AIA AND BEYOND: PROTECTING CITIES AS BUILDING OWNERS

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INTRODUCTION

- I am not a city attorney
- Your experience negotiating AIA contracts far exceeds mine
  - Particularly with respect to the relationship of parties during the project
- I probably (maybe) have more experience litigating construction defects and first-party insurance claims
- Here to talk about things to keep in mind looking forward to what happens when something goes wrong, when folks just don't act right

CONSTRUCTION CONTRACTS

Neither the talk nor the paper are intended to be comprehensive

General theme – How to put the city, as Owner, in a position of strength to protect itself and secure recovery of the costs to repair

Two aspects:

1. being able to act decisively in litigation
2. having a source from which to collect money owing

- Make sure the agreement doesn't defeat your position
- Make sure the defendant can pay – this usually means insurance coverage

* *AIA Contract Document Families*

INITIAL CONTRACT CONSIDERATIONS

- Make sure insurance coverages are adequate to protect your client from potentially catastrophic failures.
  - Everyone involved – Design Professionals and Contractors and Construction Managers

- Be aware – design professionals' policies are "claims made" and "diminishing limits"
  - Consider requiring adequate prior acts coverage in the future up to statute of repose
  - Diminishing limits – aka "wasting" – fees and expenses of defense come off the top

- Don't agree to the Architect being the initial decision maker for any claims involving design negligence

- Require Contractors and Construction Managers to maintain coverage after completion through statute of repose

AVOID ARBITRATION

- Not cheaper
- Not necessarily faster
- Not favorable to plaintiffs
- Not the best way to avoid high hourly fees associated with litigation (more about this in a minute)

Jury trials in civil cases guaranteed by the Seventh Amendment to the US Constitution – taxpayer-funded dispute resolution system

ALL DAMAGES; NO AUTOMATIC ACCEPTANCE

Don't Waive Consequential Damages

- At very least, don't waive any damages covered by insurance

No implied acceptance of non-conforming work

- "Owner's acceptance of non-conforming work will not be implied, whether by occupancy, payment, passage of time, or for any other reason."

DO NOT WAIVE OR WEAKEN WARRANTIES

- Article 3 warranty: the contractor warrants the work to be free from defect and in accordance with the contract documents
- Article 12 1-year warranty of repair
- Separate & Distinct
  - Not redundant
  - Not duplicative
- Resist any effort to combine these warranties
- Do NOT agree to shorten the time for the general warranty

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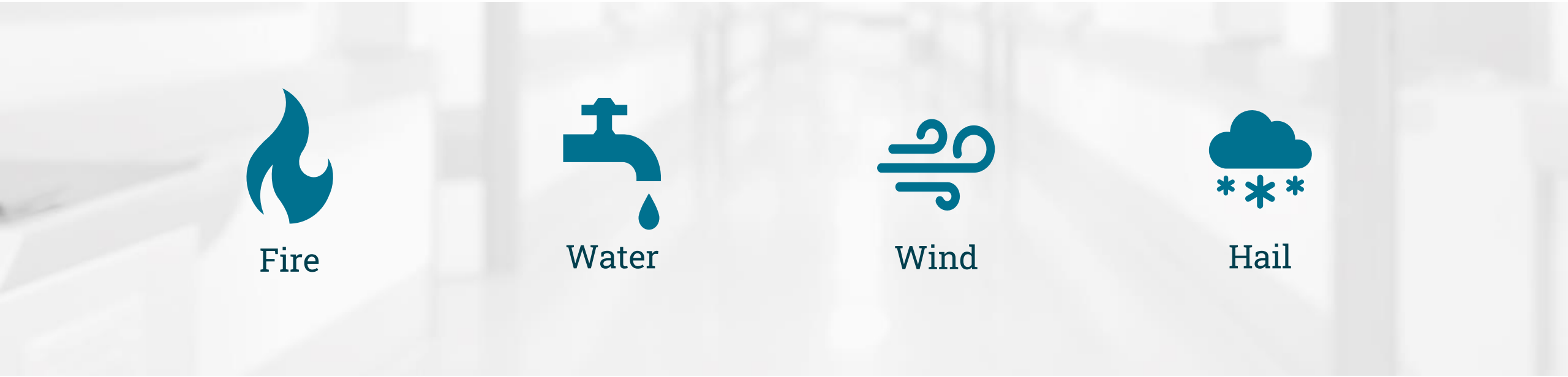
SPECIFIC PERIL VS. ALL RISK:
4 MOST COMMON PERILS



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SPECIFIC PERIL VS. ALL RISK:

All risk – much like your home coverage

- Unless excluded, it's covered

Specific peril – must be listed as an included cause to be covered

- Maybe get specific peril to cover exclusions in all risk policy, e.g., flood insurance to cover rising water exclusion

BESIDES RISK PROTECTION, WHAT ARE THE POLICY BENEFITS?

- Professional fees coverage – assist with quantifying the loss
- Replacement Cost vs. Actual Cash Value
  - ACV deducts depreciation – always less than RCV
- Cosmetic damage waiver
- Deductible – How is it calculated? Per structure, or total insured value?
- Business Interruption – reimbursement for relocation expenses or equipment rental

Arbitration

- Often required to take place out of state – usually New York
- Some clauses require panel of arbitrators all associated with the insurance industry

WHEN THE LEGISLATURE IS IN SESSION
IT'S TIME TO DUCK AND COVER

- BUT – One statute is a valuable tool for cities seeking to recover costs of repair for construction defects or full payment under P&C insurance policies
    - Authority to enter into contingency fee contracts with outside expert counsel – Chapter 2254 Texas Government Code
- Litigation is expensive and risky

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WHY IT'S VALUABLE

- Cities often forego collecting all the money that is due to them because they are afraid of litigation expense
- Chapter 2254 gives them a BUDGET-NEUTRAL solution
- Puts the city in a position of strength by shifting all of the risk to the lawyer
- WITHOUT IT:
  - City often will avoid litigation at all costs – potential defendants know this
  - Forced into early, pre-suit mediation before discovery process gives you the information to fully evaluate the claim
  - Negotiating from a position of weakness – they know you won't sue
  - Taxpayers and constituents will assign blame to elected officials and city staff

WITH IT:

- No fear of resorting to the courthouse if an agreement can't be reached
- Lawyer assumes all the risk
- NO IMPACT on the city budget
- Elected officials and city staff act as good stewards of the taxpayers' funds
- Political cover – acting responsibly; standing up for the citizens

HOW IT WORKS

- Applies only to claims > $100,000
- City council must post specified notice of intent to enter into the agreement
- Council must make findings of necessity
- To safeguard against windfall, lawyer must keep track of time spent on the case
- At the conclusion, the lawyer receives either the hourly fee, multiplied by a factor of four to compensate for the risk assumed, or the percentage fee, **whichever is less**

HOW IT WORKS (CONT.)

- Percentage fee cannot exceed 35%
- After council approval, the agreement must be submitted to the OAG for approval
- OAG has 90 days to act
- Case expenses are deducted from the city's portion of recovery and must be reasonable and necessary

ADVANTAGES

- Places city in a position of strength
- Allows retention of expert outside counsel while maintaining trusted advice of city attorney
- Elected officials and city staff act as good stewards of public funds
- Insist on accountability and full compensation without putting city resources at risk

YOUR CLIENTS ARE SAFE
CONTINGENCY FIRMS WON'T POACH THEM

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