Talking Points for Alternative Risk Transfer Solutions:

Issues Presented:

1. ? On time, On Budget.
2. ? Third party injuries of general public and subsequent defense costs
3. ? Contractor injuries at the project site
4. ? Cost overruns
5. ? Does the Design Firm have enough insurance limits?

EXECUTIVE SUMMARY

There are complex issues as it relates to the duty to defend on a given project. Finding the best solutions to those issues require a technical understanding of how insurance programs for both design professionals and contractors' function, including the limitations and differences between the two. All project stakeholders benefit from ensuring contractual obligations are adequately funded through the mechanism of insurance to the greatest degree possible.

- Project owners should rightfully expect downstream parties to protect them from risk that may arise from the design and construction phases of their projects.
- General Liability is the backbone of a contractor's insurance program. The GL policy allows contractors to assume the obligation of an upfront defense of an indemnified party, including the owner. There are also additional protections that may be added via endorsement to a contractor's CGL policy that provide the owner with additional protection, including additional insured status on a primary, non-contributory basis with a waiver of subrogation in favor of the owner.
- Professional Liability is the backbone of a design professional's insurance program. The PL policy does not allow a design professional to assume the obligation of an upfront defense of another party. It will, however, pay reasonable attorney's fees on a reimbursement basis to the extent the design professional is determined to be negligent.
- Public entities are protected by governmental immunities available to them. Design immunity is one of the most powerful defensive shields available to public bodies.
- An Indemnitee if allowed to select their own counsel, may result in exceedingly high fees. Design Professionals have aggregate insurance limits that would be eroded. Municipalities may suffer available dollars for actual damages.

Alternatives for Viable Risk Transfer Solutions:

1. Verify that proper insurance risk transfer is in place through the contractor's Commercial General Liability policy. Require that the contractor names the owner as an additional insured on a primary, non-contributory basis with a waiver of subrogation in favor of the owner. This ensures that the contractor's policy will respond to the indemnity obligation appropriately should a claim be made against the owner.

2. A bifurcated indemnification clause allows for a duty to defend to applicable under all claims other than those related to professional design services. It allows for a design professionals professional liability policy to be responsive to claims related to design services, and a duty to defend for claims that may arise under a commercial general liability policy. A sample bifurcated indemnification provision is included below.

   Indemnification for Professional Liability Claims: For liability arising out of professional services, the Consultant shall indemnify but shall have no duty to defend Owner and the Owner's officers and employees against liability for damages for which they may be liable to the extent such damages are actually caused by the negligent acts, errors or omissions of Consultant, or any of its employees or subconsultant's negligent acts or omissions under this Agreement.

   Indemnification for All Other Claims: The Consultant shall hold harmless, defend and indemnify, for damages arising out of bodily injury, death and property damage, the Owner, and the Owner's officers and employees against all claims, demands, actions and suits (including reasonable post tender attorney's fees and costs) brought against any of them arising from the Consultant's work or any of its subconsultant's work under this Agreement other than professional services.

3. Governmental Immunity: Most municipalities have access to governmental immunity based on discretionary decisions made in the course of selecting the plans for construction projects.

   (745 CS 10/3-103) (from Ch. 85, par. 3-103)

   Sec. 3-103. (a) **A local public entity is not liable** under this Article **for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property where the plan or design has been approved in advance of the construction or improvement** by the legislative body of such entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved. The local public entity is liable, however, if after the execution of such plan or design it appears from its use that it has created a condition that it is not reasonably safe.

(b**) A public employee is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property.**

(Source: Laws 1965, p. 2983.)