

“Builder’s Risk Coverage and Facility Risk Management”

“This course will discuss the proper implementation of the Diocesan Builder’s Risk Coverage, the identification of potential construction contract pitfalls, and the recognition of preventative maintenance issues and electrical risks facing our aging Catholic Church properties”.



Catholic Mutual Group



*Conference For
Catholic Facility Management 1
("CCFM")*

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Learning Objectives

At the end of this program, participants will be able to:

1. *“Better evaluate when it is appropriate to utilize the Diocese’s Builder’s Risk Coverage in lieu of the contractor’s insurance coverage, using case studies and examples”.*
2. *“Identify and understand potential construction contract pitfalls and how they affect the Diocese’s Builder’s Risk Coverage, using case studies and examples”.*
3. *“Better understand preventative maintenance issues facing Catholic Church properties, using case studies, examples and audio-visual aids”.*
4. *“Recognize electrical risks facing our aging Catholic Church properties, using case studies and examples”.*

Potential Construction Contract Pitfalls

Why do pitfalls exist for Dioceses?

- **Structure of insurance program**

What elements of standard construction contracts should be considered for change?

- **Waivers of Subrogation**
- **Insurance Requirements**

Components of the AIA Document
A201-2007 will be looked at to evaluate
suggested changes.

The language which might need to be altered in the 2007 AIA Document A201 contract is contained in Article 11. This analysis will not look at each item in Article 11. Conversely, only the items in which changes are suggested will be addressed.

11.3.1 Change: Add sentence to end “While the interests of all parties are covered, only the Owner will be named as an insured.”

Rational: This paragraph implies the Diocese to include the contractor and architect as additional insured's or loss payees on the Builders Risk coverage. When these organizations are added as additional insureds, they are actually first party insureds on the policy. The net effect is that a first party insured cannot be recovered against in the event of a loss. In other words, by being a loss payee, the contractor accomplishes the equivalent of a Waiver of Subrogation and eliminates the possibility of being pursued for a loss when they are negligent. The Diocese's Builders Risk coverage actually will include the interest of the contractor, subcontractor and sub-subcontractors. However, this will be accomplished without naming them as a loss payee. The sentence is added to ensure that there is no ambiguity as to the intent of the owner and contractor. Suggested wording to ensure that the contractor's interests are protected is included in the (*Addendum to the Construction Contract.*)

11.3.2 Change: Delete second half of last sentence “and the Owner and Contractor shall be named insured’s.” Add sentence to end of paragraph “Owner and Contractor agree only the Owner will be insured on the policy.”

Rationale: This paragraph indicates that the Contractor will be a named insured on the Boiler and Machinery Coverage. The change is suggested for the same reasons as 11.3.1.

11.3.3 Change: Add sentence to end “This paragraph does not apply to the extent Owner, Contractor, subcontractor, sub-subcontractor, architect, architects consultants, or an agent of any of the above has liability insurance to cover damages sustained by Owner or Contractor.”

Rationale: In this paragraph, the Diocese waives its right of recovery against the contractor for financial losses that go beyond the actual building under construction. Specifically, the owner waives its right of recovery for loss of use of the owner’s property and all other consequential losses. If this paragraph is not altered, the owner waives their right to recover for potential damages such as lost income or temporary expense.

11.3.5 Change: Add sentence to end “ This paragraph does not apply to the extent Owner, Contractor, subcontractor, sub-subcontractor, architect, architects consultants, or an agent of any of the above has liability insurance to cover damages sustained by Owner or Contractor.”

Rationale: This is another paragraph that contains a Waiver of Subrogation that is unrelated to the construction project and the Builders Risk coverage. If this paragraph is not struck, the Diocese cannot recover against a negligent contractor if the contractor causes damage to adjacent property. For example, a contractor may cause a fire while adding a handicapped entrance to a church. The fire could spread to the existing church and to an attached school building. If this paragraph is not deleted, the Diocese cannot recover from the negligent contractor for these damages.

The suggested changes to 11.3.3 and 11.3.5 should be made even if the Contractor provides the Builders Risk Coverage.

11.3.7 Change: Add sentence to end “This paragraph does not apply to the extent Owner, Contractor, subcontractor, sub-subcontractor, architect, architects consultants, or an agent of any of the above has liability insurance to cover damages sustained by Owner or Contractor.”

Rationale: In this paragraph, the owner and contractor agree to waive rights of recovery against each other for claims directly related to the building or addition under construction. This paragraph should be waived as it has a disproportionate effect on the owner and contractor. A potential loss to the contractor’s property at the construction site is limited while the Diocese is potentially at risk for the full amount to the building project. This paragraph should be amended to ensure that damages can be recovered from a contractor if that contractor is negligent and has liability insurance.

