A 2020 Insurance/Risk Management Primer

Surprise – It Might Remind You of 2008
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Course Participants will

1. Learn risk management fundamentals related to the firm’s architectural practice and its business practice.

2. Learn Contract fundamentals – key concerns that can be impacted by COVID-19 uncertainties

3. Learn insurance fundamentals that provide funding mechanism that can maintain the insured’s business and protect the practice (and its client)

4. Understand the demands of a claim, aka the claim drain

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1. What do I want?
2. What do I need?
3. How do I get there?
1. What I want is different for each of us - successful project, professional and/or personal recognition, profit, personal growth

2. I need – skills, knowledge, experience, trusted advisors

3. I get there by – recognizing my needs, applying experience, learning from others, negotiating confidently
2020 Primer Contracts

Standard of Care

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The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances.

B101-2017
2.1.3 As to all services provided to this Agreement...[the architect] ...shall exercise a degree of care and diligence in the performance of these services in accordance with the customary professional standards currently practiced by firms in Florida AND in compliance with any and all applicable codes, laws, ordinances, etc....
2.1.4 As to any drawings, plans, specifications or other documents or materials provided or prepared by Project Consultant or its Sub–Consultants, the Project Consultant agrees same: ... **Comply with all applicable laws, statutes, rules and regulations, building codes and Owner’s [the school board] guidelines and regulations, which apply to or govern the Project**
2.1.5 All professional design services and associated products or instruments of those services provided by the Project Consultant shall:

1. Be in accordance with all applicable codes, laws, and regulations of any governmental entity, including, but not limited to, [list of regulatory entities] with the Owner serving as the interpreter of the intent and meaning of ... any other applicable code[.]”
Synopsis
Contract language provided Architect would comply with Standard of Care **AND** would comply with code requirements.

*Two distinct compliance requirements.*

ConstructionRisk LLC – 2018 Newsletter
In the event of changes in such codes, regulations or interpretations during the course of the Project that were not and could not have been reasonably anticipated by the Architect and which result in a substantive change to the construction documents, the Architect shall not be held responsible for the resulting additional costs, fees or time, and shall be entitled to reasonable additional compensation for the time and expense of responding to such changes.
Architect shall exercise the reasonable standard of care to comply with requirements of applicable codes, regulations, and current written interpretation thereof published and in effect during the Architect's services. In the event of changes in such codes, regulations or interpretations during the course of the Project that were not and could not have been reasonably anticipated by the Architect and which result in a substantive change to the construction documents, the Architect shall not be held responsible for the resulting additional costs, fees or time, and shall be entitled to reasonable additional compensation for the time and expense of responding to such changes.
The client acknowledges that the requirements of federal, state, and local laws, rules, codes, ordinances, and regulations, including the Americans with Disabilities Act, are subject to various and possible contradictory interpretations. The Consultant will use reasonable professional efforts and judgment to correctly interpret and apply such requirements. Consultant, however, cannot and does not warrant or guarantee that the work will comply with the interpretation of such requirements by others.
2020 Primer
Contracts

Scope of Services
2020 Primer
Contracts / Scope – Define:

1. Services you will perform for the negotiated fee, i.e. the basic services
2. What services you can perform for an additional fee, i.e. supplemental or additional services
3. What services you will NOT perform, i.e. excluded services
4. Services to be performed by others
Beware of Scope Creep

Especially requests to provide services that may fall outside your scope of expertise and experience.
Remember

Even in an emergency situation, the Standard of Care remains what other similar professionals would have done under the same or similar situations at the time the services were provided.

Travelers, 2020
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Contracts

Construction Phase
Services

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Field Reports & Certifications
“Virtual” Site Visits / Update Disclaimer

• Note the restrictions made by the Authorities
• Note the alternate means of observing the construction progress
• Include the technology / method used
• Clearly state it is not based on direct in-person observations
2020 Primer
Contracts / CA Services

Construction Phase Services
X-Reference – MEP Email

Know your contract!
Communicate with Client!

