

**MEETING MINUTES**  
Quality in Construction  
June 12, 2013

**Preparer's note: Items highlighted in yellow indicate possible action items.**

**I. Outstanding items**

**A. OSA – Check with UT and TBR on what they are doing as far as evaluating completeness and validity of CM/GC information submitted in proposals.**

1. TBR - nobody looks that closely to see if what is described matches costs actually proposed, but nobody's preconstruction services proposals ever match up with scope in TBR's mind. Whether there are holes in the General Conditions, etc. we would have to know all the costs to validate any inaccuracies and just can't do that so you have to rely on what they turn in. The proposal becomes part of the contract and if 100 vs. 100,000 is in the proposal that is what is assessed.
2. STREAM - evaluates cost proposals and can't change it as it might change the award.

**B. OSA to budget for this contractor registration form to be developed.**

1. OSA budget request effective July 2015.

**C. OSA still needs help getting contact information on the advisor list.**

1. Bill Young will address this.

**D. OSA needs to ask for a revision of policy in this area, regarding requirement for stating past similar projects in evaluation criteria.**

1. Bob stated the requirement for consideration of previous project evaluations has been removed from OSA's recently revised policy on the Designer Selection process.
2. Dick Tracy – TBR – This is hard to interpret by different evaluators. The evaluated designer or contractor would need a rebuttal process also. Comments on one previous project may be associated with a bad consultant's or bad subcontractor's performance that is not even part of the team being evaluated.
3. Jim Dixey – STREAM – Agrees. If we could find a system that is fair, a more objective evaluation that would be good. Until then, it is not of value.
4. Brian Wirth – Flintco – Represents a minority contractor from Memphis. How does a contractor who saved the day or has previous experience with the campus get that considered / evaluated on that next project?
5. Dick Tracy – The issue is not whether someone has worked on my campus. The bulk of submittals have not worked on our campus and that is not critical. If they did a similar project at Vanderbilt that is more relevant to TBR.
6. Trey Wheeler – Forms can be dangerous. He agrees they should not be evaluated on future projects.
7. Dick Tracy – If the issues are still unresolved that shouldn't be held against a proposer and the current process allows that to happen.
8. Chris Remke – He recalled being involved in an OSA contractor disqualification process, where the committee was referring to a previous project performance evaluation form that was submitted to get a later project. That evaluation form said the contractor did a great job, at the same time they were being asked to disqualify that contractor for their

performance on another project. This caused all sorts of confusion, and the committee suggested getting rid of that prior project evaluation form.

**E. The State has an opportunity to revise the questions being asked in selection process and needs a recommendation from the CM/GC focus group.**

1. CM/GC group set this item aside for the month to focus on OSA request to comment on the A201. They will look at this before next month's meeting.

**F. The OSA will post on its website the interim information for the SFM review process.**

1. This has been done.

**G. SFM is open to present to the PMs of SPAs upon request.**

1. This offer is standing.

**H. Chris has DBIA PowerPoint – will get to OSA for distribution to QIC members and inclusion on the OSA website.**

1. It is on the OSA website.

**I. OSA's Angela Scott – to verify with Chris when he will get the D/B comments back so OSA's Ted Hayden can adjust the D/B contact revision calendar if needed.**

1. This comment is no longer applicable.

**J. OSA – Send out email with small projects charge.**

1. This will be done at the appropriate time (several months out).

**K. BV needs members.**

1. Jay Hosay needs members. Please volunteer.

**II. Review of State CM/GC Policy**

**A. Selection of Subs and Trades**

1. The State has asked OSA to revise the policy accordingly to be more objectively amended so OSA wanted QIC's feedback before doing so.
2. Ted Hayden reviewed Page 14 of the OSA Policy on Delivery Methods regarding: does CM/GC have to accept lowest bid? Ted's review found as long as there is a competitive procurement process it is acceptable (and it does not have to be as formal a process used to select the CM/GC); and if they didn't take lowest subcontractor's bid then they justify why.
3. State of Arizona may have provided a policy precedent – they have each proposer submit their subcontractor selection process with their CM/GC responses.
4. In discussions with STREAM, we are considering taking the low bidder or state why they weren't qualified.
5. Dick Tracy - TBR had that experience working with Mr. Fitts and they had protests if GCs were not low taking the bid. We don't want to get into CM/GC's business. The assumption is they always take the low bid but that isn't true. State doesn't want to evaluate or approve a contractor's process but just acknowledge they have a competitive procurement process. It is the Contractor's decision; State just needs the CM/GC to justify why they selected a sub if not on low bid. The contractor's letters are often not good at supporting why either.

6. Ted Hayden asked what if they submit their process and it is evaluated?
7. Don Friedman - Unless they are on the State's black list, you have to take their bid. Is there a way to select a sub without competitive selection? Do CM/GCs have to publicly open the bids?
8. Ted Hayden - Competitively procured is the goal not competitively bid, up to SPAs. To competitively procure either give Owner the process how you will select the subcontractor or justify why each time you don't take the low bid.
9. Dick Tracy - We can't evaluate if one policy is better than another.
10. Trey Wheeler - Right now this sounds very similar to selecting a designer's consultant.
11. Ted Hayden - Saying we need a way for a GC to hire one subcontractor over another besides low bid.
12. Dick Tracy – We just want a letter saying they have a process not what that process is.
13. Ted Hayden - Maybe a form letter they sign then?
14. Chris Remke – The selection process is very sophisticated, lots is considered and evaluated when selecting a sub.
15. Lisa Namie - No one mentioning voluntary alternates.
16. Dick Tracy – A GC can't take a voluntary alternate offered by a subcontractor without getting Owner's approval.
17. Clay Hickerson – Are we starting to talk about State selecting subs as CM Agent?
18. Bob answered no.
19. Dick Tracy – It is not our job as to how they do or don't do it.
20. Next steps - Ted Hayden to draft language and route to AGC and ABC for feedback.

