CONTRACT DRAFTING INITIATIVE FOR HORIZONTAL PROJECTS

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Introductions

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Construction Contract Drafting Initiative (CCDI)

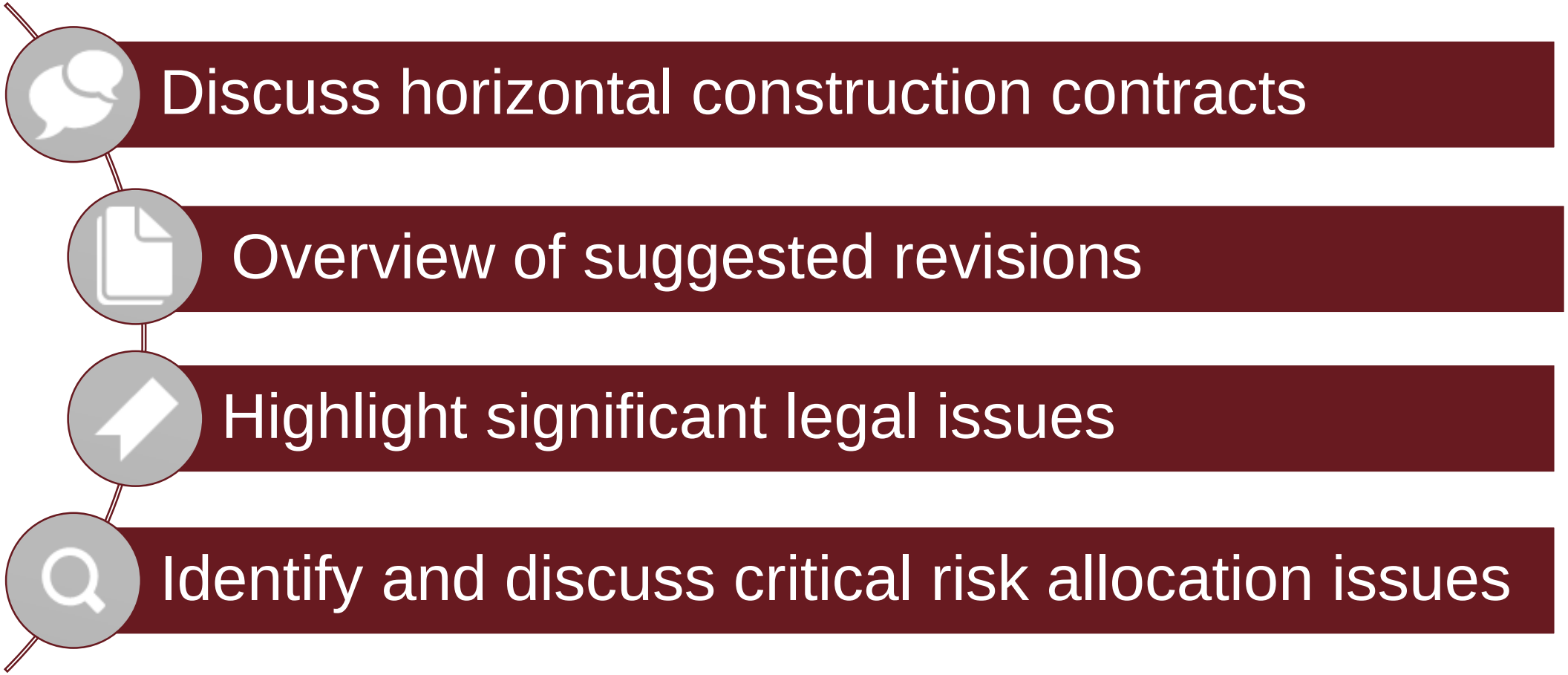
- After the 2012 Annual Conference in Austin, TX, formed a work group to exchange information and documents to revise design and construction contracts for municipal owners
- 2013 work group analyzed and revised the AIA A201–2007™ General Conditions of the Contract for Construction and presented the revisions at the annual conference in San Francisco, CA
- 2014 work group analyzed and revised the B101–2007™ (formerly B151-1997), Standard Form of Agreement Between Owner and Architect and presented the revisions at the annual conference in Baltimore, MD

Construction Contract Drafting Initiative

- 2015 work group drafted and analyzed a design-build construction contract and presented the template at the annual conference in Las Vegas, NV
- 2016 work group drafted, analyzed and revised various horizontal construction contracts to be presented at this annual conference
- Challenges in 2016
  - IMLA members use a variety of horizontal construction contract templates
    - Self generated forms and variations of EJCDC documents which require licenses
    - Specific state and local law requirements incorporated in horizontal contracts

Construction Contract Drafting Initiative

Goals for the presentation:



Schedules and Scheduling

Schedules and Scheduling

- Many disputes in horizontal construction relate to time
  - Delay
  - Acceleration
  - Loss of Productivity
  - Liquidated Damages
- CCDI provides template language outlining requirements for time
  - Contract Time
  - Changes to Contract Time
  - Limitations of Operations
  - Technical Scheduling Requirements

Schedules and Scheduling

Key Provisions:

- Commencement of Contract Times; Notice to Proceed
- Starting the Work
- Preliminary Schedules
- Limitations of Operations
- Float Ownership / Suppression
- Early Completion Schedules
- Change of Contract Times
- Damages for Delay

Schedules and Scheduling

Technical Scheduling Requirements:

- Scalable to the size / complexity of the project
  - Define level of detail
  - Define reporting requirements
  - Basic activities / logic
  - Costs / resources
  - Advanced requirements for larger projects
- Baseline schedule
- Progress updates
- Time Impact Analysis / Schedule Recovery
- Timely schedule submissions

Schedules and Scheduling

What caused the delay?

