



Indemnification of the Structural Engineer

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The article *Understanding Indemnification Clauses* published in the January 2017 issue of STRUCTURE provided an overview of indemnification clauses. A second article, *Understanding the Difference Between Indemnification and Insurance*, published in the February 2017 issue of STRUCTURE took a closer look at indemnification clauses and compared indemnification with insurance. In both of those articles, the focus was on the indemnification obligations of the structural engineer. In this article, we will look at indemnification of the structural engineer.

In a typical commercial contract, one party is providing goods or services, and the other party is purchasing the goods or services. The indemnification clause will typically require that the party providing the goods or services indemnify the purchaser against third-party claims arising from the provider's negligent acts, errors, or omissions. Thus, the indemnification clause might read:

Consultant shall indemnify and hold harmless the Client, and the Client's employees, directors, officers, and lenders from and against liabilities and expenses arising from third-party claims, including attorney's fees where recoverable under applicable law on account of negligence, to the extent caused by the Consultant's negligent acts, errors, or omissions.

Some contracts contain a mutual indemnification clause; the clause may be worded such that each party assumes the same obligation to the other party, or the party paying for the goods or services can take on a more limited indemnification obligation. As an example, ConsensusDOCS 240, *Standard Form of Agreement Between Owner and Architect/Engineer*, contains mutual indemnification obligations in Articles 7.1.1 and 7.1.2. Mutual indemnification clauses tend to be rare, however, particularly in contracts that have been drafted by the client; structural engineers usually need to negotiate for indemnification. While a general indemnification against claims arising from the client's negligence may not be necessary, a structural engineer should require indemnification against certain risks.

Drawings

Contracts vary with respect to ownership of the engineer's work product (referred to in the AIA documents as the "Instruments of Service"). Some contracts are written such that the engineer grants the Owner a non-exclusive license to use the work product. Other contracts are written such that the Owner obtains the copyright to the work product upon payment for the engineer's services. In either case, the Owner will typically want to be able to use the plans and specifications for maintaining, altering, or adding on to the project. Some Owners want to be able to use the documents on other projects.

Regardless of what the engineer negotiates with respect to ownership of the drawings, it is a good idea to require the Owner to indemnify and defend the engineer against claims arising from the use of the drawings on other projects or changes made to the drawings by others.

The wording of such clauses depends on the scope of work, but two commonly used provisions are:

The Owner agrees to indemnify, defend, and hold Engineer harmless from any claims arising from changes made to the documents by others or from Owner's use of the Documents on any other project without engagement of the Engineer.

The Owner agrees to indemnify, defend, and hold Engineer harmless from any claims arising from Owner's use of the Documents for any purpose other than the purpose they were prepared for under this agreement.

Hazardous Materials / Existing Site Conditions

Many contracts make the engineer liable for claims arising from hazardous materials brought onto the site by the engineer unless the engineer was acting under the specific direction of the Owner. However, the engineer should not be liable for claims arising from hazardous materials already existing on the site or brought onto the site by others, unless the engineer has exacerbated the situation through its negligence. When hazardous materials are a concern, the engineer may

want to require that the contract includes a clause similar to the following:

The Owner agrees to indemnify, defend, and hold Engineer harmless from any claims arising from hazardous materials existing on the site or brought onto the site by others, except to the extent the Engineer has exacerbated the situation by its negligent acts, errors, or omissions.

Likewise, if the project involves renovation of an existing structure or the subsurface conditions are unknown, it may be advisable to require the Owner to provide a general indemnification against claims arising from existing site conditions, except to the extent the engineer has exacerbated the situation through its negligence. The engineer's liability should be limited to its negligence; the Owner should bear the risk of existing site conditions.

Access Agreements

Engineers who do site investigations will sometimes need to enter onto a third party's property; this applies especially to engineers who do geotechnical investigations. Often, the property owner will want the engineer to sign an Access Agreement that requires the engineer to indemnify the property owner from any claims arising from the investigation and any damage to the property, regardless of whether the engineer is negligent. This is not unreasonable, as the property owner should not be expected to bear these costs. However, the engineer's liability for this work should not be greater than its liability under its contract with its client.

To be covered by professional liability insurance, the engineer's indemnification obligations should be limited to the extent caused by the engineer's negligence. When an engineer anticipates having to enter onto another party's property to perform the work required by its contract, it should consider including a clause such as the following in the contract:

If Consultant is required to sign an Access Agreement to enter onto the property of a third party, Client shall indemnify, defend, and hold Consultant harmless from any claims arising from its work on the third party's property, except to the extent caused by the Consultant's negligent acts, errors or omissions.

Subconsultants

Depending on the scope of work, an engineer may need to hire subconsultants to perform certain aspects of the work. Often, the prime contract will explicitly require the engineer to pass all indemnification obligations down to its subconsultants. In such cases, the engineer should make sure it negotiates terms that its subconsultants will agree to. As an example, professional liability insurance does not cover defense of indemnified parties. If the engineer agrees to defend the Owner against any allegations of negligence arising from its services, it may have trouble getting its subconsultants to agree to the flow-down requirement.

Even if the prime contract does not require that the indemnification obligations flow down to subconsultants, the subcontract should include an appropriate indemnification clause. Typical wording might be:

Subconsultant shall indemnify and hold harmless the Engineer, and the Engineer's employees, directors, officers, and lenders from and against liabilities and expenses arising from third-party claims, including attorney's fees where recoverable under applicable law on account of negligence, to the extent caused by the Subconsultant's negligent acts, errors or omissions.

It is also important that the subconsultant be required to carry sufficient insurance to cover its indemnification obligation. Ultimately, the engineer will be required to provide indemnification in accordance with the prime agreement. If the subconsultant does not have insurance to cover claims due to its negligence, the engineer will be likely be held liable.

Conclusion

To indemnify another party means to agree to financially protect them against specified claims, either by directly paying costs they are liable for or by reimbursing them for the costs they have incurred. While negotiation of the indemnification in a design agreement typically focuses on the engineer's obligations, the engineer should also make sure that it is appropriately indemnified both by its client and by its subconsultants. The actual indemnification requirements will vary, depending on the project, but typical issues that are addressed in the design contract are indemnification for the Client's use of the drawings on other projects and indemnification for

claims arising from existing site conditions. When negotiating subcontracts, the engineer should ensure that its subconsultant's indemnification obligations are appropriate for its contract and that the subconsultant has insurance to cover these obligations. ■

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