The suggested changes are often challenged by the contractor or their representatives.

The following are common objections with a corresponding answer.

Objection:

Waivers of Subrogation are fair since both parties are protected. The contractor cannot sue the owner and the owner cannot sue the contractor.

Answer:

The Waiver of Subrogation clauses in AIA documents are not equitable. The Diocese bears the risk of loss for the entire value of the building project while the contractor's risk of loss is limited to their equipment used during a construction project. For example, a Diocese may not be able to recover from a negligent contractor for a \$4 million building while a contractor is likely to be barred from recovering against the Diocese for equipment damages totaling \$50,000-\$100,000. Second, Waivers of Subrogation in AIA contracts often go beyond the building being constructed.

For example, in AIA DOCUMENT A201-2007, paragraph 11.3.5, the owner cannot recover against a negligent contractor if the negligent contractor damages an adjacent building. For example, a contractor can negligently cause a fire while adding an addition to a school building. If that fire spreads to other parts of the school or the neighboring church, the Diocese cannot recover from the negligent contractor. Also, paragraph 11.3.3 of the same AIA contract requires the owner to waive rights against the contractor for all future consequential losses. This paragraph does not require the contractor to waive its right against the owner. The Waiver of Subrogation in this paragraph also covers losses that go beyond damage to the actual building under construction such as loss of use to owner's property.

Objection:

The Diocese is taking a non-traditional approach in requiring that the Waivers of Subrogation be struck from the contract. The Diocese is the only one requiring these changes.

Answer:

Although the Dioceses are in the minority in requesting Waivers of Subrogation be struck from construction contracts, they are certainly not the only entity doing so. There are two reasons why Dioceses are in the minority requesting that Waivers of Subrogation be struck. First, most organizations are uneducated as to the negative effect of the Waivers of Subrogation. These organizations are not aware that the waivers are one-sided and often go beyond the boundaries of the actual construction project. Second, the structure of Diocesan insurance programs make the waivers a necessity. Business organizations with small insurance programs purchase Builders Risk coverage separately from their base insurance program. Therefore, when a loss occurs covered by Builders Risk coverage, it does not negatively impact that organization's future insurance rates. Dioceses need to be concerned about Builders Risk losses as they will affect the overall experience of their insurance programs.

Objection:

When both parties do not waive their right of recovery; significant problems occur when there is a loss. The Diocese's Builders Risk Policy will not pay if the contractor is negligent.

Answer:

The Diocese's Builders Risk Policy will pay for a covered loss regardless of the negligence of a contractor or subcontractor. The first priority of the Builders Risk coverage will be to put the construction project back on track. Recovery is always treated as a subsequent issue.

Objection:

If the Waivers of Subrogation are struck and the contractor's liability insurer pays, the contractor's future liability insurance rates will increase.

Answer:

Entities that cause a loss should expect their insurance rates to increase. If a Diocese sustains a large Builders Risk claim, they are also subject to future rate increases. It is equitable that a contractor responsible for a loss experience increased insurance rates. Conversely, a loss caused due to Diocesan negligence or an Act of God, should cause their future rates to increase.

Objection:

The contractor does not have liability insurance to cover their actions if the waiver of subrogation clauses are removed. Specifically, the Care, Custody and Control exclusion eliminates liability coverage for the contractor.

Answer:

The Care, Custody and Control exclusion is often misinterpreted by agents. The Care, Custody and Control exclusion does not apply to an entire building or structure being worked on by a contractor. Conversely, the exclusion eliminates coverage only for the particular area of a building being worked on at the time of loss.

More importantly, the no liability coverage objection can be nullified. For example, language in the *Addendum to Construction Contract* and the No Waiver of Subrogation paragraph does allow the owner and contractor to waive recovery rights against each other if either party does not have liability insurance to cover the damages for which they are responsible. In other words, a contractor's personal assets are never at risk, only the limits of their liability insurance.

Objection:

The contractor has to be named as a loss payee on the Diocesan Builders Risk coverage to ensure that their interests are protected.

Answer:

The contractor's interest in the project can be protected without the contractor being named as a loss payee on the Builders Risk coverage. For example, the *Addendum to Construction Contract* indicates that any payments made under Builders Risk coverage will be made jointly to the owner and contractor and reinvested in the construction project. Further, the paragraph calls for payments to be placed in a trust fund. The net effect is that the contractor's legal rights in any Builders Risk payments are protected in an equivalent manner to the contractor being named as a loss payee.

