

Indemnification and Legal Updates

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monthly meeting

ACEC
of Minnesota

A series of monthly lunch meetings for members.

Indemnification Clauses

Scope of Indemnification:

Indemnification should be limited to damages solely arising out of or resulting from the Designer's performance of its work. Damages arising from the work of others should not be included.



Indemnified Parties:

The number of indemnified parties should be limited. The ideal limitation is to the Owner (or other party with whom you have contracted) only. Owners will typically request that the indemnified parties be expanded to include investors, banks, and other project participants with no direct relationship to the Designer.



Negligence:

Liability under the indemnification clause should be predicated on a finding (not just allegation) that the designer was negligent.



Causation:

Liability under the Indemnification should be limited to claims or damages caused by the Designer (as opposed to “relating to”).

City of Minneapolis Contract

The Consultant will defend, indemnify and hold harmless the City and its officers and employees from all liabilities, claims, damages, costs, judgments, lawsuits and expenses, including court costs and reasonable attorney's fees regardless of the Consultant's insurance coverage, to the extent caused by any negligent act or omission in the performance of work and delivery of services provided by or through this Contract by the Consultant, its employees, agents, by any sub-contractor or sub-consultant, and by any employees of the sub-contractors and sub-consultant of the Consultant, in the performance of work and delivery of services provided by or through this Contract or by reason of the failure of the Consultant to perform, in any respect, any of its obligations under this Contract. The Consultant shall not be required to defend the City for any Scope of Services that involve design services as provided in Minnesota Statutes, Section 337.01.

The City will defend, indemnify and hold harmless the Consultant and its employees from all liabilities, claims, damages, costs, judgments, lawsuits and expenses including court costs and reasonable attorney's fees arising directly from the negligent acts and omissions of the City by reason of the failure of the City to perform its obligations under this Contract. The provisions of the Minnesota Statutes, Chapter 466 shall apply to any tort claims brought against the City as a result of this Contract.

Except as provided in Item 14, neither party will be responsible for or be required to defend any consequential, indirect or punitive damage claims brought against the other party.

The Consultant will ~~defend~~, indemnify and hold harmless the City and its officers and employees from all liabilities, claims, damages, costs, judgments, lawsuits and expenses, including court costs and reasonable attorney's fees to the extent permitted by statute or common law, regardless of the Consultant's insurance coverage, to the extent caused by any negligent act or omission in the performance of work and delivery of services provided by or through this Contract by the Consultant, its employees, agents, by any sub-contractor or sub-consultant, and by any employees of the sub-contractors and sub-consultant of the Consultant, in the performance of work and delivery of services provided by or through this Contract or by reason of the failure of the Consultant to perform, in any material respect, ~~any of~~ its obligations under this Contract. The Consultant shall not be required to defend the City for any ~~Scope of Services claims~~ that involve design professional services as provided in Minnesota Statutes, Section 337.01 - 337.05 and 604.21.

The City will defend, indemnify and hold harmless the Consultant and its employees from all liabilities, claims, damages, costs, judgments, lawsuits and expenses including court costs and reasonable attorney's fees to the extent permitted by statute or common law, arising directly from the negligent acts and omissions of the City by reason of the failure of the City to perform its obligations under this Contract. The provisions of the Minnesota Statutes, Chapter 466 shall apply to any tort claims brought against the City as a result of this Contract.

Except as provided in Item 14, neither party will be responsible for or be required to defend any consequential, indirect or punitive damage claims brought against the other party.

St. Louis Park Agreement

Consultant agrees to defend, indemnify and hold the City, its officers, and employees harmless from any liability, claims, damages, costs, judgments, or expenses, including reasonable attorney's fees, resulting directly or indirectly from an act or omission (including without limitation professional errors or omissions) of the Consultant, its agents, employees, or subcontractors in the performance of the services provided by this Agreement and against all losses by reason of the failure of said Consultant fully to perform, in any respect, all obligations under this Agreement.

Consultant agrees to ~~defend~~, indemnify and hold the City, its officers, and employees harmless from any liability, claims, damages, costs, judgments, or expenses, including reasonable attorney's fees to the extent permitted by statute or common law, and to the extent proximately caused by ~~resulting directly or indirectly from an~~ a negligent act or omission (including without limitation professional errors or omissions) of the Consultant, its agents, employees, or subcontractors in the performance of the services provided by this Agreement and against all losses ~~by reason of the~~ to the extent proximately caused by failure of said Consultant fully to perform, in any material respect, ~~all its~~ obligations under this Agreement.

Sample Subcontract Provisions

INDEMNIFICATION. Subconsultant agrees to indemnify and hold harmless Prime, its officers, shareholders, and agents from and against claims, damages, liability, suits, actions, and expenses, including reasonable attorney's fees, relating to losses or damages sustained by any person, including employees of Prime, to the extent arising from Subconsultant's negligent performance or failure to perform this Contract.

Potential Edits to Indemnity

Subconsultant agrees to indemnify and hold harmless Prime, its officers, shareholders, and agents from and against claims, damages, liability, suits, actions, and expenses, including reasonable attorney's fees to the extent permitted by statute or common law, relating to losses or damages sustained by any person, including employees of Prime, to the extent ~~arising from~~ proximately caused by Subconsultant's negligent performance or material failure to perform this Contract.