## **B. Preconstruction Services**

1. Ted Hayden - Current policy needs to be made so they are not considered as part of the Cost Proposal.
2. Dick Tracy - Services need to be evaluated. Submit qualifications for construction and qualifications for preconstruction along with fee for construction.
3. Trey Wheeler per TCA 104106 - Just negotiate preconstruction fee, or do per fee schedule, or have it in a separate envelope.
4. Dick Tracy - Why submit a preconstruction fee if not going to evaluate it?
5. Peter Heimbach agreed. If you can't negotiate with them you move to the next in line.
6. Dick Tracy - We know about what the preconstruction fee we should be paying is for the level of services we want. Leave it up to SPA if they want them to provide for negotiations.
7. Clay Hickerson - Lynelle said selection of Designer significantly precedes the selection of the CM/GC. Ideally, the CM/GC and the Designer should be hired about the same time.
8. Lynelle Jensen – The State has a problem hiring the CM/GC early if construction funding has not been provided.
9. Dick Tracy - Lots of contractors proposing might not be in business by the time the project is funded for construction.
10. Johnny Stites - Does it make sense to have CM/GC evaluate designer selection vs. designer helping select the CM?
11. Dick Tracy - Designer doesn't help select the CM they just make comments then go on.
12. Johnny Stites - Chemistry is important. A team with chemistry can achieve more than the best individual players put together who may not work together as well.
13. Dick Tracy – We know certain Designers and Contractors who are the best but difficult to work with, and we just work through it.

14. Clay Hickerson – When you look at the DB-One documents you might start by taking the AIA small projects document where general conditions is part of contract A107 I believe it is.

### **III. Break out of CM/GC, D/B focus groups**

- A. Review of A201 General Conditions**
- B. Collection of members comments/recommendations**
- C. Development of comments summary**

The two groups met for the rest of the time and left with instructions to submit their summary recommendations which have now been attached hereto.

June 23, 2013

Mr. Allan Cox, Chairman  
CIC CM/GC Focus Group

Subject: Discussion on AIA document A201-2007

This memo is going to bounce around somewhat more than you probably intended. Initially it will address the variations in the SPA's modifications to the AIA A201 General Conditions. Secondly, I reference the AIA A201 items identified in Alan Robertson's 6/5/13 memo. Finally, I address the AIA A201 comments by the Design/Bid/Build Focus Group as referenced in a 6/11/2013 memo by Stan Hardaway.

Allan, please feel free to identify what you believe to be the position of the CM/GC Focus Group as opposed to what are my own comments.

- As a first comment with regards to the AIA Document A201 General Conditions, I believe we were provided a modified General Conditions with some handwritten comments being considered by STREAM for its projects other than design-build.

My first comment would be that I think it would be in the State's best interest, as well as designers and contractors, if the AIA 201 General Conditions, as modified, were consistent throughout design/bid/build, best value and CMGC contracting approach. This would then mean that the same modified General Conditions would be used by STREAM, TBR and The University of Tennessee on these type projects. Currently STREAM, TBR and UT use modified General Conditions that are similar in most cases but have some very significant differences. If the various SPA's could agree to a uniform general conditions document, then certainly QIC could assist the agencies in formulating the proper language.

- Referencing an e-mail from Alan Robertson dated June 5, 2013 regarding the AIA A201 General Conditions.

- Article 3.1.0

OSA is recommending "Pull Planning" for scheduling in lieu of CPM's. I think our focus group is familiar with the principles of Lean Construction and are supportive of Reverse

Phase Scheduling and its use of Pull Planning. However, in order to be effective, Reverse Phase Scheduling must be performed after the major subcontractors are in place and the jobsite foremen are engaged in the project. Certainly in the CM/GC approach, the CM/CG will need to develop a critical path schedule (CPM milestone schedule) to incorporate into the bid packages prior to bidding and initiating construction. The Reverse Phase Scheduling would then be appropriate on major projects and could be incorporated beneficially into those projects. However, OSA needs to be aware that on certain smaller projects and on projects contracted by means other than CM/GC, the contractors awarded the project may not understand, or be practicing, the principles of Lean Construction.

I think our focus group, in summary, took the same position on this that it appears OSA is taking with regard to selection of subcontractors in the CM/GC approach. With regard to selection of subcontractors, OSA is going to require a “competitive procurement” and the CM/GC needs to define in its RFP response how this will be structured. With regard to Lean Construction principles, this would be another area where OSA may support this process and request that in the CM/GC RFP response it define its use with regard to scheduling.

- Article 3.12.10

I think the focus group is generally acceptable to the current language with regard to “professional services”. However, I do see the confusion as pertains to the contractor providing “professional services”. Even though we term our services during the preconstruction phase to be “professional services”, that should certainly not be confused with the “professional services” provided by the designers in the preparation of the construction documents. We are also thinking that the design-build process is using separate contracting documents, and the AIA A201 document is not included in that agreement.

- Article 7.3.11 – Overhead and Profit

The focus group’s general understanding of this language is that for a contractor/subcontractor at whatever level self-performing work and providing labor and materials, the mark-up on this component is 10% overhead and 5% profit. Any tier above the tier providing the self-performed work only receives a 5% mark-up on the

lower tier's work. For a general contractor or a construction manager, on a change he would earn only 5% on the subcontractor's work, but would earn 10% plus 5% on any work he self-performed.

This question does bring up another concern which is with the amount of field general conditions and overhead items that must be absorbed within the mark-up. A 5% mark-up is not adequate to cover a contractor's overhead and provide any profit margin. This group would recommend that in subparagraph 7.3.11.2, the 5% profit be changed to 5% overhead and 5% profit.

- Comments regarding the 6/11/13 comments from the Design/Bid/Build Focus Group.
  - Paragraph 1.5.2

I am hesitant to endorse this recommended addition to the paragraph because it appears to endorse the Designer having no responsibility for the contract documents that it has been paid to produce and on which the Contractors rely to construct the building.
  - Paragraph 2.4.2

As I understand this paragraph, it pertains to the contractor's failure to obtain Final Completion within the time designated in the Certificate of Substantial Completion. There are sometimes reasons when all remaining items cannot be completed within the designated time period and there should be a mechanism whereby that time can be extended. In such case it does appear appropriate that the owner should give notice prior to the owner taking over and completing the work.
  - Paragraph 3.1.5

The design-bid-build focus group is recommending adding an additional paragraph 3.1.5 to define preconstruction services. It should be noted that in the CM/GC documents, there is an Attachment "A" to the CM/GC Master Contract that defines both the preconstruction phase services and the construction phase services for this agreement. Attachment A is already appended to the Master contract and should handle the concern of the focus group.