- Design Errors
- Scope Change
- Land Acquisition
- Material Procurement
- Labor
- Machinery
- Co-ordination Issues
- Poor communication
- Inexperience
- Oversight
- Finance
- Acts of God
- Acts of Third parties beyond the control of Owner or Contractor…

Who caused delays?

- Nature
- Third parties beyond the control of Owner or Contractor
- Owner
- Contractor
- Both parties

Classifications of Delay

- Excusable / Non-Compensable
- Excusable / Compensable
- Inexcusable
- Concurrent

Bonds and Insurance

Bonds

Performance and Payment

- Why performance and payment bonds are required in public contracts
- Parties and Remedies
- Breach and Notice requirements
- Benefits of Owner-Issued Performance Bonds
- Model Performance and Payment Bonds

Labor and Materials

Why Performance & Payment Bonds Are Required For Public Construction Projects

- The **Performance Bond** secures the contractor's promise to perform the contract in accordance with its terms and conditions, at the agreed upon price, and within the time allowed.
- The **Payment Bond** protects certain laborers, material suppliers and subcontractors against nonpayment. Since mechanic's liens cannot be placed against public property, the payment bond may be the only protection these claimants have if they are not paid for the goods and services they provide to the project.

Source: http://suretyinfo.org

Parties and Remedies

- Parties to the surety bond:
  - Principal (the Contractor)
  - Obligee (the Owner, who is the public entity)
  - Obligor (the surety company)
- Obligor's remedies in the event of Principal's breach:
  - Obligee completes project itself
  - Obligee hires replacement contractor ("tender")
  - Obligor hires replacement contractor ("takeover")
  - Denial of claim
    - Source: "The Contract Bond Claims Process", Developed by the Associated General Contractors of America, April, 2014 https://suretyinfo.org/?wpfb_dl=158

Breach and Notice to Obligor:

Seaboard Surety Co. v. Town of Greenfield, 370 F.3d 215 (1st Cir. 2004):

- Contractor provided a standard performance bond Form A312, issued by the American Institute of Architects in 1984, which provided that the Contractor and the Surety jointly and severally, [bound] themselves to the Owner (Greenfield) for the performance of the Construction Contract, which the bond incorporated by reference.
- Affirmed the U.S. District Court's ruling that Greenfield was in material breach of the Bond when it hired another company to complete the project and did not give the Surety notice of intent to declare the original Contractor in default, rendering the bond null and void and discharging Surety from any and all liability under the bond.

Benefits of Owner-Issued Performance Bonds

- *Seaboard Surety Co v. Town of Greenfield* indicates that courts strictly construe notice requirements stated in the bond, and that deviation from such requirements can preclude recovery by the Obligee.
- Note in the Model Owner-Issued Performance and Payment Bonds that follow, the obligations of the Obligor become null and void only if they are waived in writing by the Obligee, but make sure that the Surety will allow this.

Model Owner-Issued Performance and Payment Bonds:

PERFORMANCE BOND

Bond No. _____

KNOW ALL MEN BY THESE PRESENT, that we _____ with a place of business at _____ as principal (the "Principal"), and _____, a corporation qualified to do business in the [**STATE**], with a place of business at _____ as Surety (the "Surety"), are held and firmly bound unto the **[PUBLIC ENTITY]** as Obligee (the "Obligee"), in the sum of [**SUM OF BOND IN WORDS AND NUMBERS**] lawful money of the United States of America, to be paid to the Obligee, for which payment, well and truly to be made, we bind ourselves, our respective heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these present.

WHEREAS, the Principal has assumed and made a contract with the Obligee, bearing the date of **[CONTRACT EXECUTION DATE]**, and entitled [**CONTRACT TITLE OR PROJECT NAME**]

NOW THE CONDITIONS of this obligation are such that if the Principal and all Subcontractors or Suppliers under said contract shall well and truly keep and perform all the undertakings, covenants, agreement, terms, and conditions of said contract on its part to be kept and performed during the original term of said contract and any extensions thereof that may be granted by the Obligee, with or without notice to the Surety, and during the life and including any guarantee required under the contract, and shall also well and truly keep and perform all the undertakings, covenants, agreements, terms and conditions of any and all duly authorized modifications, alterations, changes or additions. The obligations of the Surety set forth herein shall become null and void only if expressly waived in writing by the Obligee **[PUBLIC ENTITY]**; otherwise such obligations shall remain in full force and virtue.

