



## CONTRACT CONCERNS

### Indemnification Clauses, Part 3\* Comments on Actual Contract Clauses

**J. Kent Holland, Jr., Esq.**

#### **Contract 1**

1) Article 10 begins: "To the fullest extent permitted by law, Consultant hereby agrees to indemnify, defend and hold harmless...."

- The "defend" needs to be deleted.
- Delete the sentence in the indemnity provision that reads as follows: "Consultant's duty to indemnify hereunder shall arise at the time written notice of a claim is first provided to Owner regardless of whether claimant has filed suit on the Claim."
- Delete the phrase of the indemnity clause which currently reads: "... unless such Claims have been specifically determined by a trier of fact to be the sole negligence of the Indemnitees." The concept of that sentence is to have you defend the Owner through the time of the jury verdict and then pay indemnify for all damages (including those not caused by the negligence of Converse) unless the trier of fact (either judge or jury) decides that Owner is 100 percent responsible.
- Replace the deleted phrase above with something like the following: "to the extent damages are caused by the negligence of Consultant."

The paragraph immediately following the indented indemnity clause should be deleted in its entirety. It reads as follows:

"Consultant will defend any and all Claims or suits which may be brought or threatened against Owner and will pay on behalf of Owner any expenses incurred by reason of such Claims including, but not limited to, court costs and reasonable attorney fees incurred in defending or investigating such Claims...."

#### **Contract 2**

1. The first phrase of the indemnity obligation creates uninsured risk by triggering indemnification based on non-negligent errors and omissions. Revise the following phrase: "Services and caused by or resulting from CONSULTANT's (a) active or passive negligence, error or omission;" to delete "passive" and also to be sure that "negligence" or "negligent" becomes an adjective of "error or omission." Currently it does not modify those words. Make it "negligent act, error or omission."
2. IN the following sentence, change "statute of limitations" to "statute of repose." It currently reads: "CONSULTANT's indemnification obligation hereunder shall survive the expiration or earlier termination of this Master Agreement until such time as it is determined by final judgment that Claims against the Indemnitees for such matters indemnified hereunder are fully and finally barred as to the Indemnitees by the applicable statute of limitations."

Under the existing language, you will be on the hook for 20 years or more based on when an injury is realized and this is contrary to the purpose of the 10 year state statute of repose.

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3. The same point is applicable to the following paragraph as well: "This survival of indemnity rights shall include, without limitation, those Claims against Indemnitees by the applicable statute of limitations. The survival of indemnity rights shall include, without limitation, those Claims against Indemnitees for which any statutes of limitations are tolled or extended by estoppel, because of repairs made to the Project or other facts, regardless of consent or participation therein by CONSULTANT." However, this sentence appears to also have a typo in it because it doesn't appear to make sense. What are "claims against indemnitees by the applicable statute of limitations."?
4. The following sentence should be deleted or amended" "This indemnity applies to the full scope of liability for which CONSULTANT is individually or jointly and severally liable, and shall not be limited by Consultant's comparative fault as to other parties, except to the extent provided otherwise in Subparagraph 20(b)."

It may be OK to say that Consultant is still responsible to indemnify for damages caused by its negligence even though some other person, including an indemnitee, is also partly responsible due to their own negligence. That is not, however, what this provision appears to state. It is too broad and would suggest that Converse will indemnify for damages beyond those caused by its own negligence. You might fix this by deleting the final phrase which reads: "and shall not be limited by Consultant's comparative fault as to other parties, except to the extent provided otherwise in Subparagraph 20(b)." Replace it with just the opposite of that by stating something more like this: ""and shall be limited to damages to the extent caused by Consultant's negligence, willful misconduct or breach of contract, and as further limited by Subparagraph 20(b)."

### Contract 3:

**Indemnification.** Delete the first FIVE lines of this clause that state Consultant has the same indemnity obligations that the Engineer has agreed to with its client. The Engineer in this case has agreed to an uninsurable indemnity. Specifically, according to the prime contract language which was attached, the Engineer has agreed to indemnify the owner for damages caused "in whole or in part from any negligent act, omission, fault..." The courts interpret this to mean that if BV is even 1 percent responsible for causing any of the damages they must indemnify their client for the full 100 percent of the damages. Applying this same logic to the subcontract it would mean that Converse must do the same. This is unacceptable and uninsurable.