- Paragraph 3.2.2 – Agree with change.
- Paragraph 3.4.5.3 – Agree with the focus group recommendation. This is an example where each SPA has different requirements in its AIA A201 with regard to subcontractor attestations.
- Paragraph 3.6.3 – Agree with the focus group recommendation, however, this should apply not only to the Federal Government but also to local municipalities.
- Paragraph 3.8.2.4 – I am okay with the focus group’s recommended change. However, more important than this in looking back at 3.8.3, I am curious as to why the State in previous modifications has deleted in the first line “more than or”. An allowance is an allowance and it should be adjusted for costs that are “more than” the allowance, just like it should be adjusted for costs that are “less than” the allowance.
- Paragraph 3.10.5 – It appears to me that the recommended change is already understood in the current language – do not understand the reason for this recommended addition.
- Paragraph 5.2.1 – To me this has always been challenging language with regard to the number of days to submit the list of subcontractors and suppliers. I think it is okay as modified, particularly on a design-bid-build contract as long as the contractor is allowed to submit, as necessary, multiple subcontractors or suppliers for one or more trades; and at the same time, has the opportunity to change those subcontractors and suppliers should conditions warrant. The key here for the contractor is to have owner and designer approval so that the subcontractor award can be officially consummated.
- Paragraph 5.2.3 – If Paragraph 5.2.1 is modified responsibly, then I believe 5.2.3 as written is acceptable, but also OK with proposed change.
- Paragraph 7.3.7.1.3 – I would suggest a rewrite as follows: “For equipment rented from others, the rental cost of such machinery and equipment. For machinery and equipment belonging to the contractor, at the lesser of 100% of the Associated Equipment

Distributors Nationally Averaged Rental Rates for Construction Equipment or an amount the same equipment can be rented from the most competitive local third party source”.

- Paragraph 7.3.7.1.5 – I would recommend that the language be returned to the unmodified AIA A201. The Article would then read “Additional costs of supervision and field office personnel directly attributable to the change
- Paragraph 7.3.7.1.6 – I would recommend that this line be left in the document. “Reasonable direct payroll expense of project manager and clerical work attributable to estimating and coordinating the change”.
- Paragraph 7.3.7.1.7 – It appears to me that if you have a Class 1 Time-Related Expense there may be some resulting direct cost as well as costs that would typically be defined as field overhead and supervision. Therefore, it appears that in a Class 1 Time Related Expense any applicable cost in items .7.3.7.1.1 through 7.3.7.1.7 should be included.

Specifically related to 7.3.7.1.7, in the fifth line I have not been able to convince myself whether the word “not” should or should not be included for proper understanding of this statement.

Note: I believe 7.3.7.1 and 7.3.11 could use a revision consistent to all SPA’s.

- Paragraph 7.3.7.2 – This paragraph limits direct payroll expense to 39% of base salary or hourly wage. In some cases, particularly in a union situation, the 39% probably does not cover all costs required to be paid in accordance with the union agreement. The 39% is also insufficient to cover payroll taxes and fringe benefits of many office personnel. Probably the best solution would be leave the maximum of 39% but add a statement “unless a higher percentage can be justified by the contractor.
- Paragraph 7.3.11.2 – See the previous comment with regard to 5% overhead and 5% profit.
- Paragraph 8.3 – Agree with recommendation of focus group.

- Paragraph 9.12.1 – I am okay with the language the way it is currently written. Not sure I understand the focus group's concern over "legal implication".

The following are in reference to TBR contracts:

1. Master contract Article C.1 – Payment for pre-construction services: The TBR has tried to say and enforce that the preconstruction services fee is to be paid over the life of the contract as identified in B.1, not the time of services. They always add time to the original agreement signed at pre-con to be sure the pre-con will be completed before the contract runs out. Then they adjust the overall time when the GMP is added thru a change order. They should agree to change this to the CM being paid in full for pre-con services once the GMP has been agreed to.
2. CM Master Contract Attachment A – Scope of Services – Section 1.9.2.a: (3) It states that the contingency is for unforeseen field conditions, circumstances, other occurrences, or errors and omissions in the contract documents which a prudent CM/GC would not reasonably detect or anticipate during the discharge of their duties. This has become very problematic lately as the architects are not completing the documents or making errors and leaving things off (like steel beams for the mezzanine). We have to use the CM contingency for their errors. They should consider taking the last part of the sentence out and consider establishing a design contingency for clear errors by the architect.
3. General Conditions Article 15.1.6 Consequential Damages: This section was originally written as a mutual waiver of claims between the Owner and the CM/GC. It is currently written to read the CM/GC waives claims against the Owner only. We would recommend it be re-established as a mutual waiver.
4. General Conditions Article 11.3.7 Waivers of Subrogation: Standard State documents delete this section in its entirety. We would suggest it remain in its original text.

§ 3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

#### § 3.15 CLEANING UP

§ 3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials from and about the Project.

§ 3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and Owner shall be entitled to reimbursement from the Contractor.

#### § 3.16 ACCESS TO WORK

The Contractor shall provide the Owner and Architect-Designer access to the Work in preparation and progress wherever located.

#### § 3.17 ROYALTIES, PATENTS AND COPYRIGHTS

The Contractor shall pay all royalties and license fees. The Contractor shall ~~shall~~, subject to approval by the Attorney-General of the State of Tennessee with respect to suits or claims against Owner, defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect-Designer harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents, or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect-Designer. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect-Designer.

#### § 3.18 INDEMNIFICATION

§ 3.18.1 To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, ~~Architect-Designer's consultants,~~ and agents and employees of ~~any of them~~ the Owner from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible ~~property~~ property, including loss of use resulting therefrom, (other than the Work itself), but only to the extent caused by the willful or negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18. Contractor agrees to indemnify the Designer and Designer's consultants based on the willful or negligent acts or omissions of the Contractor, except that Contractor shall not indemnify the Designer or Designer's consultants based on design mistakes and errors or omissions.

§ 3.18.2 In claims against any person or entity indemnified under this Section 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

### ARTICLE 4 — ARCHITECT

#### § 3.19 RELATIONS WITH OWNER'S REPRESENTATIVES

§ 3.19.1 Contractor, subcontractors, material suppliers, and sub-subcontractors shall neither offer nor give a product, service, payment, negotiable instrument, gift, gratuity, or other compensation in connection with this project to a representative or employee of the State of Tennessee, the Designer, or the Designer's consultants

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These terms are pre-1985 no longer apply

§ 11.1.2 The insurance required by Section 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Work until the date of final payment and termination of any coverage required to be maintained after final payment, and, with respect to the Contractor's 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, one year after final payment. Specific lines of coverage and limits of liability provided by the Contractor shall be written in a comprehensive form satisfactory to the Owner in the following minimum requirements:

- 1. Comprehensive General Liability, including:
  - a. Premises / Operations; Underground / Explosion / Collapse; Products / Completed Operations; Contractual; Independent Contractors; Owner / Contractor; Protective; Broad-Form; Property Damage; Personal Injury (Employment Exclusion deleted)

*Commercial - not excluded - only applies to blasting - If terms are not found in a COL policy*

*All wrong*
  - b. Combined single limits for bodily injury and property damage:
    - Each Occurrence: \$1,000,000
    - Aggregate: \$2,000,000
  - c. Products and Completed Operations to be maintained for one year after final payment.
  - d. Asbestos Abatement Insurance
    - 1. Non-friable Asbestos: removal or abatement of non-friable asbestos is included in the Work, and Contractor's General Liability Insurance coverage excludes risks associated with asbestos, then Contractor shall provide evidence of a Special Endorsement.
    - 2. Friable Asbestos: If removal or abatement of friable asbestos is included in the Work, then Contractor shall provide evidence of a Special Endorsement.
    - 3. Special Endorsement: Evidence of a Special Endorsement shall be in the form of a Certificate of Insurance certifying a special endorsement for asbestos abatement insurance with a minimum \$500,000 limit of liability. If Contractor is performing no portion of the asbestos removal or abatement with its own forces, then Contractor, in lieu of its own such endorsement, may substitute a Certificate showing such special endorsement covering the subcontractor or sub-subcontractor actually performing the asbestos removal or abatement.