IN THE EVENT the Contract is abandoned by the Principal, or is terminated by the Obligee, **[PUBLIC ENTITY]**, under the applicable provisions of the contract, the Surety hereby further agrees that the Surety shall, if requested in writing by the **[PUBLIC ENTITY]** promptly take all such actions as is necessary to complete said Contract in accordance with its terms and conditions.

IN WITNESS WHEREOF, the Principal and Surety have hereto set their hands and seals this _____ day of _____, 20___.

PRINCIPAL	SURETY
_____	_____
_____	_____
[Name and Seal]	[Attorney-In-Fact]
_____	_____
[Title]	[Address]
	_____
	[Phone]
Attest:_____	Attest:_____

The rate of the Bond is _____% of the first $_____ and _____% for the next $_____.

The total premium for this Bond is $_____.

END OF PERFORMANCE BOND

PAYMENT BOND

Bond No. _____

KNOW ALL MEN BY THESE PRESENT, that we _____ with a place of business at _____ as principal (the "Principal"), and _____, a corporation qualified to do business in the [**STATE**], with a place of business at _____ as Surety (the "Surety"), are held and firmly bound unto [**PUBLIC ENTITY**] as Obligee (the "Obligee"), in the sum of [**SUM OF BOND IN WORDS AND NUMBERS**] lawful money of the United States of America, to be paid to the Obligee, for which payment, well and truly to be made, we bind ourselves, our respective heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these present.

WHEREAS, the Principal has assumed and made a contract with the Obligee, bearing the date of _____, and entitled _____ **[CONTRACT TITLE OR NAME OF PROJECT]**.

NOW, THE CONDITIONS of this obligation are such that if the Principal and all Subcontractors under said contract shall pay for all labor performed or furnished and for all materials used or employed in said contract and in any and all duly authorized modifications, alterations, extensions of time, changes or additions to said contract that may hereafter be made, notice to the Surety of such modifications, alterations, extensions of time, changes or additions being hereby waived, the foregoing to include any other purposes or items set out in, and to be subject to, the provisions of [**APPLICABLE STATUTE**], as amended, then this obligation shall become null and void; otherwise, it shall remain in full force and virtue.

IN WITNESS WHEREFORE, the Principal and Surety have hereto set their hands and seals this _____ day of _____, 20___.

PRINCIPAL	SURETY
_____	_____
_____	_____
[Name and Seal]	[Attorney-In-Fact][Seal]
_____	_____
[Title]	[Address]
	_____
	[Phone]
Attest:_____	Attest:_____

The rate for this Bond is _____% of the first $_____ and _____% for the next $_____.

The total premium for this Bond is $_____.

END OF PAYMENT BOND

Materials Bond

- Assures that labor, material, and subcontractor costs on the job will be paid. This assurance is for the use and benefit of all laborers, material suppliers, and subcontractors who are eligible by contract or statute for the protection afforded by the payment bonds.
  - Source: John Curtin, “A Basic Guide to Surety Bonds”, Engineering Times, June 2002, p.21 https://www.nspe.org

Insurance

- Commercial General Liability (“CGL”)
  - Completed Operations Coverage
- Builder’s Risk
  - Contractor’s Equipment and Installation Floater Coverage
- Property Insurance
- Automobile Liability
- Workers Compensation
  - Part One: Worker’s Compensation and Part Two: Employer’s Liability Coverage
- Pollution Liability
- Final Note: ACCORD Binders and Cancelation, Amendment, Failure to Maintain Coverage

Commercial General Liability

- Provides coverage to protect the Contractor from claims with respect to the operations performed by Contractor and any employee, subcontractor, or supplier, or by anyone for whose acts they may be liable. CGL should include aggregate limits applies on a per location/project basis for:
  - Bodily Injury
  - Property Damage
  - Products & Completed Operations Personal & Advertising Injury Medical Expenses
  - Employer's Liability

Commercial General Liability

- Policy should include coverage relating to the so-called "XCU" hazards (explosion, collapse of buildings, blasting, undermining, and underground property damage).
- Owner should request that it be named as an **additional insured and** subrogation rights be waived in favor of the Owner.

What is “Completed Operations” Coverage?

- Completed operations coverage is critical in most construction defect cases because it provides coverage for claims that arise *after* the work has been completed so long as the claim arises *during* the policy period.
- Owners should require that the contractor’s CGL policy includes “completed operations” coverage. If the damage occurs after that policy period, there still may be coverage under a later policy that also has completed operations coverage.

“Completed Operations” Coverage

- Often contract insurance requirements will require such coverage to be maintained for a certain number of years following substantial completion.
  - The 2007 AIA A201 General Conditions require contractor to provide completed operations coverage until the expiration of the period for correction of work or for such other period for maintenance of completed operations coverage as specified in the contract documents.

Builder's Risk

- Provides **first party** coverage for physical loss of materials and equipment to be permanently installed at the site during construction due to perils, such as fire, wind, etc.
  - Owner should request an **additional insured endorsement** if the contractor secures coverage for itself, or if contractor has a "blanket" builder's risk program to insure multiple projects that the contractor is performing.
  - Owner should consider "soft costs" endorsement pays the costs for loss of use as well as the costs for any project delay caused by the damage. Note, however, that this endorsement typically results in an increased premium to the policy holder (either the owner or the contractor).

