

American Association of Port Authorities Port Finance Seminar

CONTRACTS AND AGREEMENTS

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SPEAKER:



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CONSTRUCTION CONTRACTS

OVERVIEW OF TOPICS

- Delivery Methods.
- Common Types of Contracts for Construction.
- Common Contract Considerations.

CONSTRUCTION CONTRACTS

DELIVERY METHOD

- Traditional Design, Bid Build.
- Design and Construction.
- Construction Manager (no GMP).
- Construction Manager at Risk (GMP).

CONSTRUCTION CONTRACTS

DELIVERY METHOD

- Design, Bid, Build.
- Traditional model for project delivery.
- Thought to require more time.
- Owner completes and warrants plans to Contractor, the Spearin Doctrine.
- Better information for estimating and therefore bidding.
- Should provide better cost confidence.

CONSTRUCTION CONTRACTS

DELIVERY METHOD

- Design-Build Contracts.
- Contractor takes design responsibility.
- Communication of Project Requirements and Design Intent is Paramount.
- Less Budget Stable than Design Bid Build.
- Thought to be a “Fast Track” method.

GENERAL TYPES OF CONSTRUCTION CONTRACTS

- Fixed Price Agreement.
- Familiar to everyone, easy to use, straight forward expectations.
- Not available for Design-Build.
- Why stray from this? TIME.

GENERAL TYPES OF CONSTRUCTION CONTRACTS

- Guaranteed Maximum Price Agreements.
- More often used where plans are not yet complete or Contractor has design responsibility.
- More often used when pricing, discounts and owner supplied items are in play.
- Construction Manager as Agent.
- Construction Manager at risk.

CMa

CONSTRUCTION MANAGER AS AGENT

- Construction Manager as Agent (CMa).
- CMa Contracts with Owner.
- Assists in scheduling, coordination, constructability review, value engineering, observation of the work and project documentation.
- Does not perform any construction and does not hold and cannot enforce the contracts of those performing the work.

CMAR

CONSTRUCTION MANAGER AT RISK

- The Construction Manager at Risk (CMAR).
- Similar to General Contracting.
- Commitment by the Construction Manager (CM) to deliver the project within a Guaranteed Maximum Price (GMP) which is based on the construction documents and specifications at the time of the GMP plus any reasonably inferred items or tasks.
- CMAR holds the subcontracts.

A WORD ABOUT CONTRACT FORMS

- AIA suite of documents.
- Consensus Documents.
- Tailored Suite of Contracts.

- Which suit fits better? Off the rack or tailored?

THE CONTRACT

Choose the contract that is most appropriate for each project.

- Don't just choose and use any form without regard to its provisions.
 - provisions must be suited to the circumstances, goals, and risks of each project.
- Review contract documents and requirements with your risk manager, insurance broker, and legal counsel before advertising a project for bid.
- Contract documents should be coordinated, consistent, and complimentary.
- Rights and duties should be expressly and clearly articulated in the contract documents.

COMMON CONTRACT CONSIDERATIONS

- Scope of Performance.
- Time of Performance and Delays.
- Changes.
- Insurance.
- Payment.
- Dispute Resolution.

COMMON CONTRACT CONSIDERATIONS

SCOPE OF THE WORK

- Scope of the Work.
- Clarity is the issue.
- How much clarity do we pay for in the design stage?
 - Design Bid Build?
 - Design-Build?

TIME OF PERFORMANCE AND DELAYS

- Time of Performance.
 - Special Consideration to Port Activities that Delay Construction, a Port is a 24/7 operation.
 - NASA cause closings?
 - Plan for conflicting Ship Traffic?
- Liquidated Damages.

CHANGES IN THE WORK

- Changes in the Work.
- Who must approve? Commissioners? Port Management?
- Pricing? Negotiated mark-up on each or net?
- Time impact in Changes.