These should be a separate section of a COL policy

- 2. Comprehensive Automobile Liability: *Commercial or Business NOT Commercial*
  - a. Including owned, hired, and non-owned vehicles; or, if there are no owned vehicles, Contractor may provide written certification of such and provide coverage limited to hired and non-owned vehicles.
  - b. Bodily injury and property damage combined single limits: *Each Accident with acc.*
    - Each Occurrence: \$500,000
- 3. Workers Compensation and Employer's Liability, (without restriction as to whether covered by Workmen's Compensation law):
  - a. Workers Compensation: *What is purpose of this?*
    - according to statute
  - b. Employer's Liability: *100,000*
- 4. If an exposure exists, Aircraft and Watercraft Liability (owned & non-owned), with limits approved by Owner, shall be provided. *sa acc, disease 500,000 per boat*

§ 11.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work and thereafter upon renewal or replacement of each required policy of insurance. These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. Certificate(s) of insurance provided to attest to coverage shall specifically cite each element of coverage and not less than limits set forth in Section 11.1.2, as confirmation of complete coverage, and shall identify Contractor, Producer, Insurance Carrier, Project, and certificate holder, and state Producer's notice requirements as set forth in Section 11.1.4. The term "Commercial General Liability" shall mean all of the coverage listed in Section 11.1.2.1.a unless specifically noted otherwise in the certificate. An additional certificate evidencing continuation of liability coverage,

Do you own authorized agent?

init.

Can't do this send these terms are NOT in a COL policy against state law to do this

including coverage for completed operations, shall be submitted with the final Application for Payment as required by Section 9.10.2 and thereafter upon renewal or replacement of such coverage until the expiration of the time required by Section 11.1.2. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness.

*This is a ridiculous condition. Get a "per project" aggregate.*

§ 11.1.4 The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect-Designer and the Architect's-Designer's consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations.

§ 11.1.5 Contractor shall notify Owner in writing of changes in coverage or carrier not later than 10 days after notification of Contractor by Producer, or ten days before Contractor makes a change, whichever occurs first. Contractor shall require that if policies are cancelled or modified before expiration date thereof, (Producer) shall endeavor to mail ten days prior written notice to certificate holder named therein.

*Probably Not*

§ 11.2 OWNER'S LIABILITY INSURANCE

The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance.

*authorized agent or no carrier*

§ 11.3 PROPERTY INSURANCE

§ 11.3.1 Unless otherwise provided, the Owner-The Contractor shall purchase and maintain, in-with a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, Tennessee by the Department of Commerce and Insurance, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract Modifications and cost of materials supplied or installed by others, comprising total value for the entire for the covered Project at the site on a replacement cost basis without optional deductibles-basis. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.3 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

§ 11.3.1.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and debris removal, and shall cover reasonable compensation for Architect's and Contractor's-Designer's services and expenses required as a result of such insured loss. Any deductibles shall be the responsibility of the Contractor.

*probably OK wrong*

*Not used any more words in the bracket. Separate perils not in "all risk" or "special"*

*Need To Add Language Re: Installation acceptable*

§ 11.3.1.2 If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance that will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor in writing, then the Owner shall bear all reasonable costs properly attributable thereto.

§ 11.3.1.3 If the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.

§ 11.3.1.4 This property insurance shall cover portions of the Work stored off the site, and also portions of the Work in transit, work stored off the site and also portions of the work in transit. The Contractor shall present a certificate of insurance demonstrating coverage of the property stored off the site or in transit at the time payment for that portion of the work is presented.

*Sometimes I.F. is appropriate or job.*

Init.

§ 11.3.1.5 Partial occupancy or use in accordance with Section 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

#### § 11.3.2 BOILER AND MACHINERY INSURANCE

The Owner-Contractor shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

#### § 11.3.3 LOSS OF USE INSURANCE

The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

§ 11.3.4 If the Contractor requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Change Order.

§ 11.3.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

§ 11.3.6 Before an exposure to loss may occur, the Owner-Contractor shall file with the Contractor-Owner a copy of each policy that includes insurance coverages required by this Section 11.3. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has been given to the Contractor-Owner.

#### § 11.3.7 WAIVERS OF SUBROGATION

The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurances applicable to the Work, except such rights as they have to proceeds of such insurances held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

§ 11.3.8 A loss insured under the Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Section 11.3.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

§ 11.3.9 If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or as determined in accordance with the method of binding dispute resolution selected in the Agreement between the Owner and Contractor. If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with ~~Article 7, Contractor.~~

§ 11.3.10 The Owner as fiduciary shall have power to adjust and settle a loss with insurers ~~unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection is made, the dispute shall be resolved in the manner selected by the Owner and Contractor as the method of binding dispute resolution in the Agreement. If the Owner and Contractor have selected arbitration as the method of binding dispute resolution, the Owner as fiduciary shall make settlement with insurers or, in the case of a dispute over distribution of insurance proceeds, in accordance with the directions of the arbitrators.~~ insurers.

#### § 11.4 PERFORMANCE BOND AND PAYMENT BOND

§ 11.4.1 The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract. If the initial Contract Sum as awarded exceeds \$100,000, Contractor shall provide Contract Bond, in the amount of 100 percent of Contract Sum covering faithful performance of contract and payment of obligations arising thereunder. If a Contract Bond is required, and a Three Year Roof Bond is stipulated in the Bidding Documents, then the Three Year Roof Bond shall be provided as stipulated. Bond(s) shall be executed on Tennessee State Building Commission Standard Form(s) exhibited in Bidding Documents for project, and subject to provisions of Section 11.4.3.

