

A/E RISK REVIEW

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For More Information Contact:

Karen Hong

Tel: 522-2095

Fax: 522-2082

email: khong@financeinsurance.com

Indemnities, Part 2: Consultant-Friendly Agreements

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

Indemnity agreements originated in the construction industry to hold owners harmless from liabilities that arose during construction. Since the contractor has 100% control of the job site, it's only fair that the contractor should indemnify (i.e., hold harmless) the owner for any site-related problems that arise. Over time, however, the fairness concept behind indemnification has been corrupted. Today, architects and engineers are often forced to sign contracts that make them assume a large portion of the owners' risk -- even though they do not have control over those risks. Worse yet, this significant increase in liability assumed through a contractual indemnity is typically uninsurable, spelling double trouble.

Part 1 of this two-part report examined the dangers of client-drafted indemnities, identified three types of such indemnities and demonstrated techniques to persuade a client to abandon the use of these onerous agreements.

But what if a client is insistent upon including an indemnity in your contract? In Part 2, we'll examine alternative forms of client indemnities that have only limited drawbacks. We'll also address situations in which you may want to ask for a reasonable indemnity

from the client, the contractor, your subconsultants and other third parties.

The Mutual Indemnity

The limited-form indemnity discussed in Part I is definitely the least of the three evils examined previously. An even better alternative, however, is a mutual indemnity that calls upon each party to indemnify the other, but only for each party's negligent acts. If a client presents you with its own indemnity language, you can counter with a mutual indemnity such as the following example from *The Contract Guide* published by XL Insurance:

INDEMNIFICATION

The Consultant agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Client, its officers, directors and employees (collectively, Client) against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, to the extent caused by the Consultants negligent performance of professional services under this Agreement and that of its subconsultants or anyone for whom the Consultant is legally liable.

The Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant, its officers, directors, employees and subconsultants (collectively, Consultant) against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, to the extent caused by the Client's negligent acts in connection with the Project and the acts of its contractors, subcontractors or consultants or anyone for whom the Client is legally liable.

Neither the Client nor the Consultant shall be obligated to indemnify the other party in any manner whatsoever for the other party's negligence.

The Insurable Indemnity

As a decidedly less desirable alternative, you may consider giving an insistent client some type of unilateral indemnity that limits the indemnity to that which is insurable. Tie the indemnity to your negligence and purge any client-generated clause of onerous language. Include the concept of comparative negligence, which holds you liable for only the portion of the damages for which you are responsible (unless your state law has an even more protective provision). Finally, see that the indemnity is limited to the services called for under the agreement. These concepts are reflected in the following sample language from XL Insurance.

INDEMNIFICATION

The Consultant agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Client against damages, liabilities and costs arising from the negligent acts of the Consultant in the performance of professional services under this Agreement, to the extent that the Consultant is responsible for such damages, liabilities and costs on a comparative basis of fault and responsibility between the Consultant and the Client. The Consultant shall not be obligated to indemnify the Client for the Client's own negligence.

When the Client Won't Budge

If the client refuses to accept any alteration of an onerous indemnification, you have a business decision to make. You can accept the clause and the risk, hoping that the client will not ever have to apply the indemnity. Realize, however, that you are opening yourself up to an unlimited financial exposure that virtually no professional liability insurance policy will cover. This option should only be considered with a very low-risk client and project type with which your firm is thoroughly familiar and has had a claim-free record of work.

The foolproof approach, of course, is to decline any engagement that includes an onerous indemnity provision. This is a decision that may lose you an otherwise attractive client or project, but it may be the

prudent choice to ensure your long-term survivability. And who knows: your willingness to hold your ground and walk away from the work because of the indemnity clause may just earn you the client's respect and perhaps result in an eleventh hour change of heart in demanding an unfair and uninsurable contractual agreement.