INSURANCE

- Insurance.
- Check that of Design Professionals, is it a “Wasting” Policy?
- Owner Controlled Insurance Programs.
 - Great for assuring correct coverage, Jones Act, etc.
 - Not so great for Commercial General Liability.
- Require endorsement as an Additional Insured.
- Obtain Copy of the Policy.

INSURANCE

- Types of insurance commonly required on construction projects:
- Commercial General Liability – bodily injury, property damage, advertising injury caused by contractor and subcontractor negligence relating to ongoing and completed operations; Products liability.
- Often does not cover the contractor’s defective work itself.
- Professional Liability – errors and omissions of professionals such as architects, engineers, surveyors and mappers.
- Automobile Liability – bodily injury and property damage arising out of use of automobiles for business purposes.
- Workers’ Compensation and Employer’s Liability – work-related injuries and illnesses.
- Builder’s Risk – damages to materials and equipment used in construction and damages to property under construction.
- Usually obtained by owner, but contract may obligate contractor.
- Typically provides coverage through owner’s acceptance of project.
- Pollution Liability – pollution conditions arising from the insured’s operations.

- Types and amounts of insurance appropriate for the scope and risk on each individual project.
 - Must be discussed with your Risk Manager or Insurance Broker.
- Insurance requirements should be **incorporated into your contract** and should be made to **flow down to subcontractors**.
- Contract should require the insurance to cover the contractor's/design professional's **contractual indemnity obligations** (discussed further below).
- Contract should require that you, your employees, and agents be **additional insureds** on the contractor's insurance policy.
 - Flow-down provisions in subcontracts.
 - Designation of contractor's policies as **primary and non-contributory**.
 - Keeps your insurance policies out of the mix.
 - Can require the contractor to **waive subrogation** against you and your separate insurers .
 - Ensures that the risk for the covered loss stays with insurer.

PAYMENT PROVISIONS

STATUTORY RETAINAGE REDUCTION

- Retainage (Projects of construction services of \$200,000 or more).
- After 50% completion, the contractor may request from the public entity payment for up to one-half of the retainage held by the public entity.
- Public entity shall promptly make payment to the contractor, unless the public entity has grounds for withholding the payment of retainage.
- Contractor required to timely remit payment of any retainage received from public entity to subcontractors and suppliers whose work is covered by the retainage received by the contractor.
- Same time frames apply as apply to progress payments.

RETAINAGE WORK DOWN

- Upon completion of all items on the punch list developed by the public entity and the contractor, the contractor may submit a request for payment of all remaining retainage withheld by the public entity.
- If a good faith dispute exists as to whether 1 or more of the items on the punch list have been completed under the contract, the public entity may continue to withhold up to 150% of the total costs to complete those items.

DISPUTE RESOLUTION

- Dispute Resolution Board.
- Mandatory Meeting of Principals or Upper Management.
- Venue.
- Mediation – Pre-suit as a Condition Precedent.
- Arbitration – Pre-Suit – Binding or Non-Binding.
 - As Sole Method of Resolution.
- Litigation.

GUIDELINES FOR INSURANCE POLICIES



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Daniel J. Healy is a partner in Anderson Kill's Washington, D.C. office. After starting his career with Anderson Kill, he served for over five years as a Trial Attorney with the United States Department of Justice, Tax Division. He appeared as lead trial counsel in federal, state and bankruptcy courts across the country. His caseload involved tax shelters, fraud, substantive tax disputes and claims to real property. While doing so, he received numerous Outstanding Attorney awards and a Special Commendation. He also served as the E-Discovery Coordinator for the Tax Division. Mr. Healy represents policyholders seeking insurance coverage, and is Deputy Co-Chair of the Cyber Insurance Recovery Practice Group, as well as a member of the firm's Blockchain and Regulated Products Groups. He was selected by his peers for inclusion in the 2018 edition of the Best Lawyers in America in the category of insurance litigation.