§ 11.4.2 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor and Owner shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

§ 11.4.3 Surety is the person or entity identified as such in a bond and is referred to throughout the Contract Documents as if singular in number. The term "Surety" means the Surety or the Surety's authorized representative. Surety Company issuing bond shall be licensed to transact business in Tennessee by Department of Commerce and Insurance. Bonds shall have certified and current Power-of-Attorney for the Surety's Attorney-in-Fact attached. Attorney-in-Fact who executes bond on behalf of Surety shall be one who is licensed by Tennessee as a resident agent and shall affix license number to bond; or, countersignature by and license number of a licensed resident agent shall be affixed to the bond in addition to the signature of the Attorney-in-Fact.

### ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

#### § 12.1 UNCOVERING OF WORK

§ 12.1.1 If a portion of the Work is covered contrary to the ~~Architect's~~ Designer's written request or to requirements specifically expressed in the Contract Documents, it must, if requested in writing by the ~~Architect,~~ Designer, be uncovered for the ~~Architect's~~ Designer's examination and be replaced at the Contractor's expense without change in the Contract Time.

§ 12.1.2 If a portion of the Work has been covered that the ~~Architect~~ Designer has not specifically requested in writing to examine prior to its being covered, the ~~Architect~~ Designer may request in writing to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Contract Documents, such costs and the cost of uncovering, correction and recovering, shall be at the Contractor's expense unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.

#### § 12.2 CORRECTION OF WORK

##### § 12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION

The Contractor shall promptly correct Work rejected by the ~~Architect~~ Designer or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or

init.

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## Subrogation

Virtually all types of insurance policies contain a provision restricting the insured from taking actions that will impair the insurer's ability to seek reimbursement from negligent third parties for damages paid under the policy (i.e., its ability to subrogate). In some cases, this restriction is total, preventing the insured from doing anything that impairs the insurer's subrogation rights, while in other policies the insured is permitted to waive its rights of recovery against negligent third parties within specified limits. For example, some policies allow the insured to waive their rights of recovery in writing, prior to a loss.

Construction contracts routinely include a provision that the parties covered by the builders risk policy waive their rights of recovery against one another to the extent the loss is covered by the builders risk policy. This is commonly referred to as a mutual waiver of subrogation, and it reflects the contracting parties' desire to allocate certain risks to the insurance company as the sole source of recovery for losses covered by the policy. However, if the builders risk policy's subrogation provision prohibits the insured from waiving recovery rights against others, the execution of a construction contract containing a mutual waiver of subrogation would constitute a violation of the policy conditions that might prevent any recovery under the policy. Conversely, if the policy's subrogation provision allows the insured to waive its rights of recovery prior to a loss, the insurer should recognize and honor the waiver of recovery rights in the construction contract.

Most builders risk policies allow pre-loss waivers of subrogation, either affirmatively or impliedly. An implied waiver of subrogation says that the insured must do nothing *after loss* to impair any recovery rights against others. An affirmative waiver of subrogation specifically states the insured may waive recovery rights against another party in writing prior to loss. Exhibit IX.J.18 provides a sample waiver of subrogation provision that illustrates an affirmative waiver of subrogation.

By long-standing industry consensus, both of these types of subrogation provisions are interpreted as allowing the insured to waive recovery rights against others prior to loss, despite the absence of a clear statement to that effect in the latter version. In recent years, however, insurers seem to be guarding their subrogation rights more closely than before, and there has been some litigation about whether an implied waiver of subrogation provision does, in fact, effectively grant permission for pre-loss waivers by the insured. In view of this, a subrogation provision that affirmatively grants the insured this right may be more advantageous for the insured. Many of the builders risk forms currently in use include this favorable language.

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### EXHIBIT IX.J.18

#### SAMPLE AFFIRMATIVE WAIVER OF SUBROGATION

If the Company pays a claim under this Policy, they will be subrogated, to the extent of such payment, to all the Insured's rights of recovery from other persons, organizations and entities. The Insured will execute and deliver instruments and papers and do whatever else is necessary to secure such rights.

The Company will have no rights of subrogation against:

- A. Any person or entity, which is a Named Insured or an Additional Named Insured;
- B. Any other person or entity, which the Insured has waived its rights of subrogation against in writing before the time of loss.

It is a condition of this Policy that the Company shall be subrogated to all the Insured's unwaived rights of recovery, if any, against any third party Architect or Engineer, whether named as an Insured or not, for any loss or damage arising out of the performance of professional services in their capacity as such and caused by any error, omission, deficiency or act of the third party Architect or Engineer, by any person employed by them or by others for whose acts they are legally liable.

Notwithstanding the foregoing, it is a condition of the Policy that the Company shall be subrogated to all the Insured's rights of recovery against any manufacturer or supplier of machinery, equipment or other property, whether named as an Insured or not, for the cost of making good any loss or damage which said party has agreed to make good under a guarantee or warranty, whether express or implied. (...)

Source: Master Builders Risk Policy Declarations, Zurich Insurance Company, Form MBR 001-COV (0-07)

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While it is understandable that builders risk insurers would prefer to retain the right to subrogate against negligent contractors and subcontractors, most insurers with a commitment to serving the construction industry understand that doing so does not fit with the long-standing way of allocating risk in construction contracts. The number of policies that include an affirmative waiver of subrogation—many of which specifically identify "insured parties" as a group against whom they will have no rights of subrogation—demonstrates an understanding of how this risk is typically allocated in the construction contract. Insurers can mitigate the loss of subrogation rights in their underwriting of the contractor's competence as well as in their pricing structure.

### *Avoiding Subrogation Attempts*

Despite attempts to avoid subrogation against insured parties, insurers have sometimes succeeded in subrogating against negligent insureds. Most insurance professionals would expect that naming all parties with an interest in the property as insureds would be adequate to avoid subrogation, based on the long-standing principle that an insurer cannot subrogate against its own insured because doing so would go against the whole purpose of buying the insurance.

One of the most effective arguments in establishing a right to subrogate against an insured contractor in a builders risk policy is that the waiver only applies to amounts paid to the contractor for damage to its own property. Some courts have allowed this limitation, usually when the contractor's insured status is qualified with the phrase "as their interests may appear." In the opinion of these courts, this phrase restricts not only the extent to which the insured can recover for loss under the policy, but also the extent of its protection against subrogation. This interpretation allows the insurer to subrogate against the negligent contractor or subcontractor for resulting damage to other portions of the project. To avert this argument, the phrase "as their interests may appear" should not be included in builders risk named insured provisions or endorsements.