Subcontract Con't.

ATTORNEYS' FEES AND LEGAL EXPENSES. If any arbitration proceeding or action shall be brought to recover any amount under this Contract, or for or on account of any breach of, or to enforce or interpret any of the terms, covenants, or conditions of this Contract, the prevailing party shall be entitled to recover from the other party, as part of the prevailing party's costs, reasonable attorneys' fees, the amount of which shall be fixed by the arbitrators or by the court, and shall be made a part of any award or judgment rendered.

Subcontract Con't.

VENUE. The proper venue for any proceeding at law or in equity or under the provisions for arbitration shall be Arapahoe County, Colorado, and the parties hereto do hereby waive any right to object to the venue.

GOVERNING LAW. This Agreement shall be construed exclusively in accordance with and governed by the laws of the State of Colorado, with jurisdiction in the State of Colorado.

MN Law:

604.21(e) A provision contained in, or executed in connection with, a design professional services contract for any actual or proposed maintenance of, or improvement to, real property, highways, roads, or bridges located in Minnesota that makes the contract subject to the laws of another state or requires that any litigation, arbitration, or other dispute resolution process on the contract occur in another state is void and unenforceable.

Sample Onerous Indemnity

Indemnity - CONSULTANT shall indemnify, protect, save, hold harmless and insure CITY, and its respective officers, directors, employees and members and agents, from and against any and all claims and demands for, or litigation with respect to, all damages which may arise out of or be caused by CONSULTANT or its agents, employees, or sub-consultants with respect to CONSULTANT's performance of its obligations under this Contract. CONSULTANT shall defend CITY against the foregoing, or litigation in connection with the foregoing, at CONSULTANT's expense, with counsel reasonably acceptable to CITY. CITY, at its expense, shall have the right to participate in the defense of any Claims or litigation and shall have the right to approve any settlement, which approval shall not be unreasonably withheld. The indemnification provision of this Section shall not apply to damages or other losses solely caused by or resulting from the negligence or willful misconduct of CITY. All indemnification obligations shall survive termination, expiration or cancellation of this Contract.

One Approach – Limit to available Insurance

To the fullest extent permitted by law, Designer will indemnify and hold the Owner harmless from and against all Claims to the extent caused by Designer's or its Consultants' negligent acts, errors or omissions that are or could be covered by the professional liability insurance required as part of the Required Insurance.

Another approach – split general and professional liability

Indemnification. Except to the extent related to CONSULTANT's performance of professional services, CONSULTANT agrees that it will save and protect, hold harmless, indemnify, and defend the Owner against any and all claims, expenses (including attorneys' fees), losses, damages, or lawsuits arising out of or resulting from, the CONSULTANT's acts or omissions in the performance of the Contract, including acts or omissions of its employees, subcontractors, representatives, agents, or anyone else for whom they may be liable.

With respect to any and all claims, expenses (including attorneys' fees allowed by statute or common law), losses, damages, or lawsuits to the extent proximately caused by CONSULTANT's negligent acts, errors, or omissions in the performance of professional services, the CONSULTANT agrees to indemnify and hold harmless the Owner .

Onerous Defense Clauses

PROFESSIONAL'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO PROFESSIONAL'S DUTY TO INDEMNIFY, REGARDLESS OF PROFESSIONAL'S ULTIMATE LIABILITY FOR INDEMNITY. PROFESSIONAL MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF PROFESSIONAL'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, PROFESSIONAL IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY PROFESSIONAL.

One Approach – Limit Defense to Adjudicated Liability

Consultant agrees , to the fullest extent permitted by law, to indemnify and hold harmless the Client against all damages, liabilities or costs, to the extent caused by the Consultant's negligent performance of professional services or that of its subconsultants or anyone for whom Consultant is legally liable, as determined by judicial or arbitration proceedings. Consultant shall not be obligated to defend or indemnify the Client in any manner whatsoever for the Client's or other third-party's concurrent or sole negligence or alleged concurrent or sole negligence. Nothing herein is intended to create a duty to immediately defend the Client until and unless negligence is established by judicial proceedings or arbitration on the part of the party charged with a defense tender hereunder.

Recent County Contract

CONSULTANT agrees to ~~defend~~, indemnify, and hold harmless the COUNTY, its officials, officers, agents, volunteers and employees from any liability, claims, causes of action, judgments, damages, losses, costs, or expenses, including reasonable attorney's fees as permitted by statute or common law, to the extent caused by resulting directly or indirectly from any negligent act or omission of CONSULTANT, a subconsultant, anyone directly or indirectly employed by them, and/or anyone for whose acts and/or omissions they may be liable in the performance of the services required by this Agreement, and against all loss by reason of the failure of CONSULTANT to perform any obligation under this Agreement. For clarification and not limitation, this obligation to ~~defend~~, indemnify and hold harmless includes but is not limited to any liability, claims or actions resulting directly or indirectly from alleged infringement of any copyright or any property right of another by CONSULTANT, the employment or alleged employment of CONSULTANT personnel, the unlawful disclosure and/or use of protected data, or other noncompliance with the requirements of the Data Practices provisions set forth in Section 11 thereof by CONSULTANT.

Thank You



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