Mr. Healy has experience obtaining coverage relating to D&O liabilities, business interruptions, environmental liabilities, health benefits, property damage, asbestos products, and intellectual property disputes. He has represented clients in a range of industries, including in railroad, financial services, manufacturing, retail, technology and food and beverage. He also litigates all areas of intellectual property. He has represented trademark owners in disputes involving domain names, cybersquatting, online infringement and reverse confusion, has appeared before the Trademark Trial and Appeal Board and has litigated claims of unfair competition, copyright infringement and patent infringement. Once, he successfully represented a client against the U.S. Patent and Trademark Office.

NOT YOUR ORDINARY CONTRACTS

- Standard Forms.
 - Generated by the insurance industry.
 - Subject to regulatory approval.

- Limited Revisions by Endorsement.
 - Strict internal parameters.
 - Not disclosed to you.



- Even the Endorsements are Pre-Written.

NOT “ARMS-LENGTH” TRANSACTIONS

- Unequal bargaining power.
 - Insurers have disproportionate clout.
 - Policyholders often are required to purchase insurance.
 - Not a lot of choice among their options.
- Anti-trust considerations.



EVEN THE PRICING IS STANDARDIZED

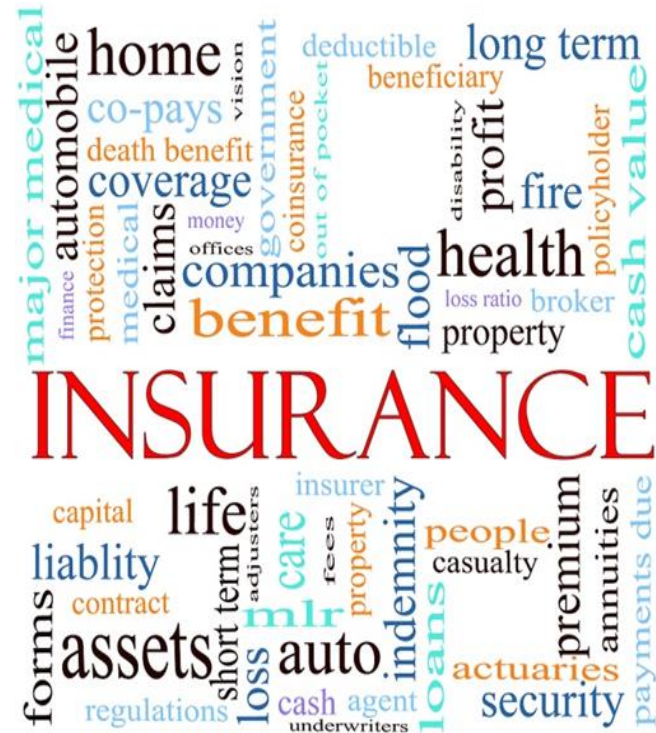
- Premiums are set by third-party rating agencies.
 - Based on actuarial standards.
 - Minimal room for negotiation by policyholder.
 - Not subject to ordinary competition.

- Historical scandals about price-fixing.
 - Bid-rigging by brokers.
 - Other.



MANY TYPES OF INSURANCE POLICIES

- General Liability.
- Builders Risk.
- Workers Comp/Employers Liability.
- Umbrella/Excess Liability.
- Errors & Omissions Liability.
- Directors & Officers Liability.
- Crime/Specialized Cyber.
- Broad Form Property.
- Performance Bonds.
- OCIPs & CCIPs.



BLINDED BY THE FINE PRINT



"The fine print can be read only if held up to a mirror."

THE BASIC STRUCTURE

- Declarations Page.
- Insuring Agreement.
- Definitions.
- Conditions.
- Exclusions.
- Endorsements (standard form).
 - i.e., the pollution exclusion in the mid-70s.
- Endorsements (manuscript).