Contractor's Equipment and Installation Floater Coverage

- Equipment floater coverage provides coverage to the contractor for physical damage that might be caused during construction to any of the contractor's equipment.
- Contractors installation floater coverage provides coverage to the contractor for property owned by the contractor which may later be installed as a permanent part of the project.
  - Owner is not an additional insured, but may require contractor to have this insurance protection to replace damaged equipment and/or damaged materials in a timely manner so as not to cause undue delay to the project.

Property Insurance

- First party coverage for physical loss for existing buildings/facilities.
- Be mindful of potential coverage gaps on a project where the work involves renovation to existing buildings/facilities.
- Builder’s risk ordinarily will not cover existing buildings or structures (but may be added by endorsement).
- Physical loss after completion not covered by builders risk – make sure property insurance is in place when needed.

Automobile Liability

- Provides coverage with respect to the operations of any owned, non-owned, and hired vehicles including trailers used in the performance of the work.
- Owner should request that it be named as an **additional insured and** subrogation rights be waived in favor of the Owner.

Workers Compensation

- Part One: Workers Compensation
  - Provides payments to employees who suffer a work-related injury or occupational illness. There is no limitation of liability for this type of coverage.
- Part Two: Employer's Liability (additional coverage not included in Part One)
  - Protects employer if employee, the employee's family members, relatives or third parties bring suit for employment-related injuries or illnesses.
  - Although contractor will incur a higher premium to obtain this additional coverage, increased limits of liability can help owners minimize the potential for litigation associated with injuries to workers on the job site.

Contractor's Pollution Liability

- Affords coverage for liability resulting from a release due to the contractor's operations.
- Must be separately purchased by a contractor, but for design professionals, an equivalent endorsement can be added to a professional liability policy.
  - specify the endorsement for design professionals on the project;
  - a professional liability policy's coverage may provide pollution coverage arising from professional services only which is far more limiting and may leave a gap in coverage.
  - If included as part of a consultant's professional liability insurance policy, this applies to ALL operations of an insured, and will cover pollution losses whether caused by the professional services of the consultant or by any other activity of the consultant.

Contractor's Pollution Liability

- Owners should specifically seek contractors' pollution liability from the consultant (as opposed to coverage for pollution claims arising from professional services) to provide broader coverage for pollution liability and should seek additional insured status under this coverage.
  - If coverage is added by endorsement (as opposed to being included in the main policy), there may be an increased premium (up to 10%) depending upon the consultant's environmental exposure.
- While insurers typically will not agree to add owners as additional insureds under the professional liability coverage, they will agree to do so under the contractor's pollution liability coverage.

Certificates of Insurance (COI)

- Is not valid endorsement to a policy of insurance and do not specify what coverage is included if policy endorsements have been issued. The **ACORD 25** form is one form of COI.
- A COI often contains disclaimer language:
  - “This Certificate is issued as a matter of information only and confers no rights upon the certificate holder. This Certificate does not amend, extend or alter the coverage afforded by the policies below.”
  - ...The insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies.
- You must read and understand the policy of insurance to be sure of coverage.

ACORD

- Association for Cooperative Operations Research and Development (ACORD), is a non-profit organization that provides the global insurance industry with data standards and implementation solutions.
- The ACORD Forms are contain universal language and documentation that all insurance agencies use and recognize.

ACORD 25 COI

OLD:

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL __ DAYS WRITTEN NOTICE TO THE CERTIFICATEHOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

NEW:

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS

Problems with the “Old” ACORD 25 COI

- The “old” ACORD 25 COI contained language that:
  - implied that the insurer would endeavor to provide written notice of cancellation to the certificate holder.
  - suggested flexibility in the number of days prior notice of cancellation the certificate holder will be entitled by leaving the number of days notice blank.
  - by not addressing notice of cancellation for non-payment of premium separately, it implied that the certificate holder may be entitled to more notice than the policyholder in such circumstances.

Problems with the “Old” ACORD 25 COI

- The “old” ACORD 25 COI contained language that:
  - Allowed the certificate holder flexibility in the number of days notice, inviting other modifications to the ACORD 25 cancellation clause including:
    - deleting the words “endeavor to”
    - deleting the words “, but failure to do so...”
    - adding similar obligations to notify in the event of: (1) change in coverage terms, (2) reduction in limits, and/or (3) non-renewal
- Making these changes likely provided little additional protection to the certificate holder. Even with the old language, the insurance certificate clearly stated that it was a matter of information only and did not endorse, amend, or alter the terms of the insurance policies on the certificate.

Changes to ACORD 25 COI Cancellation Provision – Best Practice for Owners

- Request a complete copy of the contractor's insurance policy.
- Verify the presence of required coverage and other insurance requirements with experienced counsel or a consultant specializing in insurance.
- Look for notice provisions that provide:
  - Only the "first-named insured" will be notified of cancellation or intent not to renew
  - Additional insureds are not required to be notified, and
  - No notification to certificate holders is made if the first-named insured cancels or non-renews the policy.

