ACEC

American Council of Engineering Companies of Florida

American Council of Engineering Companies of Florida (ACEC-FL) Risk Management Committee White Paper "Higher than Standard" Standard of Care

PROBLEM STATEMENT:

One of the core tenants of the American Council of Engineering Companies of Florida's (ACEC-FL) Risk Management Committee is to properly allocate and compensate for risk in consulting contracts. In the State of Florida, the Legislature saw fit to establish the framework for indemnification in Florida Statutes 725.08. This Statute includes very specific information relating to what may be required, so the Problem Statement relates to a public agency requiring language in a contract that does not meet the specifics of 725.08, or Language Not in Compliance with Statute (LNCS).

SHORT ANSWER TO LNCS QUESTION:

A design professional can contractually agree to additional indemnification, but to the extent that an engineer explicitly and unequivocally agrees to contractually assume and exercise such higher standard, a Florida court could very well rule that those claims/damages that are proximately caused by the engineer's breach of such provision are not insurable by virtue of the professional liability policy's "contractual liability" and/or "express warranty" exclusions.

DISCUSSION:

To address the Standard of Care (SOC) Question raised by ACEC-FL, sample contractual provisions were reviewed that specifically address the level or quality of work to be performed by an engineering firm. For example, one SOC provision unequivocally states that the " ... Engineer warrants and represents that all Services will be free of fault or defect and will comply in every material respect with the representation or descriptions provided therefor by Engineer." Likewise, another the sample Contract contains similar statements and representations, such as:

> Firm shall cause the Work to be performed in compliance with any and all applicable requirements of federal, state and local laws, ordinances, codes, criteria, authority, rules, and regulations as may be amended from time to time, including without limitation the. Codes and Ordinances of the City of Tampa, Florida, which include among others The City of Tampa Ethics Code, ("Applicable Law").

Based upon the assumption that the foregoing provisions require the engineer's contractual assumption of a duty that exceeds Florida's common-law SOC, these types of contractual provisions may very well trigger the professional liability insurance policy's "express warranty" exclusion and potentially implicate the "coverage liability" exclusion.

To evaluate ACEC-FL's SOC Question, we first identified those principles that govern a design professional's work under Florida law. The relationship between the design professional and the contracting client is usually founded in contract. Florida courts have distinguished general contractual duties, such as those imposed under an ordinary contract for goods or services, from the duty imposed

on a professional. In *Lochrane Engineering, Inc. v. Willingham Realgrowth Investment Fund, Ltd*., supra, at 232 (Fla. 5th DCA 1989), this duty is explained:

> The duty of a professional who renders services, such as a doctor, lawyer, or engineer, is different from the duty of one who renders manual services or delivers a product. The contractual duty of one who delivers a product or manual services, is to conform to the quality or quantity specified in the express contract, if any, or in the absence of such specification, or when the duty and level of performance is implied by law, to deliver a product reasonably suited for the purposes for which the product was intended . or to deliver services performed in a good and workmanlike manner. However, the duty imposed by law upon professionals rendering professional services is to perform such services in accordance with the standard of care used by similar professionals in the community under similar circumstances.

See also, *CH2M Hill Southeast, Inc. v. Pinellas Co.*, 698 So.2d 1238, 1240 (Fla. 2d DCA 1997); *Alderman v. BCI Engineers & Scientists, Inc.*, 68 So.3d 396 (Fla. 2d DCA 2011); *Ahimsa Technic, Inc. v. Lighthouse Shores Town Homes Development Co*., 543 So.2d 422 (Fla. 5th DCA 1 9 8 9); *Macintyre v. Green's Pool Service, Inc*., 347 So.2d 1081 (Fla. 3d DCA 19 77); *Gleason v. Title Guarantee Co*., 317 F.2d. 56 (5th Cir. 1963); *Lillibridge Health Care Services, Inc. v. Hunton Brady Architects, P.A*., 2010 WL 3788859 (M.D. Fla. 2010). In accordance with this general principle, and even if the plans and specifications are found to be deficient, the design professional is not liable for defective plans and specifications if those plans and specifications reflected the standard of common knowledge at the time of their preparation. *Quality Inn South, Inc. v. Weiss*, 505 So.2d 509 (Fla. 3d DCA 1 98 7).

In addition to contract claims, claims against the design professional may sound in negligence, and damages awarded under this theory of recovery are not subject to Florida's "Economic Loss Rule." The professional standard of care under contract and tort is essentially identical; the "duty" is generally defined by the scope of the design professional's contract and arises from something it was hired to do. *See*, *Lochrane Engineering lnc., supra; Alderman v. BC/Engineers & Scientists, lnc*., 68 So. 3d 396 (Fla.2d DCA 2 01 1); *Shepard v. City of Palatka*, 414 So.2d 1077 (Fla. 5th DCA 198 1); *Tiara Condominium Association, Inc. v. Marsh & Maclennan Co.*, 110 So. 3d 399 (Fla. 2013).