An affirmative waiver of subrogation with respect to insured parties is the most effective protection against subrogation by the builders risk insurer because it is an explicit agreement on the part of the insurer not to subrogate against a particular party. Some policies include such a waiver in the basic form, but others will require an endorsement. But even that is not foolproof. In at least one case, *Turner Constr. Co. v. John B. Kelly Co.*, 442 F. Supp. 551 (E.D. Pa. 1976), a builders risk insurer whose policy named the contractor and all subcontractors as insureds and contained a waiver of subrogation endorsement in favor of all those insured by the policy was nevertheless allowed to subrogate against a negligent subcontractor. The policy in question included the troublesome "as their interests may appear" language, and the court found that the waiver of subrogation endorsement functioned only to prevent the insurer from recovering the subcontractor's portion of the builders risk proceeds. This outcome would suggest that in order to be sure that a builders risk waiver of subrogation is enforceable, it must explicitly state that the insurer relinquishes recovery rights against insured contractors and subcontractors *even if*

*their negligence causes a covered loss, and regardless of the extent of their insurable interest in the covered property.*

For some years now, the trend has been for courts to disallow subrogation against contractors and subcontractors, even when the builders risk policy did not contain policy provisions designed to prevent it. It may well be that the issue of builders risk subrogation is viewed by most insurers as having been settled by the courts in favor of the contractors. Nevertheless, the most cautious strategy is to take as many of the available actions as possible to avoid subrogation against insureds under the builders risk policy, including all of the following.

- The policy should allow insureds to waive their rights of recovery against others prior to a loss.
- The general contractor and all subcontractors should be named insureds without the qualifying "as their interests may appear" language. (If there is a construction manager who has assumed the risk of loss to the project, the construction manager should be an insured as well.)
- The policy should include an affirmative waiver of subrogation with respect to all insureds. If the basic form does not include such a waiver, attach a waiver of subrogation endorsement.

While any one of these ought to be enough to prevent subrogation by the builders risk insurer, some courts have allowed subrogation even when one or more of these features were in effect. The prevailing wisdom, therefore, is that it is best to include all three provisions whenever possible.

### ***Architects, Engineers, Manufacturers, and Suppliers***

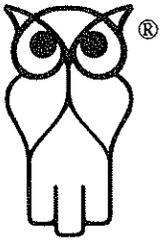
Many builders risk policies that otherwise allow pre-loss waivers of subrogation contain an exception with respect to architects and engineers, and sometimes manufacturers or suppliers of equipment or materials used in the project as well. A provision preserving the insurer's right to recover under a manufacturer's or supplier's guarantee or warranty is not usually problematic, but prohibitions on waiving rights of recovery against architects and engineers can be an issue in builders risk insurance.

The preservation of rights of subrogation against architects and engineers is usually limited to losses that are the result of a professional act, error or omission, and is intended to keep these types of losses in the architect's or engineer's professional liability policy. However, if the construction contract includes a waiver of subrogation in favor of architects and engineers for losses covered by the policy, a policy condition is violated, and coverage may be compromised. It is imperative therefore to make sure the contract and the builders risk policies are compatible in this regard, modifying one or the other as necessary.

The sample provision in Exhibit IX.J.18 takes an innovative approach, affirming the insurer's rights of subrogation with respect to *unwaived* rights of recovery against a *third*-party architect or engineer. This language honors any waiver of subrogation against such parties in the construction contract, while preserving the insurer's rights of subrogation that are not waived in the contract. Further, the exception to the affirmative waiver of subrogation applies only to *third-party* architects and engineers. This prevents an action of subrogation against employees of an insured contractor who are licensed architects or engineers. (Design-build contractors, for example, usually employ design professionals in-house.)

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# IRMI® Insights

Insurance and Risk Management Perspectives Available Only from IRMI

## Sound Advice for Contract Drafters: Fix Your Out-of-Date Insurance Requirements!

By Jack P. Gibson, CPCU, CRIS, ARM

November 2010

Most business contracts (e.g., construction contracts, leases, purchase agreements, service agreements) include clauses that require one or both parties to purchase certain minimum levels of insurance. The basic purpose of this is twofold:

- ◆ To make certain that one party has the resources to pay a claim made against it by the other contracting party or to repair damage to the property involved with the contract (e.g., a lease) or to replace it when destroyed.
- ◆ To fund the obligation to indemnify the other party that is so commonly included in hold harmless clauses in contracts (or, in addition to the hold harmless, to provide additional insured status in the other party's policy).

While the basic goals are simple, a preponderance of contract drafters botch the job. Why do so many contract drafters consistently foul up on the insurance requirements they impose on vendors, contractors, and others to the point that they are impossible to meet? A major cause is that their insurance clauses require antiquated and outdated insurance policies or

policy modifications that are no longer even available in the insurance marketplace!

This happens all too frequently due to lack of knowledge or simple laziness. Contract drafters are usually business people or attorneys who are quite knowledgeable about the subject of the contract or the law but in the dark about insurance coverage and what can be realistically achieved in the insurance marketplace. Thus, they often just copy contract terms that were drafted previously without either taking time to review the insurance clause and update it or seeking assistance in doing so if they do not have the knowledge.

### About the Author

Jack P. Gibson, CPCU, CRIS, ARM, is president of International Risk Management Institute, Inc. For most of his 32-year career as a researcher, lecturer, and author on risk and insurance topics, contractual risk transfer has been a major focus. He is coauthor of *The Additional Insured Book* and *Contractual Risk Transfer*, as well as nine other titles in the IRMI reference library. He is also cochairman of the IRMI Construction Risk Conference.

Since this happens over and over again, many contracts rely on insurance terminology that has been out-of-date for decades! Though very common, this is an inexcusable error in contract drafting.

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**... many contracts rely on insurance terminology that has been out-of-date for decades!**

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This article describes the issue, why it is a problem for the drafter's company as well as for the lessee, vendor, or contractor, and why it results in an immediate breach of contract situation upon execution of the agreement. It then provides simple, straightforward advice to contract drafters who wish to assure their organizations are properly protected.

### **Why this Is an Issue**

Insurance clauses essentially require one or more of the contracting parties to arrange an insurance program that will provide a certain scope of protection to the other party. Since reputable business entities buy and maintain broad insurance programs on an ongoing basis, ideally the stipulated insurance will require little or no adjustment to the existing insurance program of the contracting party. When, however, the clause requires policy form types or a level of coverage that are difficult to obtain or not available in the marketplace, the party agreeing to the requirement will be placed in an untenable position—essentially in breach of the contract with little or no means to cure the breach.

When this occurs, one of two things happens: (1) no one realizes that the current insurance

program is not in compliance with the requirement, and everyone unknowingly goes about their business; or (2) someone representing the organization that has agreed to the improper requirement tries in vain to obtain the required policies or amendments to the existing policies and realizes that it cannot be done. Such situations are not good for either contracting party.