Resources available:
Contact PLI Agent - Carrier
Counsel for Legal Advice

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2020 Primer
Contracts / CA Services

Certifications

No change – limit to direct knowledge or information supplied to you / to your scope of services.
Construction Phase Services / Contractor Delay Claims

COVID - Anticipated
Waiver of Consequential Damages

Keystone Airpark Authority v. Pipeline Contractors, Inc.
January 2019 – Florida appellate court certified this question to the Florida Supreme Court
Not Accepted / Decision by 1st District Court of Appeals Currently Stands as Florida Law

Where a contract expressly requires a party to inspect, monitor and observe construction work and to determine the suitability of materials used in the construction, but the party fails to do so and inferior materials are used, are the costs to repair damage caused by the use of the improper materials general, special, or consequential?
Passero shall have no liability for indirect, special, incidental, punitive or consequential damages of any kind.
Sample Language

Notwithstanding anything in this Agreement to the Contrary, it is agreed that neither party shall be liable in any event for any special or consequential damages suffered by the client arising out of the services hereunder. Special or consequential damages as used herein shall include, but not be limited to, loss of capital, loss of product, loss use on any system, or other property, or any other indirect, special or consequential damage, whether arising in contract, tort (including negligence), warranty or strict liability.
Sample Language / Mutual Waiver

Neither the Client nor the CONSULTANT shall be liable to the other or shall make any claim for any incidental, indirect or consequential damages arising out of, or connected in any way to the Project or this Agreement. This mutual waiver includes, but is not limited to, damages related to loss of use, loss of profits, loss of income, loss of reputation, unrealized savings or diminution of property value and shall apply to any cause of action including negligence, strict liability, breach of contract and breach of warranty.

Beazley
“The Architect shall not be responsible for delays caused by factors beyond the Architect’s reasonable control, including but not limited to delays because of strikes, lockouts, work slowdowns or stoppages, government ordered industry shutdowns, power or server outages, acts of nature, widespread infectious disease outbreaks (including, but not limited to epidemics and pandemics), failure of any governmental or other regulatory authority to act in a timely manner, failure of the Client to furnish timely information or approve or disapprove of the Architect’s services or work product, or delays caused by faulty performance by the Client’s or by contractors of any level. When such delays beyond the Architect’s reasonable control occur, the Client agrees that the Architect shall not be responsible for damages, nor shall the Architect be deemed in default of this Agreement.”

Beazley Insurance Company / Mar 2020
What if my contract does not include?

Unforeseen Conditions
2020 Primer
Contracts

Termination Clauses
For cause
For convenience

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2020 Primer
Contracts / Termination

1. Know what’s in your contract
2. Follow your contract
3. Tap into resources – PLI Agent-Carrier / Legal Counsel
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Insurance

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2020 Primer
Insurance

Professional Liability

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Negligence – i.e. Standard of Care

Assuming more liability in a contract than available coverage
Watch what you say

Avoid Warranties & Guarantees
Based upon, arising out of, or in any way relating
directly or indirectly to any warranty or guarantee
by You; however, this exclusion will not apply to any
guarantee that Your Professional Services conform
with the generally accepted standard of care
applicable to that Professional Service.
Policy Rating Factors

Looking Forward – Rate Increase

Limits – increase / decrease

Cancellation

Tail Coverage / ERP

COVID-19
Revenue

Most carriers use a 3 to 5-year average revenue.

Projected: some use – some don’t – be conservative.

Reduced revenue: short-term limited impact / long-term can take up to two-renewal cycles to impact.

Multi-year policies – 98% no midterm rerate / no midterm replacement.

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Rating Credits

Risk Management Credits: Carrier webinars / Risk Mgmt Courses (like this)

Limitation of Liability: % use limited to $250,000 or less

Waiver of Consequential Damages

Membership in a Professional Association – AIA, NCARB

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Rating Debits

Project Types: Condos – Developer or Association / most guidelines include individual units as condo

Uninsured Subs

Low percentage of written agreements – with Client / with Sub

Claims: Five-year loss ratios
Retroactive (Retro) Date: 1st year policy incepted / continuous coverage

Increased Limits: Unless negotiated (not always feasible) apply from date of increase – does not apply retroactively

Decreased limits: Applies retroactively and forward as of date of decrease (know your contracts)
2020 Primer
Insurance / PLI / Cancel / Expire

CLAIMS-MADE POLICY FORM
CLAIMS-MADE & REPORTED POLICY FORM

ONCE CANCELLED / EXPIRED – UNLESS TAIL COVERAGE PURCHASED – IT IS AS IF COVERAGE NEVER EXISTED

MINI-TAIL: THIRTY (30), SIXTY (60), NINETY (90) DAYS

ERP/TAIL: COST FUNCTION OF EXPIRING POLICY – SOME CARRIERS HAVE A RETIRED POLICY – SUBJECT TO CARRIER GUIDELINES

RETIREMENT PLANNING: TALK TO YOU AGENT!