Under these general "standard of care" principles, the theory of "strict liability in tort" is generally unavailable to claims against design professionals. *See* generally, *Easterday v. Masiello*, 518 So. 2d 260 (Fla. 1988). Likewise, under these; same principles, the design professional neither expressly nor impliedly warrants his or her work. Rather, a design professional warrants that he or she will perform the required professional services in accordance with the applicable standard of care. *Bayshore Dev. Co. v. Bonfoey*, 78 So. 507 (Fla. 1918); *Audlane Lumber & Builders Supply, Inc. v. O.E. Britt Associates, Inc*., 168 So.2d 333 (Fla. 2d DCA 1964).

If, however, an express provision within a professional services contract provides for a heightened standard of care, the professional must perform in accordance with the terms of the contract. *See* generally, *The School Board Of Broward County, Florida v. Pierce Goodwin Alexander & Linville*, 137 So.3d 1059 (Fla. 4th DCA 2014) (professional services contract for renovation of school required architect, during all phases of its performance, to deliver design plans that were code-compliant, and did not merely require that plans be prepared with ordinary and reasonable skill, such that architect committed itself to higher standard of care than that imposed at common law; sections referring to architect's duty for

professional services specifically stated that all design plans were to be in compliance with applicable codes, and only one section made reference to "customary professional standards."); *CH2M Hill SE., Inc*., 698 So.2d, at 1240 ("[l]f the professional contracts to perform duties beyond those required by ordinary standards of care, the quality of that performance must comport with the contractual terms.'').

With respect to the SOC Question, our first concern is that ACEC-FL should anticipate the insurer's argument that damages resulting from an engineer's assumption of the enhanced SOC are excluded by virtue of the standard professional liability policy's "express warranty" exclusion [any claim based upon or arising out of, in whole or in part, directly or indirectly, express warranties or guarantees.] This type of exclusion has been addressed in at least one authoritative treatise, Bruner And O'Connor On Construction Law, §11:535. Coverage For Liability Based upon Warranty Or Guaranty (June 2018 Update):

> A common exclusion states that professional liability policies do not apply to any "claim" based upon, arising out of, attributable to, directly or indirectly resulting from express warranties or guarantees. This exclusion is the embodiment of the concept that professional liability policies insure professionals against the risks of failing to meet a standard of care rather than guaranteeing or warranting a particular result. As a general rule, warranty liability imposes a higher duty than the implied promise to exercise reasonable care required of members of the insured's profession. While the judicial treatment of warranties has been anything but consistent, there is a strong trend in the law that warranty liability is really a species of strict liability . . .

Many insurers wish to avoid underwriting what essentially are strict liability risks. In the words of one commentator:

> The exclusion contemplates activities that are not within the scope of services generally provided by design professionals. Standard contract forms developed by the American Institute of Architects in the National Society of Professional Engineers carefully point out that the design professional does not warrant any estimate of probable construction costs. The exclusionary language of the policy is consistent with the standard contract language and intended to preclude coverage for situations in which the architect or engineer may promise certain performance or results which exceed professional practice standards. Ruiz and Palmer, Design Professionals' Insurance and Surety Programs, in Architect and Engineer Liability, Cushman and Hedemann eds. at§ 3.6 (1995).

Id.

Moreover, a second concern raised by the SOC Question is the potential application of the Policy's "contractual liability" exclusion in this specific context. This exclusion in a situation involving an insured's contractual assumption of an enhanced SOC, the ACEC should anticipate an insurer's argument that those damages specifically attributable to an insured engineer's contractual assumption of a SOC greater than that imposed by Florida common law is excluded from coverage.

In light of the above, we recommend that the ACEC-FL engineer carefully review all proposed contracts to identify specific provisions that suggest the engineer's contractual assumption of an enhanced SOC, as a client's allegation that the engineer has breached such provision in a resulting liability claim could

potentially trigger either of the foregoing exclusions or, at the very least, give rise to insurance coverage litigation to test the scope and reach of the exclusions.

CONCLUSION:

It is recommended that ACEC-FL advise its membership to continue their careful review of any proposed contract that contains contractual provisions wherein the design professional expressly agrees to guarantee or warranty that their work is free from defect no matter the reason or cause and/or confirms their (or others') compliance with code requirements over which they have no control or exceed industry standard. Although examples of such types of clauses are myriad, we recommend that such provisions be avoided to eliminate jeopardizing the professional liability insurance coverage relied upon by your membership and indirectly by their clients.

Approved – 6/20 ACEC-FL Risk Management Committee