Objection:

I don't like the suggested changes. I am going to recommend the contractor purchase Builders Risk coverage on the project.

Answer:

In theory, the primary objective reason for the contractor to purchase separate Builders Risk coverage is to guard against future liability insurance rate increases should the contractor cause a loss during a construction project. However, this objection/strategy can actually be a viable option for a Diocese. Transference of risk outside the Diocesan coverage program for a large construction project insulates the Diocesan program from a potential unique loss. Builders Risk coverage is often inexpensive when incorporated into the cost of a \$5-\$20 million project.

ADDENDUM TO CONSTRUCTION CONTRACT (When Contractor Provides Builder's Risk Coverage)

Typically when organizations are adding an addition, undergoing a major renovation or remodeling their facilities, a written contract is signed with a contractor. The attached Addendum to Construction Contract should be attached to contracts with contractors performing work at your parish and the Contractor is providing the Builder's Risk Coverage. This Addendum to Construction Contract should be utilized in the following situations:

1. When your organization enters into a construction, renovation, or remodeling contract in excess of \$10,000 with a contractor or architect and Builder's Risk Coverage is provided by the contractor. For small contractor jobs that are under \$10,000 (or the threshold of your Diocesan construction contract review policy), it is not a requirement for your organization to utilize the Addendum to Construction Contract. However, the organization must still verify that these contractors have liability insurance covering their construction operations at the parish.
2. When a contractor is performing an unusual or dangerous construction procedure at your parish. An example of this would be a contractor job involving the use of scaffolding or which calls for asbestos removal.

By attaching the Addendum to Construction Contract to the contract or incorporating its wording into a contract, your parish will satisfy insurance requirements. If the Addendum to Construction Contract is not attached to the contract with a contractor, the wording of the addendum must be incorporated into the contract developed by the parish and the contractor. The parish should always verify that the contractor has named the parish as an additional insured on their general liability insurance policy. It is not adequate for the parish to obtain a certificate of insurance which names the parish as a "certificate holder."

**ADDENDUM TO CONSTRUCTION CONTRACT
(When Contractor Provides Builder's Risk Coverage)**

BUILDER'S RISK INSURANCE: A Builder's Risk and Boiler and Machinery Coverage will be obtained by CONTRACTOR to cover the project. Any payment under Builder's Risk or Boiler and Machinery Coverages will be made jointly to OWNER and CONTRACTOR. Further, OWNER and CONTRACTOR agree that any payment under Builder's Risk or Boiler and Machinery Coverages will be placed into a joint account until such funds are reinvested in the construction project.

GENERAL LIABILITY INSURANCE: While CONTRACTOR is performing operations at PARISH, CONTRACTOR shall maintain general liability insurance in the amount of not less than two million dollars (\$2,000,000) per occurrence. It is further agreed that the CONTRACTOR agrees to protect, defend, indemnify, and hold harmless the PARISH against and from any claim or cause of action arising out of or from any negligence or other actionable fault of the CONTRACTOR, or its employees, agents, members, or officers.

AUTOMOBILE LIABILITY INSURANCE: CONTRACTOR shall maintain automobile liability insurance for any owned autos, hired autos or non-owned autos used in connection with the contractor's business. Automobile liability coverage should be maintained by the CONTRACTOR in the minimum amount of two million dollars (\$2,000,000) combined single limit.

WORKER'S COMPENSATION INSURANCE: CONTRACTOR shall maintain worker's compensation insurance as required by law.

ADDITIONAL INSURED: CONTRACTOR agrees to provide a certificate of insurance to the PARISH which will name the PARISH as an additional insured on CONTRACTORS liability policy for claims arising out of CONTRACTORS, subcontractors or sub-subcontractors operations or made by CONTRACTORS, subcontractors or sub-subcontractors, employees, agents, guests, customers, invitees or subcontractors. CONTRACTOR must verify its liability insurance policy is primary in the event of a covered claim or cause of action against PARISH.

SUBCONTRACTORS: CONTRACTOR shall be required to verify that all subcontractors maintain general liability insurance, worker's compensation insurance and automobile liability insurance. Furthermore, CONTRACTOR agrees to indemnify and defend the PARISH for any claim or cause of action, whatsoever which was caused by the negligence, or other actionable fault of an uninsured subcontractor.

NO WAIVER OF SUBROGATION: OWNER does not waive any rights of recovery against the CONTRACTOR, subcontractor or sub-subcontractor for any damages not covered by Builder's Risk Coverage. OWNER and CONTRACTOR, subcontractor and sub-subcontractor do waive the right of recovery against each other for any damages covered under Builder's Risk Coverage. The extent of OWNERS ability to recover from CONTRACTOR is limited to the extent CONTRACTOR has liability insurance.

