

EC RISK REVIEW

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Indemnities, Part 2: Where Agreements May Make Sense

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 project owners harmless from liabilities that arose during construction. Since the contractor has virtually 100% control of the jobsite, it's only fair that the contractor should indemnify (i.e., hold harmless) the owner for any site-related liabilities that arise from the construction work.

Over time, however, the fairness concept behind indemnification has been corrupted. Today, design and environmental consulting firms are often asked to sign contracts that make them assume a large portion of their client's 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.

Part 1 of this two-part report examined the dangers of client-drafted indemnities, identified the three major 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 fewer drawbacks. We'll also address situations in which you

may want to ask for a reasonable indemnity from the client, the contractor or your subconsultants.

The Mutual Indemnity

The proportionate-negligence indemnity discussed in Part 1 is definitely the least of the three evils examined in that issue. An even better alternative, however, is a mutual indemnity that calls upon the client and the environmental consultant to indemnify the other, but only for each party's negligent acts.

If a client presents you with one-sided indemnity language and refutes your efforts to remove the clause altogether, you and your attorney may counter with a mutual indemnity. Here, you agree, to the fullest extent permitted by law, to indemnify and hold harmless the client against all damages, liabilities and costs to the extent caused by your negligent performance of professional services under your contract with the client.

In return for your indemnity agreement, your client must also agree, to the fullest extent permitted by law, to indemnify you and hold you harmless against all damages, liabilities or costs to the extent caused by the client's negligent acts in connection with the project. Also, have the client agree to indemnify you against the acts of its contractors, subcontractors, consultants or anyone for whom the client is legally liable.

At the end of the mutual indemnity, reiterate that neither your client nor you shall be obligated to indemnify the other party in any manner whatsoever other than for each party's own negligence. Also make it clear that the indemnity agreement does not include a duty to defend. A fair-minded client who asks you to hold them harmless for your negligent acts should be willing to provide you the same protection.

The "Final Offer" Unilateral Indemnity

If your client refuses a mutual indemnity, you and your attorney may consider offering one final unilateral agreement that limits the indemnity to your negligent insurable acts. Work with your legal counsel to draft an acceptable indemnity that includes all of the following elements:

- The indemnity must be negligence based. Make it clear you are only indemnifying your client against your negligent acts, errors or omissions.
- The indemnity must be proportionate. You should only be responsible proportionately for damages caused by your negligence, not for damages caused by others.
- The damages must be real. The indemnity should not apply to "alleged" liability.
- The indemnity should not include a duty to defend. This duty would be considered a contractual obligation and therefore uninsurable under most professional liability policies.
- The indemnity must not apply to third parties. It should apply only to the client and not to its agents and representatives, the contractor or others.
- The indemnity should be limited. See that the indemnity only applies to the services called for under your client-consultant agreement.

Under such an indemnity, then, you could agree, to the fullest extent permitted by law, to indemnify and hold harmless your client against damages, liabilities and costs arising from your insured negligent acts in the performance of professional services under the client agreement, to the extent that you are responsible for such damages, liabilities and costs on a comparative basis of fault and responsibility between you and the client. Specify that you shall not be obligated to indemnify the client for the client's own negligence.

When Your Client Says Take It or Leave it

If your client refuses to accept any alteration to an onerous indemnification, you have an important business decision to make. You can accept the clause and take on the risk, hoping that the client will not ever apply the indemnity. Realize, however, that you are opening yourself up to an unlimited financial exposure that your professional liability insurance policy will likely not cover. This option should only be considered with a very low-risk client and a project type with

which your firm is thoroughly familiar and has had a claim-free record of work.

If you chose to go forward with an insistent client with a less-than-friendly indemnification, provide them with two options. Agree to perform your services at one fee without the indemnity and at a higher fee with the indemnity in place. Explain that it is only prudent that you offset your increased uninsurable risk with an increased fee. Sometimes, clients may agree to eliminate or revise an indemnity in exchange for a lower fee.

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 badly needed 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 to Ask Your Client for an Indemnity

As stated, the original concept of indemnity is based in fairness, and no consultant should be overly reluctant to indemnify a client from your own negligence, errors or omissions if the agreement is otherwise fair. On the other hand, there may be certain situations where an environmental firm should not accept work on a project unless the client is willing to indemnify the consultant from unusual project risks. Such instances may include projects involving hazardous waste, asbestos, renovations, or the possible unauthorized reuse of your design documents. Fast-track projects with a highly accelerated schedule are another candidate for an indemnity.

Indeed, there are times when an indemnity from your client is the only prudent approach. With high-risk projects, your firm did not create the hazards and your role is to help the client overcome them. An indemnity from the owner should be a requirement for your services.

Work with your attorney to draft an indemnity agreement in which your client agrees, to the fullest extent permitted by law, to indemnify you and hold you harmless against all damages, liabilities or costs arising out of or in any way connected with the project or your performance of services under the client agreement,

except those damages, liabilities or costs attributable to your negligent acts or negligent failure to act.

Should You Consider a Waiver?

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 any indemnity agreement separate so that if the waiver is ruled invalid the indemnity isn't thrown out with it. A simple waiver drafted by your attorney may stipulate that in consideration of the substantial risks to you in rendering professional services in connection with a risky project, the client agrees to make no claim and waives, to the fullest extent permitted by law, any claim or cause of action of any nature against you or your subconsultants, which may arise out of or in connection with the project or the performance of services under the client agreement.

Third-Party Indemnities

In the event of jobsite injuries to construction workers or others, design and environmental consulting firms are often named in the resulting claims. For protection against these and other third-party claims, discuss with your attorney adding a clause to your client contract that requires the client to include provisions in its client-contractor contract requiring the contractor to 1) have adequate insurance and 2) indemnify you and the owner for any claims by the contractor's employees. With a third-party indemnity, the client would agree to require all contractors to carry statutory workers compensation, employers liability insurance and appropriate limits of commercial general liability insurance (CGL). The client would further agree to require all contractors to have their CGL policies endorsed to name the client, you and your subconsultants as "additional insureds" and to provide contractual liability coverage sufficient to insure the hold harmless and indemnity obligations assumed by the contractors. The contractor would be required to furnish the client and you 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 contractor would, to the fullest extent permitted by law, indemnify

and hold harmless the client, you and your subconsultants from all claims by employees of the contractors.

Subconsultant Indemnities

Finally, when serving as a prime consultant you and your attorney may consider seeking mutual indemnities with your subconsultants to protect each party from damages and costs arising from claims due to the negligent actions of the other. In such an agreement, you and your subconsultants would mutually agree, to the fullest extent permitted by law, to indemnify and hold each other harmless against all damages, liabilities or costs arising from each of your negligent acts in the performance of your services under the agreement, to the extent that each party is responsible for such damages, liabilities and costs on a comparative basis.

Conclusion

It is critical to discuss the language of any client-written indemnities with your legal counsel and try to remove the indemnity or, at the least, strike out onerous and unfair language. As professional liability specialists, we can help you determine the insurability of such indemnities and help you build a case with your client as to why an indemnity may be unenforceable, uninsurable and undesirable.

Likewise, before you consider asking a client, contractor or subconsultant for an indemnity, make sure any such agreement is within the laws of your state or project jurisdiction. While there are certainly instances where indemnities can help reduce your liabilities in high-risk projects, you should avoid trying to pass on liabilities that rightly belong to you.

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 preventives, 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.