Changes to ACORD 25 COI Cancellation Provision – Best Practice for Owners

- Because standard notice provisions limit notice to Owners regarding cancellation or material modification of insurance coverages, contractors must obtain endorsements or amendments to bring insurance coverages into conformity with contract requirements.
- Consider modifying form contracts to require that the Contractor:
  1. Provide notice of cancellation or material coverage changes.
  2. Send a pdf or fax a copy of any carrier notice of changes in policy conditions as soon as it is received by the Contractor.
  3. Provide updated COI every 30 days or as part of the documentation required for the Contractor's application for payment.

Traps for the Unwary: When Being Additional Insured Is Not Being Additional Insured

- Owners can and should seek additional insured status for claims that arise during the project or other after substantial completion.
- Be aware that not all endorsements provide both types of coverage.
  - The standard ISO additional insured form for CGL policies is known as the ISO 20 10 form. Initially published in November 1985 as ISO 2010 11 85, this form has since undergone several revisions, largely from then industry's response to various court cases interpreting the language of the form. The coverage afforded under successive revisions of ISO CG 20 10 has steadily been eroded.
  - There are over 300 hundred nonstandard endorsements that are used by insurers to add additional insureds to CGL policies. Although these forms may be modeled on ISO forms, they must be carefully scrutinized to determine the coverage they offer.

Additional Insured Status ISO 2010 11 85

- **WHO IS AN INSURED (Section II)** is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of 'your work' for that insured by or for you.
- Provides broad coverage to the additional insured, including "completed operations" coverage.
- Offered by few, if any, insurers at present, and will be difficult or impossible for most general contractors to purchase in the marketplace if specified in an owner’s insurance requirements.

Additional Insured Status ISO 2010 11 85

- **WHO IS AN INSURED (Section II)** is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of 'your work' for that insured by or for you.
- Contractor's liability insurance carrier may be required to defend and indemnify the Owner even when the alleged bodily injury and/or property damages are not caused by the contractor's acts.
  - The term "arising out of" has been interpreted broadly by the courts. See Merchants Ins. Co. of New Hampshire, Inc. v. U.S. Fidelity and Guar. Co., 143 F.3d 5, 9-10 (1st Cir. 1998); Transamerica Ins. Group v. Turner Constr. Co., 33 Mass. App. Ct. 446, 449-50 (1992).
- All but negates a limited indemnification provision in a construction contract when this form or its equivalent are used.

Additional Insured Status ISO CG 2010 10 93 or 03 97

- **WHO IS AN INSURED (Section II)** is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.
- Excludes completed operations coverage.

Additional Insured Status ISO CG 2010 07 04

- Continues to exclude completed operations coverage AND
- Limits coverage for additional insureds to liabilities that are causally connected to the named insured's acts or omissions (similar to action-based indemnity).
- Under this endorsement, the named insured be at least a partial "cause" of the alleged injury and provides grounds for the insurer to reserve and/or potentially disclaim additional insured coverage where, for instance, the only negligence alleged is that of the additional insured.

Additional Insured Status ISO CG 2033 10 01

- Automatically provides additional insured status to any party when such status is required by contract and removes the need to separately schedule each additional insured.
- Excludes completed operations coverage.

2013 Change to ISO AI Endorsements

- CG 20 10 04 13 / CG 20 37 04 13
- “To the extent permitted by law” – anti-indemnity statutes may prevent you from requiring contractor or contractor from requiring subcontractor to purchase insurance for owner/contractor as additional insured
- If coverage required by contract, AI coverage will not be broader than contract requires, even if policy provides more – no “bonus” coverage
- Coverage limit is the lesser of that provided by the policy or required by the contract – no “bonus” limits
- New blanket endorsement – CG 20 38 04 13 – who is an insured includes “any other person or organization you are required to add as an additional insured

Cancellation, Amendment, and Failure to Provide and Maintain Insurance Coverage

- Cancellation or unauthorized amendment to coverage, or failure to provide and maintain insurance is an unacceptable risk for all parties. Contracts must include terms clearly stating that:
  - Each policy and certificate of insurance provided to the Owner by the Contractor shall contain a provision or endorsement that the coverage afforded will not be cancelled or materially amended and no renewal will be refused until at least thirty (30) days' prior written notice has been given to the Owner; and that
  - Contractor’s failure to promptly provide and continue in force such insurance shall constitute a material breach of the contract and shall be grounds for immediate termination thereof by and in the sole discretion of the Owner.

Changes to the Contract

Changes in Work

Change Orders

- Certificate of Appropriation

Construction Change Directives

- Work under protest
- Minor changes

Constructive Change

Changes in the Work

- § 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.
- § 7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Engineer; a Construction Change Directive requires agreement by the Owner and Engineer and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Engineer alone.
- § 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

Change Orders

§ **7.2.1** A Change Order is a written instrument prepared by the Engineer and signed by the Owner, Contractor and Engineer stating their agreement upon all of the following:

1. The change in the work;
2. The amount of the adjustment, if any, in the contract sum; and
3. The extent of the adjustment, if any, in the contract time.