RETIRED PROFESSIONALS AUTOMATIC EXTENSION: LIMITED CARRIERS, GENERALLY 3, 5 OR 10-YEARS OF CONTINUOUS COVERAGE

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2020 Primer
Insurance / PLI / COVID 19

Contracts: Know the terms & conditions / Use Contract Review Services
Pre-Claims Assist: This is NOT a claim – Use the services offered
Contractor Delay Claims / Cost-Overruns / Change Orders
Client Terminations / Budgets
8/11 - State of Florida instructed agencies to cut 8.5% from budgets
Election Cycles – 2020 / 2022
Recession / COVID - Budget cuts / lending freezes / permits slowing

COMMUNICATE – COMMUNICATE – COMMUNICATE
DOCUMENT – DOCUMENT – DOCUMENT

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Insurance / PLI Resources

- Contract Review
- Risk Management Materials
- Circumstance Reporting
- Pre-Claims Assist
- Supplemental Payments

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Non-Construction Industry: WC required 4 or more employees, including officers
Exempt but NO immunity provided

Expected losses: See losses / Unknown impact on rates

COVID-19 Claim Concerns: Pierce Employers’ Liability
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Insurance – Workers Comp/Employers Liability

Links
State of Florida / Division of Workers Compensation

WC Home Page
https://www.myfloridacfo.com/Division/WC/

Exemptions
https://www.myfloridacfo.com/Division/WC/Employer/Exemptions/default.htm
State of Florida / Division of Workers Compensation
COVID Stats

- As of 05/31
  - 3,807 Indemnity Claims
  - 1,718 Denied – Partial / Total

- As of 06/30
  - 5,639 Indemnity Claims
  - 2,643 Denied – Partial / Total

- As of 07/31
  - 11,872 Indemnity Claims
  - 5,176 Denied – Partial / Total

- Total Costs 2020 - $13,120,059 / 5.3% of Total Indemnity
2020 Primer
Insurance – Workers Comp/Employers Liability

State of Florida / Division of Workers Compensation
COVID Stats
Website Link

https://www.myfloridacfo.com/Division/WC/PublicationsFormsManualsReports/Reports/
Employment Practices Liability

Not commercially available
High deductibles ($25,000 firm of 15)
May contain COVID related exclusions

If you have the policy in place and have employees – maintain if possible

06/30 renewal – one EPLI carrier received 70 claims in a week
Commercial Auto

Company does not own/lease vehicles –
Hired/Nonowned Auto Liability – inexpensive, “may be” included with CGL

Owned /Leased Vehicles
Rates are not stable
Losses = Rate Increase
MVRs / Driving Training
Commercial General Liability

Covers premises / slips & falls / excludes professional services

Include (should): Blanket Additional Insured, Primary & Noncontributory, Waiver of Subrogation

Excludes:
Business Income, Cyber Liability, Drones (UAV exceptions by carrier)
2020 Primer
Insurance / Contract Coverages / Cyber

CYBER STATISTICS
Florida Trend / 2019-01-25

300,000 Consumer Complaints (FBI) $1.4B Reported Losses / $110.6M Floridians

Business Email Compromise $62.7M
Corporate Data Breach $5.1M

Backup / Train / Cyber-Insurance

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Insurance / Contract Coverages / Cyber

CYBER EXPOSURES

Network Security
Network Business Interruption / 3rd Party Provider Interruption
Cyber Extortion (Ransomware)
Fraudulent Wire Transfer

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Does my policy cover COVID-19 shutdowns?
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Insurance / Property

Business Interruption

PROBABLY NOT

Physical Damage to Insured Location
Covered Cause of Loss
Governmental Action – tied to above
Virus Exclusions

Report the Claim

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Insurance / Property

Business Interruption

Court Decisions – To Date – In Favor of Carrier

Michigan

D.C

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The Claims Drain

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2020 Insurance Primer
Claims Drain

1. Emotions
2. Resources
   a. Time
   b. Money
   c. People
3. Distraction
4. Go/No-Go (AIA Trust)
2020 Insurance Primer
Claims

Manage Client Expectations ...
Beginning with your proposal and negotiation of clear equitable contract language
Questions?
Disclaimer:

This information is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.