When You Want an Indemnity from Your Client

As stated, the original concept of indemnity is based in fairness, and no consultant should be overly reluctant to indemnify an owner from the design firm's own negligence, errors or omissions. Likewise, there are certain instances where a design firm should not accept work on a project unless the client is willing to indemnify the consultant from unusual risks. Such instances may involve hazardous waste, asbestos, condominiums, renovations or the possible unauthorized reuse of your design documents.

Indeed, there are times when an indemnity from your client is the only prudent approach. Your firm did not create the hazards and your role is to help the client overcome them. In high-risk projects, an indemnity from the owner should be a requirement for your services. Such a contractual clause might read like the following sample from XL Insurance:

INDEMNIFICATION

The Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant, its officers, directors, employees and subconsultants (collectively, Consultant) against all damages, liabilities or costs including reasonable attorneys' fees and defense costs, arising out of or in any way connected with this Project or the performance by any of the parties above named of the services under this Agreement, excepting only those damages, liabilities or costs attributable to the negligent acts or negligent failure to act by the Consultant.

For additional protection on very risky projects, particularly those involving hazardous conditions that you can't control or properly insure, talk to your attorney about the viability of asking your client for a waiver -- an agreement from the client not to sue you. A waiver is one of the most difficult provisions to obtain and to enforce, and some states have strict statutes applying to waivers. Therefore, keep the waiver and

indemnity separate so that if the waiver is ruled invalid the indemnity isn't thrown out with it. Here is a sample waiver from XL Insurance:

WAIVER

In consideration of the substantial risks to the Consultant in rendering professional services in connection with this Project, the Client agrees to make no claim and hereby waives, to the fullest extent permitted by law, any claim or cause of action of any nature against the Consultant, his or her officers, directors, employees, agents or subconsultants, which may arise out of or in connection with this Project or the performance by any of the parties above named of the services under this Agreement.

Third Party Indemnities

In the event of jobsite injuries to workers or others, architects and engineers are often included in the resulting claims. For protection against these and other third-party claims, add a clause to your client contract that requires the client to include provisions in the client-contractor contract requiring the contractor to 1) have adequate insurance and 2) indemnify you and the owner for claims by the contractor's employees. Here is sample language from XL Insurance:

CONTRACTOR INSURANCE AND INDEMNITY REQUIREMENTS

The Client agrees, in any construction contracts in connection with this Project, to require all contractors of any tier to carry statutory Workers Compensation, Employers Liability Insurance and appropriate limits of Commercial General Liability Insurance (CGL). The Client further agrees to require all contractors to have their CGL policies endorsed to name the Client, the Consultant and its subconsultants as Additional Insureds and to provide Contractual Liability coverage sufficient to insure the hold harmless and indemnity obligations assumed by the contractors. The Client shall require all contractors to furnish to the Client and the Consultant certificates of insurance as evidence of the required insurance prior to commencing work and upon renewal of each policy during the entire period of construction. In addition, the Client shall require that all contractors will, to the fullest extent permitted by law, indemnify and hold harmless the

Client, the Consultant and its subconsultants from and against any damages, liabilities or costs, including reasonable attorney's fees and defense costs, arising out of or in any way connected with the Project, including all claims by employees of the contractors.

Indemnity From Subconsultants

Prime consultants may seek indemnities from their subconsultants to protect themselves from damages and costs arising from claims due to the actions of these subconsultants. Consider the following language from XL Insurance:

INDEMNIFICATION

The Consultant and the Subconsultant mutually agree, to the fullest extent permitted by law, to indemnify and hold each other harmless against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising from their own negligent acts in the performance of their services under this Agreement, to the extent that each party is responsible for such damages, liabilities and costs on a comparative basis.

Conclusion

Indemnities are complex and have enormous liability implications. Have your attorney draft or approve any indemnity language with respect to the laws of the governing jurisdiction to determine exactly what your rights and exposures may be. Work, too, with us, your professional liability insurance specialist, to determine the insurability of any indemnities you intend to sign.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventatives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.