

Commercial Umbrella Policy
- Coverage: $4MM
- Claim: $1MM

Employee Personal Umbrella Policy
- Coverage: $1MM
- Claim: $1MM

Commercial Auto Policy
- Coverage: $1MM
- Claim: $300K

Employee Personal Auto Policy
- Coverage: $2MM
- Claim: $2MM

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Professional Liability Insurance

- Also known as Errors and Omissions insurance
- Primary liability protection for firms performing professional services
- Covers bodily injury, property damage, and economic loss/consequential damages
- Is written on a claims-made basis with a retroactive date, also known as prior acts date
What it covers – damages to others that you are legally liable to pay as a result of negligent acts, errors or omissions in the performance of your professional services.

Most policies include a duty, rather than right, to defend.

Defense costs are included in the limit of insurance (unlike many General Liability and other policies) –

*This seriously impacts the decision about what limit of insurance to carry*
Pollution Legal Liability

• Contractors Pollution Legal Liability insurance is designed to address environmental liabilities associated with the job-site operations of contractors. These include contaminated soil disposal and the accidental release of fuel oil, chemicals and/or toxic gases from broken pipelines, utilities and stationary and mobile fuel tanks.

• Covers for Pollution at any site where you or any Subcontractor working on your behalf performs any contracting or remediation operations, e.g., Soil Driller
## True Cost of a Problem

<table>
<thead>
<tr>
<th>Cost of Problem</th>
<th>Revenue needed to offset problem cost*</th>
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<tr>
<td>• $1,000</td>
<td>• $20,000 (400 staff hours)</td>
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<tr>
<td>• $10,000</td>
<td>• $200,000 (4,000 staff hours)</td>
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<tr>
<td>• $50,000</td>
<td>• $1,000,000 (20,000 staff hours)</td>
</tr>
</tbody>
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*Assumes 5% after tax profit*
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