

School Construction Project Liabilities and Protections: *The Architect's Perspective*

CASH Workshop

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The Architects

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Overview

- This is a People Business!
 - Risk Management
 - Owner/District
 - Design Team
 - Contractor
 - One of a Kind vs. Assembly Line
 - Perfection is not Possible
 - Public Works Contracting
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Communication is Key!

- Contract Negotiations
 - Starting without a Contract
 - Unclear Scope of Services
 - Managing Expectations
 - Proportional Risk (Limitation of Liability)
 - Risk Management Guidelines
 - Appropriate Contingency
 - Roles and Responsibilities of Team
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Indemnity

- Assumption of risk/liability
 - Law already governs Negligence
 - Preparing a fair agreement is possible
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Case Study: Indemnity (as proposed)

- "Architect shall defend, indemnify and hold harmless the District, its agents, representatives, officers, consultants, employees, trustees and volunteers from any and all claims, demands causes of action, costs expenses, liability, loss, damage or injury of any kind, in law or equity or property or persons, including personal injury and/or death, directly or indirectly arising out of, connected with, or resulting from its performance of the Services, the Project or this Agreement."
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Indemnity (modified)

- "To the furthest extent permitted by California law, Architect shall defend, indemnify and hold harmless the District, its agents, representatives, officers, consultants, employees, trustees and volunteers from any and all claims, demands causes of action, costs expenses, liability, loss, damage or injury of any kind, in law or equity or property or persons, including personal injury and/or death, directly or indirectly arising out of, connected with, or resulting from its performance of the Services, the Project or this Agreement."
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AB 573 (Wolk)

- September 2006
- Limits liability of design professional

This bill would provide, for all contracts, and amendments thereto, entered into on or after January 1, 2007, with a public agency for design professional services, that all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such contract, and amendments thereto, that purport to indemnify, including the cost to defend, the public agency by a design professional against liability for claims against the public agency, are unenforceable, except for claims that arise out of or relate to the negligence, recklessness, or willful misconduct of the design professional.

Indemnity (better)

- "To the furthest extent permitted by California law, Architect shall defend, indemnify and hold harmless the District, its agents, representatives, officers, consultants, employees, trustees and volunteers from ~~any and all~~ claims, demands causes of action, costs expenses, liability, loss, damage or injury of any kind, in law or equity or property or persons, including personal injury and/or death, directly or indirectly arising out of, connected with, or resulting from its ~~performance of the Services, the Project or this Agreement~~ or relating to the negligence, recklessness or willful misconduct of the design professional."
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Negligence

□ Standard of Professional Care

"Design Professional required to render services with an ordinary degree of skill and care that would be used by other reasonably competent practitioners under similar circumstances, taking into consideration the contemporary state of the art and geographic idiosyncrasies."

Insurability

- Why is it important?
 - Assumption of Liability is not Insurable
 - Litigation should be the last resort
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Warranties, Certification and Guarantees – AB 983 Failed

- Often found related to ADA Issues
- Agencies sometimes ask for Certification
- Shifting liability to the Contractor

This bill would provide that there is an implied warranty of the accuracy and completeness of the plans and specifications provided to the contractor by the public entity, charter city, or charter county. This bill would further provide that these provisions shall not be construed to require a contractor to prove an affirmative or intentional misrepresentation or active concealment on the part of the public entity, charter city, or charter county that provides the plans and specifications.

Change Orders: Who pays?

- A normal part of Contraction
 - Added Value
 - Errors and Omissions
 - Owner Requested
 - Agency Required
 - Other
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Unjust Enrichment

- Gaining advantage by another's mistake
 - Value Added Argument
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Case Study

- Re-Use of Plans (Third time's a charm!)
 - Ownership of Design
- Due Diligence
 - Incorporate previous RFIs, Change Orders, etc.
 - Site Adaptation included some changes to plans
- One Change Order
 - \$1,890,550 Million Project
 - Value Added:
 - \$1,180 (.06%)
- Who Pays?



Managing the Risk

- Use Qualifications Based Selection (QBS)
 - Ask about Quality Control
 - Confirm Capabilities of Staff
 - Check References
 - Develop a Relationship
 - Create Partnerships
 - Sharing Risk
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Where are we going?

- IPD – Integrated Project Delivery
 - What Determines Best Value?
 - Alternative Delivery
 - Partnerships
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Questions