Change Orders

§**7.2.2.1** Contractor's Change Order Proposals shall be complete and all inclusive. The amount of the adjustment in the Contract Sum and Contract Time, if any, shall be stated in the proposal for all Work affected by the proposed change. Once a Change Order is executed, the Contractor shall be required to perform all of the Work required therein (including incidental Work and changes to related Work which may be required to complete the Change Order) in accordance with the Contract Documents for the amount stated in the Change Order.

Construction Change Directives

§ **7.3.1** A Construction Change Directive is a written order prepared by the Engineer and signed by the Owner and Engineer, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

§ **7.3.2** A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

Differing Site Conditions

Changes in Work Versus Differing Site Conditions

- Differing site condition clauses are designed to benefit both the public owner and the contractor by reducing the cost of public projects.
  - Public owner benefits because the contractor need not add large contingency sums to its bid to cover the risk of encountering adverse subsurface conditions.
  - Contractor benefits because it is assured that it may receive compensation if conditions are encountered which materially differ from those indicated in the contract.
- Public owner no longer has to pay the contractor a windfall price when only normal conditions are encountered, and contractor can seek compensation to avoid a disaster should unanticipated conditions arise.

Differing Site Conditions: Types I and II

- Type I: conditions which differ from “those shown on the plans or indicated in the contract documents”
  - Litigation over Type I conditions centers on whether conditions shown in, or indicated by, the contract documents misrepresented or omitted actual conditions encountered.
- Type II: conditions which differ from “those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and
  - Litigation over Type II changed conditions is more difficult in that contractor must show that it “had no notice of the existence of the condition and that the condition is somehow unusual.”

If We Could Contemplate Them, We Would

> “It is always **wise to look ahead**, but difficult to look further than you can see.”
>
> –Winston Churchill

Risk Allocation

Resist the fear to put all the risk on one party and ask?

- Who is best able to handle the risk
- What is the potential cost of the risk
- What is my client's risk tolerance

Contract Clauses

- Materials contain clauses from:
  - Tennessee DOT
  - Connecticut DOT
  - Framingham, Massachusetts
  - Ft. Worth, Texas
- DOT clauses are similar in structure and have typically been tested by the courts.
- Clauses should be modified based on the project type
- Because a clause is more robust does not mean its better

Key Components Of Clause Should Address Each Stage of a Differing Site Condition

Owner and Contractor Document at Each Stage

DSC Clause Consistent with other Contract Language – Notice, Extra Work, Claims, Etc.

Third Party Impacts and Permitting

The Third Party

- No contractual relationship with the contractor
- Not subject to delay damages
- Not part of day to day project activities
- “My way or the highway”

Third Parties and Common Impacts

Utilities

- Late notification from the owner
- Poor coordination by the contractor
- Late completion of work, lack of urgency

Railroads

- Unclear and changing requirements for submittals and operations
- Failure to provide flagmen

Permitting Impacts

- Permitting agencies often the most restrictive on a project
- Permits often require owner and contractor actions
- Permitting agency not concerned about construction schedule
- Permitting agency review time
- Contractor not knowledgeable of permitting process and what's required

No Damage for Utility Delay

- Have been tested by the courts and found to be valid
- Not bulletproof if the owner does not fulfill its obligation
- These are typically big claims – there will be a challenge
- Don’t use one size fits all

Electronically Stored Information Records Retention, and Audits

Electronically Stored Information, Records Retention, and Audits

*"**Omnia praesumuntur contra spoliatem**"*

"All things are presumed against the spoliator"*

*Rests upon a logical proposition that one would ordinarily not destroy evidence favorable to himself/herself

Electronically Stored Information, Records Retention, and Audits

> “The spoliation of evidence germane ‘to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.’”

Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y.2003) (*quoting Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir.1998))

Electronically Stored Information, Records Retention, and Audits

Fed. R. Civ. P. 34 Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

A. In General. A party may serve on any other party a request within the scope of Rule 26(b):

1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

a) any designated documents or **electronically stored information**—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

b) any designated tangible things; or

2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Electronically Stored Information, Records Retention, and Audits

Fed. R. Civ. P. 34

B. Procedure.

2) Responses and Objections.

e) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

i. A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

ii. If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

iii. A party need not produce the same electronically stored information in more than one form.

Electronically Stored Information, Records Retention, and Audits

Fed. R. Civ. P. 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

E. Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

   1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

   2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

      a) presume that the lost information was unfavorable to the party;

      b) instruct the jury that it may or must presume the information was unfavorable to the party; or

      c) dismiss the action or enter a default judgment.