CONTRACT OVERRIDE AND SEVERABILITY PROVISION: CONTRACTOR and PARISH agree that this addendum overrides any and all portions of previous agreements between CONTRACTOR and PARISH that contain language in contradiction with this contract. If any portion of this Addendum to Construction Contract is deemed or is determined to be in conflict with local or state or national statutes, both CONTRACTOR and PARISH agree that the portion of the Addendum to Construction Contract which is in conflict with the statute will be stricken from the Addendum to Construction Contract with the remainder of the Addendum to Construction Contract remaining binding for both parties.

CONTRACTOR:

PARISH:

(PARISH is understood to include the
Diocese of _____)

BY:

BY:

NAME _____

NAME _____

DATE _____

DATE _____

START DATE OF CONTRACT (Understood to be date signed if left blank): _____

Instruction to Parish (Parish Use Only): This Addendum to Construction Contract stands on its own as a legal contract between PARISH and CONTRACTOR should this addendum not be incorporated or attached to a contract.

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Typically when organizations are adding an addition, undergoing a major renovation or remodeling their facilities, a written contract is signed with a contractor. The Addendum to Construction Contract should be attached to contracts with contractors performing work at your parish. The Addendum to Construction Contract should be utilized in the following situations:

1. When your organization enters into a construction, renovation, or remodeling contract in excess of \$10,000 with a contractor or architect. For small contractor jobs that are under \$10,000 (or the threshold of your Diocesan Construction Contract Review Policy), it is not a requirement for your organization to utilize the Addendum to Construction Contract. However, the organization must still verify that these contractors have liability insurance covering their construction operations at the parish.
2. When a contractor is performing an unusual or dangerous construction procedure at your parish. An example of this would be a contractor job involving the use of scaffolding or which calls for asbestos removal.

By attaching the Addendum to Construction Contract to the contract or incorporating its wording into a contract, your parish will satisfy insurance requirements. If the Addendum to Construction Contract is not attached to the contract with a contractor, the wording of the addendum must be incorporated into the contract developed by the parish and the contractor. The parish should always verify that the contractor has named the parish as an additional insured on their general liability insurance policy. It is not adequate for the parish to obtain a certificate of insurance which names the parish as a “certificate holder.”

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AUTOMOBILE LIABILITY INSURANCE: CONTRACTOR shall maintain automobile liability insurance for any owned autos, hired autos or non-owned autos used in connection with the contractor’s business. Automobile liability coverage should be maintained by the CONTRACTOR in the minimum amount of two million dollars (\$2,000,000) combined single limit.

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NO WAIVER OF SUBROGATION: OWNER does not waive any rights of recovery against the CONTRACTOR, subcontractor or sub-subcontractor for any damages. OWNER and CONTRACTOR, subcontractor and sub-subcontractor do waive the right of recovery against each other for any damages covered under Property, Builders Risk or Boiler and Machinery coverage for which either party is responsible if that party does not have liability insurance to cover such damages and liability insurance has been maintained as required by this document.

CONTRACT OVERRIDE AND SEVERABILITY PROVISION: CONTRACTOR and PARISH agree that this addendum overrides any and all portions of previous agreements between CONTRACTOR and PARISH that contain language in contradiction with this contract. If any portion of this Addendum to Construction Contract is deemed or is determined to be in conflict with local or state or national statutes, both CONTRACTOR and PARISH agree that the portion of the Addendum to Construction Contract which is in conflict with the statute will be stricken from the Addendum to Construction Contract with the remainder of the Addendum to Construction Contract remaining binding for both parties.

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BY:

NAME

DATE

START DATE OF CONTRACT (Understood to be date signed if left blank): _____

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Church Preventative Maintenance

The following is no secret to facility managers:

Preventative maintenance funding is usually the first thing that is cut from the budget when looking to save funds.

Unfortunately, that can actually cost more money in the long run.

It also creates two problems:

- 1) Increased repair costs for equipment break down
- 2) Increased exposure to liability and property losses

Sometimes it is the little things that can hurt the most.

What are some examples of the most overlooked or deferred maintenance items?

- Emergency Lights and Exit Lights
- HVAC Systems
- Interior stairs and landings
- Roofs and gutters
- Flooring
- Sidewalks, exterior stairs, other walkways
- Exterior security lighting
- Exit doors
- Electrical systems
- Building security
- Playgrounds

Exit Doors

- Doors need to open and close easily and smoothly.
- Doors with automatic closures should be checked for proper operation.
- Door latching devices should unlock to open the doors easily and latch smoothly when closed.
- No more than 15 pounds of pressure against the latch to open the door.