DECLARATIONS PAGE

- Sets forth:
 - Named insured(s), loss payees/mortgagees.
 - The premium.
 - Which of the coverage options were purchased.
 - The policy limits and term (effective dates).
 - Any aggregate limits and sublimits.
 - The deductible or self-insured retention.
 - Any underlying policies.
 - Retro date for claims made policies.

GENERAL LIABILITY POLICIES

- Insuring Agreement.
 - “The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . .”

GENERAL LIABILITY POLICIES

- Ongoing operations.
 - During course of construction a brick falls from a building and damages third party property or a person.
- Completed operations.
 - 2 years after final completion a brick falls off the building and strikes damages third party property or a person.

- Separate limits.
- Separate exclusions.



SAVE YOURSELF FROM “CONSENT” PROVISIONS



PROPERTY POLICY LIMITS / DEDUCTIBLES

PERILS:

- Fire / “AOP”
- Windstorm
- Named Storm
- Earthquake

LIMITS:

- Per Occurrence
- Included
- Annual Agg. – “PML”
- Annual Agg. – “PML”

DEDUCTIBLES:

- \$10K – \$25K
- Included
- 2% – 5% (*Per Wind Zone*)
- 2% – 5% (*Per EQ Zone*)

“ALL-RISK” PROPERTY POLICIES

- Insuring Agreement.
 - “All risks of direct physical loss or damage [to insured property] provided that such physical loss or damage occurs during the policy period.”
- Alternative form of property policy: “Named Perils.”



“NAMED PERIL” PROPERTY POLICIES

- Risks are covered only if specified in form.
- Insuring Agreement:
 - “Subject to the terms, conditions and limitations of this policy, we insure you against financial loss resulting from direct physical loss of or damage to covered property caused by any of the following perils: explosion; fire or lightning; riot or civil commotion; smoke; theft, including direct physical damage done by burglars; vandalism or malicious mischief; volcanic action; weight of ice, snow or sleet; wind or hail.”

OTHER INSURING AGREEMENTS

1. Insuring Agreement:

This policy, subject to the terms, exclusions, limitations and conditions contained herein or endorsed hereto, insures against all risk of direct physical loss or damage to insured property while at the location of the INSURED PROJECT, while in offsite temporary storage or while in inland transit, all within the policy territory and occurring during the term of this policy.

2. Property Insured:

A. At the location of the INSURED PROJECT:

- (1) Permanent Works – All materials, supplies, equipment, machinery, and other property of a similar nature, being property of the insured or of others for which the Insured may be contractually responsible, the value of which has been included in the estimated value of the INSURED PROJECT in the DECLARATIONS, all when used or to be used in or incidental to the demolition of existing structures, site preparation, fabrication or assembly, installation or erection or the construction of or alteration, renovation, rehabilitation of the INSURED PROJECT.
- (2) Temporary Works – All scaffolding, form work, fences, shoring, hoarding, falsework and temporary buildings all incidental to the project and the value of which has been included in the estimated value of the INSURED PROJECT in the DECLARATIONS.

A. Coverage

We will pay for “loss” to Covered Property from any of the Covered Causes of Loss.

1. Covered Property

Covered Property, as used in this Coverage part, means “Builders Risk.”

2. Covered Causes of Loss

Covered Causes of Loss means RISK OF DIRECT PHYSICAL LOSS except those causes of “loss” listed in the Exclusions

• * *

“Builders Risk” means: Property Described in the Declarations under “Builders Risk” owned by you for which are legally liable consisting of: (a) Buildings or structures including temporary structures while being constructed, erected or fabricated at the “job site”; (b) Property that will become a permanent part of the buildings or structures at the “job site”; (1) while in transit to the “job site” or temporary storage location; (2) while at the “job site” or at a temporary storage location.

“Loss” means accidental loss or damage.

TIME ELEMENT EXTENSIONS

- Extra Expense: Costs incurred on the project that would not have been incurred but for the covered event.
- If properly structured, not limited to increased costs incurred in connection with the damaged work.
 - Rather, any costs incurred by reason of the event are covered, unless expressly excluded.
- Sometimes, but not always, limited to costs incurred during the period of restoration and repair of damaged work.