Electronically Stored Information, Records Retention, and Audits

Where a party seeks an adverse inference instruction based on the spoliation of evidence, it must establish:

1. That the party having control over the evidence had an obligation to preserve it at the time it was destroyed;

2. That the records were destroyed “with a culpable state of mind”; and

3. That the destroyed evidence was “relevant” to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 107 (2d Cir.2002)

Electronically Stored Information, Records Retention, and Audits

Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y.2003)

Identifying the boundaries of the duty to preserve involves two related inquiries:

1. When does the duty to preserve attach?
2. What evidence must be preserved?

There are also two additional questions pertinent to satisfying preservation requirements:

3. How must a party go about fulfilling its ultimate obligation?
4. Who is responsible for seeing that it is fulfilled?

Electronically Stored Information

- Types of ESI
- Software/Technology Used
- Storage of ESI

Electronically Stored Information

- Retention of ESI
- Custodians of ESI
- Litigation Hold

Electronically Stored Information, Records Retention, and Audits

Major Challenges

- Identify Custodians
  - Organizational Chart
  - Custodian Questionnaire
- Identify the software and hardware used
  - Director of IT/Staff Questionnaire
- Obtain document and ESI retention and destruction policies
- Issue claim/litigation hold letters
- Implement claim/litigation hold

Dispute Resolution

What Generates Disputes?

Contractor's failure to perform work

Owner or Third Party interference with Contractor's work

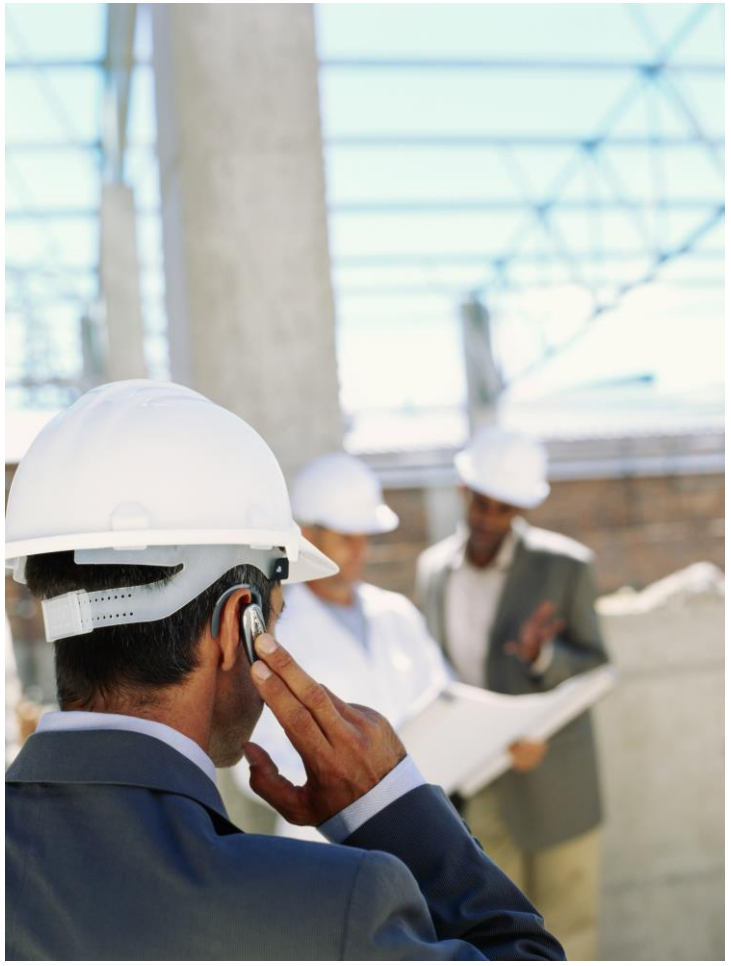
Dispute Resolution

Owner’s Remedies

- Suspension of Work
- Termination for Convenience
- Termination for Cause/Default
- Administrative Proceeding
- Mediation/Arbitration/Litigation

Contractor’s Remedies

- File an administrative claim/dispute
- Mediation/Arbitration/Litigation



Dispute Resolution

27. TERMINATION FOR DEFAULT

THE DIRECTOR, OFFICE OF PROCUREMENT, may terminate the contract in whole or in part, and from time to time, whenever THE DIRECTOR, OFFICE OF PROCUREMENT, determines that the contractor is:

a. defaulting in performance or is not complying with any provision of this contract;

b. failing to make satisfactory progress in the prosecution of the contract; or

c. endangering the performance of this contract.

The Director, Department of General Services, will provide the contractor with a written notice to cure the default. The termination for default is effective on the date specified in the County's written notice. However, if the County determines that default contributes to the curtailment of an essential service or poses an immediate threat to life, health, or property, the County may terminate the contract immediately upon issuing oral or written notice to the contractor without any prior notice or opportunity to cure. In addition to any other remedies provided by law or the contract, the contractor must compensate the County for additional costs that foreseeably would be incurred by the County, whether the costs are actually incurred or not, to obtain substitute performance. A termination for default is a termination for convenience if the termination for default is later found to be without justification.

Source Montgomery County, MD C.I.P. Work Order Contract

Dispute Resolution

28. TERMINATION FOR CONVENIENCE
This contract may be terminated by the County, in whole or in part, upon written notice to the contractor, when the County determines this to be in its best interest. The termination is effective 10 days after the notice is issued, unless a different time is given in the notice. The County is liable only for payment for acceptable performance prior to the effective date of the termination.