In the first instance, all is bliss until some horrific accident requires everyone to pull out the insurance policies only to learn that they do not provide the coverage that was thought to be in place. This results in further complications, including coverage disputes and possible lawsuits with the insurers and between the contracting parties.

In the second case, a post-contract negotiation process begins as the parties seek to compromise with each other and the insurer on the scope of insurance to be provided. This can be a time-consuming and costly process

#### **Contractual Risk Transfer Resources from IRMI**

- *Contractual Risk Transfer*—the reference manual
- *The Additional Insured Book*—the bestselling book
- *Effective Contractual Risk Transfer in Construction*—a free whitepaper
- *Contractual Risk Transfer in Construction*—an online CRIS® course

that is entirely avoidable when these clauses are properly drafted in the first place.

### How It Happens

Insurance policy terms are not static as the policies are continuously revised by the insurance industry. Many contract drafters do not realize just how frequently insurance policies are revised or the extent to which changes are incorporated when they are revised. Most insurers use standard policy forms drafted by a service organization such as Insurance Services Office, Inc. (ISO), American Association of Insurance Services (AAIS), and National Council on Compensation Insurance (NCCI). These policy form drafters continuously revise their forms in response to court rulings that interpret them and changes in business practices, the environment, and exposures to loss. The revised forms are then filed with insurance regulators and the replaced forms are withdrawn, often making it a violation of the insurance code for an insurer to use them any longer.

The policy form that has changed the most over the years is also the most critical one to get right in contracts: the commercial general liability (CGL) policy. This is the policy that covers the insured's liability to third parties, including contractually assumed liability. Since it is one of the most important policy forms for contractual risk transfer purposes, these revisions can be quite problematic. Consider that there was a standard CGL form in place from 1973 until 1986, some 13 years. Since the 1986 revision, the policy has been revised about every 3 years (between 1986 and 2010 there have been 8 revisions).

Each of these policy revisions has made many insurance requirements drafted prior to the revision out-of-date. However, the most significant changes were undoubtedly those that were implemented in 1986. They were so significant that even the name of the policy was changed (from "*comprehensive* general liability" to "*commercial* general liability").

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**It is extremely common to see insurance clauses that require the 1973 CGL policy form rather than a newer version.**

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Since the 1986 revision was implemented some two and a half decades ago, you might think that these changes would be reflected in the insurance requirements of most modern-day business contracts. Due largely to incessant replicating of old contract language year after year, decade after decade, that is, unfortunately, not the case. It is extremely common to see insurance clauses that require the 1973 CGL policy form rather than a newer version. They do this by requiring the purchase of a comprehensive (as opposed to "commercial") general liability insurance policy. Making matters worse, they then go on to stipulate that a number of coverage extension endorsements that were necessary with that 1973 policy be attached. The extensions included in these endorsements have been built right in to modern-day CGL forms, and the endorsements are no longer available (in fact, many insurance underwriters are young enough that they have never even seen them!).

The problems caused by outdated terminology in contracts are most severe with CGL insurance. However, mistakes are also common when requiring other lines of insurance.

## How To Quickly Spot the Problem

It's a fairly simple matter to identify antiquated insurance requirements in contracts. Knowing a few key words to look for is all it takes, and a checklist of the most common antiquated terms is provided in Figure 1. Consider any of these terms to be red flags—when they are used in a contract, the entire insurance clause should be suspect. Clauses using such terminology achieve little other than wasting time, causing disagreements, or even leading to lawsuits down the road.

## How To Draft Solid Insurance Requirements

Some basic objectives of contract insurance clauses include the following.

- (1) Require insurance coverage terms and limits that will specify the scope of protection warranted to cover the primary risks associated with the business endeavor to which the contract pertains.
- (2) Avoid imposing requirements that cannot be achieved in the insurance marketplace.
- (3) Keep the requirements as understandable, simple, and easy to implement as possible.
- (4) Recognize that the other party already has an insurance program in place and try to avoid imposing requirements that would require them to renegotiate their program with their insurers.
- (5) Allow the other party a reasonable amount of flexibility with respect to how they meet the overall requirements.

Figure 1 Red Flag Insurance Terminology	
<b>Liability Insurance Requirements</b>	
◆	Comprehensive general liability insurance
◆	Public liability insurance
◆	Manufacturers and contractors (M&C) liability insurance
◆	Owners, landlords, and tenants (OL&T) liability insurance
◆	Contractual liability insurance
◆	Additional named insured
◆	Coinsured
◆	Cross-liability endorsement
◆	Broad form comprehensive general liability (CGL) endorsement
◆	Broad form property damage endorsement
◆	Combined single limit (CSL)
<b>Auto Insurance Requirements</b>	
◆	Comprehensive auto liability insurance
◆	Additional insured or coinsured status (other than for a lessor of a vehicle)
◆	Cross-liability endorsement
<b>Workers Compensation Requirements</b>	
◆	Workmen's compensation insurance
◆	Borrowed servant endorsement
◆	All states coverage/broad form all states coverage endorsement
◆	<i>In rem</i> endorsement
<b>Property Insurance Requirements</b>	
◆	Fire and extended coverage or extended coverage endorsement
◆	Additional named insured

- (6) Minimize the possibility that the requirements will become outdated during the term of the contract due to insurance market changes and policy form revisions.

To achieve these basic goals, a number of tactics should be considered, as follows.

- (1) Perform a risk analysis on the business endeavor and decide how the risk could best be allocated between the parties.
- (2) Outline the insurance requirements using this risk analysis and allocation plan as a guideline.
- (3) Set minimum coverage standards by requiring coverage that is the same as or substantially equivalent to standard policy forms that are referred to by specific name and form number.
- (4) Specify coverage forms but not exact edition dates to allow for the possibility that later editions will be introduced during the term of the contract.
- (5) Specify a total liability insurance limit that can be met by any number of layered policy forms rather than minimum underlying CGL limits and a specific umbrella limit.
- (6) Avoid specifying a maximum deductible amount for liability insurance.
- (7) Avoid requiring any coverage modifications for which there are no endorsements in standard forms portfolios.

### About IRMI®

For over 30 years, International Risk Management Institute, Inc. (IRMI) has been a premier provider of practical and unbiased risk management and insurance information to corporations, law firms, government, and the insurance industry. This information is developed by the most experienced research and editorial team in insurance reference publishing in partnership with a host of industry practitioners who work with us. We take great pride in giving you up-to-date, objective, and practical strategies, tactics, and solutions to help you succeed and prosper in a changing insurance and risk management environment. You can obtain this information in the books, reference manuals, and newsletters we publish in a variety of print and electronic formats, our online continuing education courses, and our seminars, webinars, and conferences.

