Indemnification Provisions in Design Professional Contracts

Public entities often enter into contracts with design professionals (professional engineers, land surveyors, architects, or landscape architects) to assist in planning, design, or construction administration for various projects. Those contracts will probably contain an “indemnification clause.” Simply stated, an indemnification clause protects one contracting party from the wrongful acts of the other. For instance, if an accident was caused by a design defect, an indemnification clause would hold the owner harmless for damages caused thereby.

The specific wording of such clauses is important when entering into contracts. Too broad of an indemnification clause will not be insurable, which will prevent qualified design professionals from entering into a contract or may expose the public entity to uninsured risk. Likewise, too narrow of an indemnification clause may unnecessarily increase the risk for a public entity.

This article describes some issues that may be problematic for all of the parties involved when considering an indemnification clause language in a contract.

**Problem 1 | Broad Form Indemnifications**

The first problem is what’s known as “broad form indemnifications.” This means that the owner wants indemnification for:

1. Acts that go beyond the designer’s negligence, errors or omissions (contract examples include “any and all acts”, “intentional acts”, or just “acts”);
2. Acts of a third party other than the design professional (contract examples include “acts of third parties”, or “other’s actions”); and/or
3. The public entity’s negligence, errors, or omissions.

The issue goes to the insurability of those indemnifications. Design professionals’ actions are measured by the “standard of care”, which is defined as “what a similar professional would do under like circumstances.”

The design professional’s errors and omissions (E/O) liability insurance is designed to make clients whole when the design professional does not meet that standard – in other words, when they are negligent. Moreover, insurance coverage cannot insure against the acts of third parties not under the designer’s control. Therefore, a broad form indemnity for “all acts” or “third party acts” asks the design professional to indemnify the owner even though the design professional might have met the standard of care and wasn’t negligent - or even at fault - on an issue. That is not only unfair, it is not insurable. Therefore, it places the design professional at an untenable risk. As important, it places owners in a position where they have no benefit of the E/O insurance that they require by the contract.

**Problem 2 | Warrantees for Professional Services**

The second issue is when an indemnification asks design professionals to “warrantees” their services or perform to a level that goes beyond the standard of care.

Some common problematic contract terms might include:

- “design professional shall warrantee their work against defects”;
- “the design professional shall use superior efforts”; or
- “the design professional shall guarantee their work for a period of one year from date of services.”
Again, insurability of these contracts becomes problematic because E/O insurance does not cover warranties, guarantees, or “perfection.” The expectation is that the professional will meet the standard of care and, if not, insurance will be available.

**Problem 3 | Defense Costs**

The third issue is indemnifications that ask the design professional to “defend” the owner and pay for attorney fees and other costs related to allegations or claims. Some difficult contract language might include:

- “designer shall defend owner against claims, allegations”; or
- “designer shall pay for defense costs for any claim or allegation related to negligent acts, errors, or omissions.”

E/O insurance will reimburse defense costs after the fact if they are included as damages attributed to the designer's negligence. The problem is when a contract forces a design professional to defend a claim when there is no link to negligence or if negligence is not yet determined. That’s uninsured risk to the design professional. State law describes the award of attorney’s fees in civil actions for contracts related to services.

**Conclusion**

It is good public policy to have design professionals who are able to provide services to the public and private clients. It is a benefit to public entities that their design professional be insured for risks associated with tasks that the professional undertakes. Design professionals are required to provide services that meet the “standard of care” for their industry. If they are found liable for damages or litigation costs due to their negligent acts, errors, or omissions (not meeting that standard) they should be held responsible and pay in proportion to their liability. Until a lawsuit is settled (liability established and damages or costs are awarded by a trier of fact), it is fair that all parties to the lawsuit pay for their own defense expenses. Any party to an agreement (owners and design professionals) should not be held liable for the actions of others outside of their control.

Should you choose to include an indemnification paragraph in your contract, the following language is a good model to use:

> “Design Professional agrees to hold harmless and indemnify Client from and against liability arising out of Design Professional’s negligent acts, errors, or omissions in performance of services under this Agreement.”

**What To Do?**

So, what should the public entity/owner do about these issues to make sure design professionals can maintain their insurance coverage for the benefit of the public? Here’s a quick check list to share with your legal department on indemnification clauses in contracts with your design professionals:

- Limit any indemnification clause to “the designer’s negligent acts, errors, or omissions in performance of services under this Agreement.”
- Do not require the designer to indemnify you against the actions of any third parties.
- Do not require design professionals to “warrantee” or “guarantee” their work.
- Do not require the design professional to “defend” you against claims or allegations.
- Do require the design professional to “meet the standard of care in performance of services.”
- Do require the design professional maintain the appropriate level of professional liability insurance.

**Questions?**

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