Source Montgomery County, MD C.I.P. Work Order Contract

Dispute Resolution

During Construction

- Owner concerns – $$$, progression of work, contractor following laws and politics

After Construction

- Owner concerns – $$$, warranties, state/federal project audits and politics

Dispute Resolution

Dispute Resolution

Arbitration

- Pros
  - Arbitration can usually occur before you get a trial in court
  - Arbitrator should be experienced in construction law
- Cons
  - As expensive as litigation?
  - Impaired discovery
  - Difficult to join 3rd parties
  - Limited motions practice
  - No realistic ability to appeal

Dispute Resolution

Uniform Arbitration Act (some version adopted by 35 states and DC)

Grounds upon which a court shall vacate an arbitration award are:

1. if the award was procured by corruption, fraud, or other undue means;
2. if there was partiality by an arbitrator appointed as a neutral, corruption in any arbitrator, or misconduct prejudicing the rights of any party;
3. if the arbitrators exceeded their powers;
4. if the arbitrators committed certain procedural errors in the conduct of the hearing, as to prejudice substantially the rights of a party; and
5. if there was no agreement to arbitrate.

Downey v. Sharp, 428 Md. 249, 51 A.3d 573 (2012). Note that at common law, an arbitrator's award could not be vacated unless the arbitrator was determined to have been guilty of fraud, misconduct, or prejudice, had exceeded his or her authority, or had made a mistake of law or fact appearing on the face of the award.

Uniform Arbitration Act

Uniform Business and Financial Laws Locator“ at https://www.law.cornell.edu/uniform/vol7#arbit Legal Information Institute. Cornell University Law School. Accessed September 22, 2016.

•Alaska
•Arizona - §§ 12-1501 to 12-1518
•Arkansas - Ark. Code, Title 16, Subtitle 7, Ch. 108, Subchapter 2, §§ 201 to 207.
•Colorado - C.R.S., Title 13, Contracts and Agreements, Art. 22, Part 2, §§ 201 to 223
•Delaware - Del.Code, Title 10, Part IV, Ch. 57, §§ 5701 to 5725
•District of Columbia - D.C. Code, Division II, Title 16, Ch. 43, §§ 16-4301 to 16-4319
•Florida
•Hawaii (2000 Act) - H.R.S. §§ 658A-1 to 658A-29
•Idaho
•Illinois
•Indiana
•Iowa
•Kansas - §§ 5-401 to 5-422
•Kentucky (PDF)
•Maine
•Maryland - Md. Code, Courts and Judicial Proceedings, Title 3, Subtitle 2, §§ 3-201 to 3-235
•Massachusetts
•Michigan
•Minnesota - §§ 572.08 to 572.30
•Missouri
•Montana - MCA 27-5-111 to 27-5-324
•Nebraska - §§ 25-2601 to 25-2622
•Nevada (2000 Act)
•New Mexico (2000 Act) - NMSA 1978 §§ 44-7A-1 to 44-7A-32
•North Carolina - §§ 1-567.1 to 1-567.20
•North Dakota (PDF) - §§ 32-29.3-01 to 32-29.3-29
•Oklahoma - 15 §§ 801 to 818
•Pennsylvania
•South Carolina
•South Dakota
•Tennessee - Tenn. Code, Title 29, Ch.5, Part 3, §§ 301 to 320
•Texas
•Utah
•Vermont
•Virginia - §§ 8.01-581.01 to 8.01-581.016
•Wyoming

Dispute Resolution

Litigation

- Pros
  - Jurisdiction, venue, choice of law, jury v. non-jury, all in contract
  - Joinder of third-parties is possible
  - Broad discovery with subpoenas to third-parties
  - ESI Order with privilege and work product clawback
  - Motions practice and appeal rights
- Cons
  - Expensive
  - Judge may be inexperienced in construction law
  - Could take a long time to get a trial

Dispute Resolution

ARTICLE 16 – DISPUTE RESOLUTION

16.01 *Methods and Procedures*

A. Either City or Contractor may request mediation of any Contract Claim submitted for a decision under Paragraph 10.06 before such decision becomes final and binding. The request for mediation shall be submitted to the other party to the Contract. Timely submission of the request shall stay the effect of Paragraph 10.06.E.

B. City and Contractor shall participate in the mediation process in good faith. The process shall be commenced within 60 days of filing of the request.

C. If the Contract Claim is not resolved by mediation, City's action under Paragraph 10.06.C or a denial pursuant to Paragraphs 10.06.C.3 or 10.06.D shall become final and binding 30 days after termination of the mediation unless, within that time period, City or Contractor:

    1. elects in writing to invoke any other dispute resolution process provided for in the Supplementary Conditions; or
    2. agrees with the other party to submit the Contract Claim to another dispute resolution process; or
    3. gives written notice to the other party of the intent to submit the Contract Claim to a court of competent jurisdiction.

Source *City of Fort Worth, TX Standard General Conditions of the Construction Contract (Rev 9/8/2011)*

Questions/Discussion