Building Security

- Do you have a good key control policy?
- Do you check your outside lights regularly?
- Do you prohibit outside doors from being blocked open?
- Do you keep landscaping trimmed away from doors and windows?

Playgrounds

- Playgrounds and equipment should meet Consumer Product Safety Commission Standards (CPSC)
- Regularly check all bolts and connection points
- Adequate cushioning material (Minimum 9"-12")
- Age appropriate equipment
- Adequate "use zones"
- Adequate supervision
- **NO HOMEMADE PLAYGROUND EQUIPMENT!**
- Regularly check the condition of the athletic fields for adverse conditions

Housekeeping

- Following proper housekeeping practices is the cheapest preventative maintenance effort we can make.
- A place for everything and everything in its place. It may sound simple, but it works!
- If you haven't used it in a while, dispose of it
- While clutter may not start a fire, it gives the fire a place to start and contributes to the spread and severity of a fire. It also can cause trip and fall injuries.

Preventative Maintenance Checklist

Daily

- ***Wet or snowy days:***

Clean up water around entrances and on steps right after school starts, just before lunch, and just before dismissal.

- Check all stoves, hood filters, and cooking areas to insure they are properly cleaned to remove grease and inflammable waste.
- Check exit lights.
- Check all outside lights.
- Vacuum carpets (in heavy traffic areas, classrooms, offices, etc.).
- Pick up all trash around buildings.
- Clean up around dumpster.

- ***Cold Weather Precautions:***

- If heat is left on, check to see that it is still on.
- Pipes under sinks are usually on the outside walls.
- Open the cabinet doors so heat can get to these pipes.
- Use salt and shovel to clean a path on each set of steps when there is ice on the ground.
- Path should be next to the handrail.

Check all portable heating units to insure they:

- (1) are not a tripping hazard;
- (2) don't overload a circuit.

Preventative Maintenance Checklist

Weekly

- Check gauge on fire extinguishers.
- Check smoke detectors.
- Water all shrubs and trees (if it hasn't rained that week).
- Drain water from air compressor.
- Blow down boiler.
- Check plumbing in all commodes.
- Check all sinks for leaks.
- Pour water in bathroom floor drains.
- Cut grass.
- Check lights – fluorescent/incandescent.

Preventative Maintenance Checklist

Monthly

- Check all window frames and glass for cracks.
- Check window screens.
- Check caulking on windows.
- Check hardware on all doors.
- Check all storage areas to insure they are clean, shelves are not overloaded, and heavy objects are stored on lower shelves.
- Check all trees for dead branches.
- Check all playground equipment.
- Check and clean out outside drains.
- Check all painted surfaces to see if scraping and painting are in order.
- Check all fences.
- Trim shrubs.

Preventative Maintenance Checklist

Every 3 months

- Change oil in air compressor.
- Clean heating & air conditioning coils.
- Clean filters.
- Lubricate bearings and shaft.
- Leave heat on in vacant buildings, or turn off the water and drain the pipes.
- Check fuses/breakers.
- Check motors/connections.

Every 6 months

- Clean carpets.
- Oil fan motor.
- Blow down water heaters.
- Remove and clean out P-traps.
- Inspect roof.
- Clean out gutters.
- Check weather stripping on doors and windows.

Yearly

- Check roof drains for blockage after every heavy rain.
- Termite inspection/treatment (outside contractor).
- Fire extinguishers checked (outside contractor).
- Clean entire heating/air condition unit.
- Check panel identification.
- Check receptacles.

What If We Don't Have The Staff?

This is where we need to use outside vendors to assist in caring for our buildings and grounds.

It doesn't matter if you are hiring grounds maintenance vendors, replacing HVAC systems, remodeling, or constructing a new addition or building, using the proper contract review guidelines is vital to have a smooth and uneventful project.

Thank you for your time!

QUESTIONS??

**This concludes The American Institute of Architects
Continuing Education Systems Course**



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Catholic Mutual Group
John Gorski
Assistant Vice President
Risk Management Department
10843 Old Mill Road
Omaha, NE 68154
Phone: 402-514-2313
Email: jgorski@catholicmutual.org

Catholic Mutual Group
Ken Winters
Fire Safety Manager
10843 Old Mill Road
Omaha, NE 68154
Phone: 402-514-2318
Email: kwinters@catholicmutual.org