TIME ELEMENT EXTENSIONS (CONT.)

- Costs incurred to accelerate the repair of damaged work.
- “Expediting expense” coverage extension.
 - “Subject to the specific sub-limit set forth above, this policy shall also pay for the reasonable extra costs to make temporary repairs and to expedite the permanent repair or replacement of the insured property which is damage by an insured peril, including additional wages for overtime, night work, and work on public holidays and the extra costs of express freight or other rapid means of transportation.”

“SUE AND LABOR”

- Term comes from an inland marine policy form.
 - “In case of loss or damage it shall be lawful and necessary for the Insured, his or their factors, servants, and assigns to sue, labor and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this Insurance, nor shall the acts of the Insured or the Insurers, in recovering, saving and preserving the property insured, in case of loss or damage, be considered a waiver or an acceptance of abandonment. The expense so incurred shall be borne by the Insured and the Insurers proportionately to the extent of their respective interest.”

SUE AND LABOR RATIONALE

- Insured's mitigation of loss reduces carrier exposure.
- Insured should be compensated for cost saving efforts that inure to insurer's benefit.
- Purpose of sue and labor coverage is “to encourage and bind the assured to take steps to prevent a threatened loss for which the underwriter would be liable if it occurred, and when a loss does occur to take steps to diminish the amount of the loss.”*

* *Home Ins. Co. v. Ciconett*, 179 F.2d 892, 895 (6th Cir. 1950) .

ANTI-CONCURRENT CAUSATION CLAUSES

- Typically appears as the lead-in to the Exclusions section.
- States that all coverage is excluded if there is an excluded cause of loss, “whether or not any other covered cause of loss contributes concurrently or in any sequence to the loss.”



GIVE NOTICE EARLY (AND OFTEN)

- The first action that any policyholder should take when facing a potential loss is to Give Notice.
- The second action that any policyholder should take when facing a potential loss is to Give Notice.
- Late notice can be fatal to a claim, and is one of the most frustrating reasons for coverage to be denied.
- Give notice first – ask questions later.
 - Resist the very reasonable temptation to give notice only after you are appropriately informed.



CHOOSE YOUR WORDS WISELY . . .

- Broad and generic is better than specific – *especially* because you need to give notice early.
- Be careful with causation.
 - Causation is an issue of both fact and law.
 - State laws on causation vary widely.
 - Entire trials can be devoted to what caused what.
 - There’s no need to commit to “because of” or “caused by” in your notice letter.
- You may not know about some losses for a long time.
 - E.g. DICC.



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Stephen Palley is a Partner in Anderson Kill's Insurance Recovery and Construction Practice groups, based in Washington, D.C. He is also co-chair of Anderson Kill's recently launched Blockchain and Virtual Currency group, a cross-disciplinary team of lawyers with experience across a wide range of legal practice areas. Mr. Palley has represented public and private owners, general contractors, construction managers and others in connection with insurance transactions and litigation for tens of billions of dollars of construction projects throughout the United States. In 20 years of litigation experience, he has handled construction insurance disputes and other insurance disputes in state and federal courts across the United States, along with a broad range of commercial litigation, products liability and other matters. Mr. Palley is a fellow of both the American College of Coverage and Extra Contractual Counsel and the Construction Lawyers Society of America, and has also been recognized as Washington, D.C. "Super Lawyer" in Construction Litigation. A frequent and sought after speaker and writer on construction insurance-related topics, Mr. Palley is the lead editor and contributing author of "Construction Insurance" and contributing author of Fundamentals of Construction Law, treatises published by the ABA Forum on the Construction Industry.

