



Would You Accept This Indemnification Clause?

By Ed Schwieter, P.E., S.E.

Indemnification clauses are the number one source of problems in contracts for professional services. Structural engineers are frequently presented with very one-sided contracts drafted by their Client's attorney, who may not understand contracting for design professional services or merely wishes to maximize the contractual benefits for the Client. These contracts may contain an indemnification clause like this (real) one:

To the fullest extent permitted by law, Consultant shall indemnify, defend, and hold harmless Client (including its owners, affiliates and subsidiaries), its officers, directors, agents, shareholders, successors and employees (the "Indemnitees") from and against any and all claims, liability, actions, causes of actions, complaints, costs, expenses (including prejudgment interest), and demands whatsoever, in law or in equity, including without limitation those for bodily injury, personal injury, sickness, disease, death or property damage (including but not limited to the Construction Work itself), arising out of, or alleged to arise out of, or as a result of, or alleged to be the result of the performance of the Services. Consultant, at Consultant's sole expense, shall promptly dispose of all such claims, defend all lawsuits filed against Client on the account thereof, pay all judgments rendered against Client in such lawsuits (including any prejudgment interest assessed against any Indemnitee), and reimburse Client in cash upon demand for all reasonable expenses incurred by Client on the account thereof including, but not limited to, attorney fees, expert witness fees, and court costs. Consultant shall indemnify Client and hold Client harmless from the above-referenced claims regardless of whether such claim is caused or alleged to be caused in part by any joint or concurrent negligent act (either active or passive) or omission by an Indemnitee; provided however, that Consultant shall not be obligated to indemnify for those claims to the extent that the same is proximately caused by the sole negligence or willful misconduct of Client or Client's agents, servants or independent contractors who are directly responsible to Client, excluding Consultant. Notwithstanding anything to the contrary contained herein, Client at its option shall have the right to participate in the defense of any claims asserted against it, approve the selection of counsel and approve the terms of any settlements made in its name or on its behalf.

Would you sign the contract offered with this clause? I would not and you should not! The Client may tell you that the contract clause is "non-negotiable," or "everyone else accepts it,"

or "if you do not sign this, your competitor will." However, do Clients expect engineers to pay as little attention to engineering services as they expect engineers to pay toward onerous and inappropriate contract language? Engineers should be just as conversant with contract provisions as they are with design criteria and engineering analysis.

The problem phrases in the indemnification clause are many, including:

1) **An expansive duty to defend.** The duty to defend against third party claims is not required under common law. The duty to defend can only arise through contractually assumed obligations and, therefore, third party claims defense costs are not covered by professional liability insurance.

2) **Extreme language like "any and all" and "without limitation."** Extreme language is considered to be too broad and open-ended to be included in fair and balanced contracts. These extreme words may expand the indemnification to include other damages that might otherwise be excluded.

3) **Does not require liability to be established.** The words "alleged to arise out of" expands the indemnification clause to include situations where liability has not been established.

4) **Does not limit liability to the extent the Consultant is responsible.** The indemnification should be limited to losses "to the extent arising out of" negligent performance of the services. This establishes the proportionality of liability for claims since often several parties are negligent to varying degrees.

5) **Requires immediate reimbursement of attorney fees.** The cost of defending starts well before mediations or trial and any determination of fault. The immediate reimbursement required under the duty to defend requires paying attorney fees in advance, even when liability is not eventually established.

6) **Requires indemnification of Client even if they are negligent.** The indemnification clause as written obligates indemnification except when the Client's "sole negligence" is established. What if the Client is partially liable? If the consultant's actions contributed 1% to the damages, the client would not be solely negligent, and yet the indemnification clause would require the Client to be held entirely harmless.

The indemnification clause would be insurable, fairer, and far simpler and easy to

understand if it included a reciprocal indemnification and read:

Each party to this Agreement shall indemnify and hold harmless, but without duty to defend, the other party (including its owners, affiliates and subsidiaries), its officers, directors, shareholders, successors, and employees (the "Indemnitees") from and against liability, actions, causes of actions, complaints, costs, and expenses, including those for bodily injury, personal injury, sickness, disease, death, or property damage, to the extent arising out of or as a result of the negligent performance of their duties. Neither party shall be obligated to indemnify the other party in any manner whatsoever for the other party's own negligence.

Assistance with contract review and negotiation are available through professional liability insurance brokers, your professional liability insurance carriers, and the engineer's attorney. There are many other resources available, including books written by attorneys on design professional contracts and by professional liability insurance carriers and brokers on their websites. Good resources include:

- *Contract Guide for Design Professionals* written by J. Kent Holland, Jr. and published by Zurich (available for free download at <http://bit.ly/2tpQFYI>)
- DPIC Companies' *Guide to Better Contracts* (out of print)

Another option is to counter the Client's contract with one written by an industry association, which are typically written from a more balanced perspective. Such contracts are offered by CASE, EJCDC, AIA, ConsensusDOCS, and DBIA. The contracts from CASE, EJCDC, and AIA tend to be best suited for structural engineers and require the least amount of changes and additional negotiations as they are fair and balanced.

Some engineers "just sign" the uninsurable and unreasonable contract offered by the Client. This is a disservice to themselves and the engineering industry, and sets a bad precedent that other engineers have to work hard to change and overcome. Don't ignore the contractual terms offered in client-written contracts. ■

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