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Unfortunately, there are no shortcuts for drafting insurance contract clauses that impose achievable requirements and provide adequate protection to the contracting party. Doing so requires careful review and drafting by a person who is knowledgeable of insurance coverage and what is reasonably achievable in the marketplace existing at the time the contract is drafted.

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**If your broker couldn't meet your requirements for their clients, you shouldn't expect others to be able to meet them either.**

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If you are a contract drafter, you must either utilize an adviser who has this knowledge or acquire and maintain this knowledge yourself. Most attorneys do not keep up with current insurance market practices and are therefore unable to provide realistic suggestions. Therefore, the best advisers are generally either insurance agents/brokers or fee-based consultants. If you haven't asked your own agent or broker to review the requirements you impose on others, this can be a very helpful approach. If your broker couldn't meet your requirements for their clients, you

shouldn't expect others to be able to meet them either.

If you wish to acquire and maintain the knowledge for drafting contract insurance requirements, consider subscribing to *Contractual Risk Transfer*. This IRMI reference service drills into all aspects of the topic, covering indemnity and hold harmless clauses, additional insured status on insurance policies, contractual liability insurance, the use and abuse of insurance certificates, and much more. Most relevant to the topic of this article, it includes boilerplate insurance requirements to adapt for your own purposes.

## Summary

Too many business contracts being used today include insurance clauses that use outdated, ambiguous, and misleading insurance terminology. The result is a contract provision that does not achieve its purpose and can lead to costly disputes or legal battles. With a little homework and due diligence, these provisions can be updated to better protect the party imposing the requirements while reducing the burden on the party accepting them. This is truly a win-win proposition for everyone, and there is no excuse for failing to do it.



This publication does not give legal accounting, or other professional advice. If such advice is needed, consult with your attorney, accountant, or other qualified adviser.

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June 11, 2013

State of Tennessee QIC

Design/Bid/Build Focus Group

Members:

Lisa Namie, Ricky Bursi, Stan Hardaway, Jim Dixey

To: Alan Robertson

Please see the outline below of our group's comments after our review of the 2007 AIA A201 General Conditions Agreement:

- 1) We suggest adding the following language to Paragraph 1.5.2: "Because Owner and Designer have no control over their usage, Instruments of Service are supplied with the understanding that Owner and Designer retain no responsibility for any documents developed from these files or drawings, and that Contractor and any person or company to whom Contractor supplies these files waive any claim against Owner and Designer. Owner and Designer make no warranties, either expressed or implied of merchantability and fitness for any particular purpose. In no event shall Owner and Designer be liable for any loss of profit or any damages claimed from using the Instruments of Service, whether authorized or not."
- 2) Paragraph 2.4.2: We recommend adding language that provides a 10 day notice to contractor to provide time to correct a default in the contract time. For example, the contractor may have requested additional time be added to the contract for weather related issues or other conditions that impacted the schedule, but may not have been awarded yet at the date of substantial completion and the owner should not be able to immediately take over the work without notice if there are legitimate requests for time extension that are still outstanding.
- 3) If preconstruction services provided by the contractor need to be described in this agreement such as the case when using the CM/CG approach, then we recommend adding a new paragraph describing these duties and services in a new paragraph under Article 3 such as 3.1.5. It also may make sense to the owner to have a separate agreement with the contractor for preconstruction services only.
- 4) In paragraph 3.2.2, please add "ed" after the word "report" in the 8<sup>th</sup> line of the paragraph.
- 5) In paragraph 3.4.5.3, we recommend deleting "and with each Application and Certificate for payment thereafter". The affidavits for not using illegal immigrants should be handled one time at the beginning of the project so that the pay applications are not so cumbersome each month.

- 6) In paragraph 3.6.3, the contractor should not be held liable for any changes to the federal tax rates during construction and should receive a change order for any increase to the federal tax rates that apply to the construction of the project because it would be out of their control and would be unable to predict change by the federal government.
- 7) In paragraph 3.8.2, we recommend adding to the end of subparagraph 3.8.2.4, “which shall not be unreasonably withheld”.
- 8) In paragraph 3.10.5, we recommend adding to the last sentence: “Contractor shall cooperate fully in the commissioning process, and shall require the necessary forces assisting the Contractor to likewise cooperate fully, and shall accomplish the tasks and assume the responsibilities assigned to the Contractor herein”.
- 9) In paragraph 5.2.1, we recommend changing the response time by the contractor to submit his list of subs and suppliers to the owner and designer to 14 days and the review time by the owner and designer to 7 days.
- 10) In paragraph 5.2.3, we recommend deleting the wording in the last sentence that says “has acted promptly and responsively in submitting names as required” and inserting a specific time frame for the contractor to respond similar to the time limits suggested in 5.2.1.
- 11) In paragraph 7.3.7.1.3, we recommend not deleting “whether rented from the Contractor or others” because with the maximum rental charge of 80% of AED rates, it shouldn’t matter whether the contractor rents from himself or outside rental. Many contractors have some equipment that they own and rent to their projects and this is a fair practice since the rental rate is established already. In subparagraph .5, add “or additional defined scope requiring such additional supervision” at the end of the sentence. Costs may not be related to just overtime work. In subparagraph .7, we recommend adding project manager and vehicle as an approved cost because when contract time is extended, there are additional project manager DPE and car rental expenses that would have been included in the original general conditions that were based on the original schedule that would need to be extended also.
- 12) In paragraph 7.3.7.2, we recommend not including a specific labor burden percentage here that can be charged with change orders, but requiring the contractor to submit his labor burden percentage with his original bid submission and this would set the percentage that would be allowed to be charged whenever there are change orders.
- 13) In paragraph 7.3.11.2, we recommend changing the allowance to 10% overhead and 5% profit on subcontractors additional work because the contractor will incur additional paperwork, coordination, and risk due to the subcontractor’s additional work that was added.

- 14) In section 8.3, it does not address a definition for changes due to unforeseen conditions either on the site or in an existing building under the Class 1 or Class 2 causes. We recommend adding language for these changes either at the end of subparagraph 8.3.1.1 or by creating a new “Class 3” definition that would include a cause for unforeseen conditions.
- 15) In paragraph 9.12.1, we recommend deleting the phrase “Time being of the essence” because of the legal implication that the contractor is always at fault if the schedule is not met and the agreement establishes several allowable causes that would allow an extension of time of the contract.

This concludes our comments in our review of the 2007 AIA A201 General Conditions document.

Sincerely,

Stan Hardaway  
President  
Hardaway Construction Corp.