BUILDERS RISK

- Who is Covered?
- What is Covered?
 - Physical Damage to Work.
 - Coverage Extensions.
 - Extra Expense.
 - Soft Costs.
 - Delay in Completion.
- Negligence.
- Equipment Floaters.
- Permanent Property.



BUILDERS RISK MYTHS

- Myth #1. Builders Risk doesn't cover damage caused by negligence.
- Myth #2. Builders Risk only covers damage caused by negligence.
- Myth #3. Builders Risk *claims* must be made during course of construction.
- Myth #4. If Builders Risk applies the CGL doesn't.
- Myth #5. Builders Risk is the only property policy that covers course of construction losses.

COMMON CGL DISPUTES

- Construction Defect as an Occurrence.
- Whose policy is primary?
 - AI disputes.
- The line between construction means & methods and professional services.
- Missing policies, missing forms.



WRAPS IN A NUTSHELL

- The OCIP vs. CCIP argument.
 - Which is better for owner?
- What's included?
- What's excluded?
- Traps for the unwary.
- The cost vs. convenience argument.



INSURANCE AND RISK TRANSFER CONTRACT MORE DRAFTING TIPS

- Key clauses.
 - Look beyond insurance section and/or exhibit.
 - Limitations of liability.
 - Waivers (including of subrogation).
 - Flow-down clauses.
 - ✓ Subcontractor coverage.
- How is cost handled?
- It's not boilerplate.



WHAT DOES A SUBROGATION WAIVER WAIVE?

- The right of the parties to sue to the extent of “available” insurance coverage?
- A third party insurance company’s rights?
- Is a waiver of a third party’s rights really enforceable?



WHEN IS THE WAIVER TRIGGERED?

- Upon execution of the contract, before a claim even arises?
- When a claim arises but before it is paid?
- After insurance is procured?
- After a claim arises and an insurance company has paid?



CLAIMS

- What should I do when a potential claim arises?
- Review policies, contract documents.
- Notifications.
 - Parties involved in the construction process.
 - BR, other policies.
 - Notify performance bond surety?
 - Lender notice requirements?
- Balance need to protect/preserve evidence with needs of active job site, desire to minimize delay.

CLAIMS

- Relationship with claims handling personnel.
- Develop categories of damage tied to scope of policy.
 - Direct physical damage, expediting expense, debris removal, sue and labor/mitigation etc.
 - Nexus to physical damage.
 - Avoid premature characterization/categorization of damage.

CLAIMS

- What is “repair of physical damage”?
 - Pre-repair inspection services?
 - Establishment of “bone yard”
 - Need to inspect damage prior to repairs?
 - Stabilizing damaged construction.
 - Scope of coverage for over-time, etc., to mitigate delay may depend on breadth of coverage extensions.
 - Is “sue and labor” inherent within Policy?
 - What about coverage for overhead & fee?

CLAIMS

- In addition to Builders Risk, consider other coverage.
- If policy contains little coverage for consequential losses, consider application of CGL.
- Review CGL policy pre-loss to confirm that policy does not include manuscript exclusions for property during the course of construction.
 - What happens if . . .
 - There is limited consequential loss coverage in BR policy?
 - CGL contains course of construction property damage exclusion?

CLAIMS

- Timing of proof of loss?
- Request additional time if needed.
- Consider tolling, stand-still agreements.
- Will carrier advance funds and/or accept partial proof of loss?



CLAIMS

- Who should be paid first?
 - Practical considerations.
- First named insured as “fiduciary” or “trustee” of funds.
- Right to set off payment with other claims?
 - Negotiate direct right of payment without set-off?



EMERGING TRENDS

- Insurance Considerations for “Alternative” Project Delivery Methods.
 - Design-Build.
 - Integrated Project Delivery.
 - Public Private Partnership (P3).
- Green Construction/Sustainability Issues.
- Cyber Security Claims.
- Drone Coverage.
- Coverage for blockchain/DLT use cases.



QUESTIONS AND ANSWERS



THANK YOU.



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