BIM Legal and Insurance Issues

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Brian’s “Laws” of Risk Allocation

• No agreement is inherently “too risky”
  – The key is to understand and manage risk

• Risk = Reward (Profit)
  – Get paid for the risk you are accepting
  – Decline risk you cannot control and cannot price (unlimited exposures)
  – Understand what risk you can transfer (for a fee), such as insurable risk and risks that can “flow-down” to other participants
Efficiency vs. Legal Risk

• “Lonely BIM” as a communications process does more to maintain “traditional” risk allocations between designers, contractors and suppliers – But it may limit some of the Project efficiencies that a BIM methodology can provide (real time clash detection, 4D scheduling, early Owner input, etc.)
Efficiency vs. Legal Risk

• “Collaborative BIM” as a design methodology begins to blur some of the lines of historic risk allocation

  – But Project efficiencies gained from more accurate estimating (5D modeling), less re-work, etc. may support additional risk-taking

  – Broader than any particular project, BIM for maintenance/operations also may increasingly become an Owner expectation in certain market segments (marketing and sales use)
Efficiency vs. Legal Risk

AIA E203-2013 Art. 4

ARTICLE 4  BUILDING INFORMATION MODELING PROTOCOLS
§ 4.1 If the Parties indicate in Section 3.1 that Building Information Modeling will be used on the Project, specify below the extent to which the Parties intend to utilize Building Information Modeling and identify the provisions of this Article 4 governing such use:

[« »] The Parties shall utilize Building Information Modeling on the Project for the sole purpose of fulfilling the obligations set forth in the Agreement without an expectation that the Model will be relied upon by the other Project Participants. Unless otherwise agreed in writing, any use of, transmission of, or reliance on the Model is at the receiving Party’s sole risk. The remaining sections of this Article 4 shall have no force or effect.

[« »] The Parties shall develop, share, use and rely upon the Model in accordance with Sections 4.2 through 4.10 of this Exhibit.
Fundamental Legal Risk

• For construction professionals, the *Spearin* doctrine
  – Warranty of completeness and adequacy – and right to Change Orders (if breached) and non-liability (if defective)

• For design professionals, the Shop Drawings/Submittals concept
  – Not Contract Documents
  – Reviewed only for “design concept” and Contractor responsible for errors or omissions, even if approved
Fundamental Legal Risk

• Restatement (Second) of Torts § 552

“(1) One who, in the course of his business, profession or employment... supplies false information for the guidance of others in their business transactions is subject to liability for a pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.”
Fundamental Legal Risk

- **Uses and Reliance on the Model Information**
  - **Who** (can use the information)?
  - **What** (can they use the information for during/following the Project)?
  - **Where**?
  - **How** (will they add to and modify the information)?
  - **When** (in the iterative process (LODs) can the information be used)?
BIM Agreement

• Addresses (ideally) some of these questions:
  – **Who**: “The Parties agree to incorporate this Exhibit into their agreements with any other Project Participants that may develop or make use of Digital Data on the Project.” (AIA E202-2013 § 1.2)
  – But participants decide who may develop/use BIM Model
    • Timing is key in establishing contractual obligations between multiple parties
    • Bid carve-outs: “Prepared without seeing BIM Execution Plan”

  – BIM Execution Plans/Implementation Guides
BIM Agreement

• Addresses (ideally) some of these questions:
  – **What:** Authorized Uses of Digital Data (e.g., AIA G201-2013 § 3.2)
    • “I” – Integrate (incorporate additional digital data without modifying data received)
    • “M” – Modify as required to fulfill obligations for the Project
    • “R” – Reproduce and distribute
    • “S” – Store and view only
    • Others – AIA E203-2013 § 4.5.1.2: “The Modeling protocols shall address…[the]
      definition of the various LOD for the Model Elements and the associated Authorized
      Uses for each defined LOD.”
  – **BIM Execution Plans/Implementation Guides**
BIM Agreement

- Addresses (ideally) some of these questions:
  - **How:** “The Modeling protocols shall address....the process by which the Project Participants will identify, coordinate and resolve changes to the Model.” (AIA E203-2013 § 4.5.1.6)
  - BIM Execution Plans/Implementation Guides
BIM Agreement

• Addresses (ideally) some of these questions:
  
  – **When:**
    
    (AIA G202-2013 § 3.3)
    
  – **BIM Execution Plans/Implementation Guides**
Practical Advice

• Understand both the (1) legal obligations and (2) Project expectations
  – There are many weak, but expensive, legal claims based on disappointed, but informal, expectations

• If others are relying on your Model information, clearly define in the BIM Execution Plan the “Who, What, How and When”
Practical Advice

• If you are relying on others’ Model information, understand your reliance rights
  – And any Limitations of Liability/Indemnities

• When participating in BIM, understand your insurance program and the Project coverages
Critical Insurance Coverages

• Professional Liability / OPPI / CPPI
• General Liability
• Builders Risk / Delay in Start-Up
• Permanent Property Insurance
<table>
<thead>
<tr>
<th>Policy</th>
<th>Professional Liability</th>
<th>Commercial General Liability</th>
<th>Builders Risk (first party coverage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coverage</td>
<td>Damages due to a Wrongful Act</td>
<td>Bodily Injury or Property Damage due to negligence</td>
<td>Direct physical damage to building, materials, equipment</td>
</tr>
<tr>
<td>Standard of Care</td>
<td>Reasonably prudent professional firm</td>
<td>Reasonably prudent contractor</td>
<td>Reasonable precautions to protect property</td>
</tr>
<tr>
<td>Conditions</td>
<td>Report claims/conditions Don’t compromise insurer’s defense</td>
<td>Report claims/conditions Don’t compromise insurer’s defense</td>
<td>Protect property from (further) damage Timely/complete notice of loss</td>
</tr>
<tr>
<td>Defense</td>
<td>Erodes policy limit</td>
<td>In addition to limit</td>
<td>n/a</td>
</tr>
</tbody>
</table>
Insurance Policy Conditions

In Event of Claim
- Promptly notify insurer in writing of claim or any situation likely to give rise to a claim
- Cooperate with insurer’s defense of claim
- Refuse, except solely at your own cost, to voluntarily make any payment, admit liability, assume any obligation, or incur any expense without our prior written approval
- Protect insurer’s right of subrogation
Practical Advice

• Know your business partners (Owner, Design-Builder, Designer, Trades)
• Maintain traditional project roles through collaborative process
• Don’t assume liability / guarantee performance beyond norms
• Assess your exposure to professional liability
• Determine necessary amounts / types of coverage
• Review policies carefully, including limits, conditions, endorsements
• Meet with insurer underwriting and claims departments to assure understanding and buy-in
Questions and Answers

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