

Indemnification Clause Negotiations

February 1, 2016

Arguments

1. “To the extent permitted by law”
2. If you are right, then you have nothing to worry about
3. The Statute does not apply to us
4. The statute limits indemnities the owner can give to designers

Hennepin County

- In July 2014 issued a solicitation for proposals to get on approved consultant list. Original packet included indemnification language which was insurable and acceptable.
- In September, issue modified contract language with uninsurable indemnification language.
- ACEC met with County twice to discuss language and to try to negotiate a compromise.
- After many months decision was that the language may be amended on a case by case basis.

Hennepin County.

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, to the extent caused by resulting directly or indirectly from any willful misconduct or 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, CONSULTANT's 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 11hereof by CONSULTANT.

MnSCU

- Contracts from MnSCU are still inconsistent
- Some have been modified based upon the new statute, but some have not.
- In December of 2015, one of my clients received an old contract and we requested our standard changes.

MnSCU

- This is the language in the MnSCU Agreement:
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- **LIABILITY.** The CONTRACTOR shall indemnify, save, and hold MnSCU, its representatives and employees harmless from any and all claims or causes of action, including all attorney's fees incurred by MnSCU, arising from the performance of this contract by the CONTRACTOR or CONTRACTOR'S agents or employees. This clause shall not be construed to bar any legal remedies the CONTRACTOR may have for MnSCU's failure to fulfill its obligations pursuant to this contract.
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MnSCU

- **Here is what we sent to MnSCU and their General Counsel:**
- We recommend revising the indemnity to make it comparative to our fault and tied to our negligence. Under Minnesota law, a provision in a design professional services contract that requires us to indemnify and defend an owner from the negligent acts of another party is void and unenforceable. This law, codified at Minn. Stat. § 604.21, became effective 8/1/14. The “arising from” language in the MnSCU indemnity creates a risk that we could be liable for the negligence of another party. Under the new law, a court could find this indemnity unenforceable. That is why we recommend revising the indemnity to be comparative to our fault and tied to our own negligence by changing “arising from” to “to the extent caused by the negligent performance...”. Such revisions would benefit both parties as MnSCU would have the reassurance of an enforceable indemnity and our professional liability insurance would cover such an obligation. (Our insurance will not cover damages caused by the negligence of another party).

MnSCU

The State takes the position that Minn.Stat.Sec. 604.21 does not apply to the State because the State is not named in the statute nor are the words of the statute so plain, clear, and unmistakable as to leave no doubt as to the intention of the legislature.(Minn.Stat.Sec. 645.27). In other words, the State takes the position that the indemnification language in Century College's contract is enforceable and not void. The indemnification language in the contract best protects the interest of the College. However, the College can agree to revise the indemnification language as a business decision, but that decision is not based on the Contractor's view that the clause is void and unenforceable.

Minn. Stat. 645.27

645.27 STATE BOUND BY STATUTE; WHEN.

The state is not bound by the passage of a law unless named therein, or unless the words of the act are so plain, clear, and unmistakable as to leave no doubt as to the intention of the legislature.

History:

1941 c 492 s 27

Minn. Stat. 604.21

604.21 INDEMNITY AGREEMENTS IN DESIGN PROFESSIONAL SERVICES CONTRACTS VOID.

(a) A provision contained in, or executed in connection with, a design professional services contract is void and unenforceable to the extent it attempts to require an indemnitor to indemnify, to hold harmless, or to defend an indemnitee from or against liability for loss or damage resulting from the negligence or fault of anyone other than the indemnitor or others for whom the indemnitor is legally liable.



Questions