### Contract 4:

**Indemnification.** *Consultant shall take all reasonable precautions to prevent the occurrence of any injury, including death, to any person or any damage to any property arising out of the acts or omissions of the Consultant, its agents, employees, or subcontractors.*

*Consultant shall **defend**, indemnify and hold harmless the Client and its officers, agents, and employees, against all losses, claims, liabilities, damages, and expenses of any nature directly or indirectly arising out of or as the result of any negligent act or omission by Consultant or the employees, agents, or subcontractors of the Consultant, in the performance of this Agreement.*

**COMMENT:** In the above referenced clause the indemnification is reasonable except for the part requiring you to defend. Request that the word "defend" removed.



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### **Contract 5: Add Contractor Indemnification of Design Firm**

Since you have some influence in what language the project owner includes in the construction contract with the contractor, you might include language in your contract with the project owner requiring the owner to include language in its construction contracts requiring the contractor to indemnify you as well as the owner. This will provide you with greater protection against contractor claims or from losses arising out of the contractor's performance of its work. An example of such a clause is the following:

"The Owner will require any Contractor or Subcontractors performing work in conjunction with the Contract Documents for this Project as produced under this Agreement to hold harmless, indemnify and defend, the Owner and the Engineer, their consultants, . from any and all liability claims, losses or damages arising out of or alleged to arise from the Contractor's (or Subcontractor's) performance of the work described in the Contract Documents for this Project...."

### **Contract 6:**

**Indemnification.** With the exception of the "defense" obligation, this is a reasonable indemnification clause, that after expressing details of the indemnification, states: "Notwithstanding the foregoing . . . (ii) Consultant shall only be obligated to indemnify the Indemnified parties to the extent the Liability is determined by a court or forum of competent jurisdiction, mediator or independent third party expert witness to arise from the negligence, intentional acts or willful misconduct of Consultant...."

With regard to the "defense" obligation under this clause, you should be aware that the professional liability policy will not cover your contractual obligation to pay your client's legal fees and costs. That is deemed a contractual liability that you would not have incurred under common law in the absence of the contract language. It is, therefore, excluded under the contractual liability exclusion of the policy.

### **Contract 7:**

**"Indemnification."** This clause states that the Consultant shall "indemnify and hold harmless" the client from damages "caused by or resulting from any negligent act, conduct or omission." The final nine lines of the paragraph state that "in the event Standard Pacific or Indemnitees provide Consultant with any designs whatsoever, such designs are provided merely as a recommendation. If Consultant incorporates such designs into any plans or work which are the subject of the Services, Consultant shall be deemed to have exercised its own professional judgment and adopted such designs as its own and the indemnity provided for herein shall be fully effective."

The first part of this indemnification based upon "negligence" appears to be satisfactory. To the extent that an indemnification obligation arises as a result of negligence in the performance of professional services, the errors & omissions policy will respond, subject to the applicable terms and conditions of the policy. The final nine lines quoted above, however, are problematic. I believe that if the client provides you with sealed plans and specifications of a licensed design professional, you should be entitled to rely upon those documents and should not be expected to review them, second guess them, or do anything with them other than complete its own services in a manner

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consistent with those documents. Consider requesting some clarification to this clause, at least as to the reliance upon design documents prepared by licensed professionals retained by your client.

### Contract 8:

**Indemnity.** The first line in this paragraph states that "Engineers shall indemnify, defend, protect and hold harmless Builder ...."

Since the professional liability policy will not cover your costs to "defend and protect" your client, these two words should be deleted from this article.

The second paragraph of this article states that the indemnification obligations of the Engineer "shall not be limited by the amounts or types of insurance..." (emphasis added).

It is actually preferable to do precisely what the Builder is attempting to prevent, that is, limit Engineer's liability to the insurance coverage required by the contract. With that in mind, consider deleting the italicized words (not and or) in the sentence.

### Contract 9:

**Indemnity.** (a) To the fullest extent permitted by law, Consultant will protect, defend (at Consultant's sole expense and with counsel acceptable to Owner), indemnify and hold free and harmless the Owner... from and against any and all claims ... arising out of or alleged to arise out of ... (i) breach of this Contract ..., or (ii) Consultant's errors, omissions, active or passive negligence and/or willful misconduct in its performance.... (c) Consultant's duty to defend the Indemnitees is separate from, independent of and free-standing of Consultant's duty to indemnify the Indemnitees and applies whether the issue of Consultant's negligence, breach of contract or other fault or obligation has been determined...."

Two aspects of this clause create uninsurable liability. First, the duty to "defend" is uninsurable. It would be advisable to attempt to have the language in (a) concerning the duty to defend removed from that subparagraph. In addition, the entire subparagraph (c) should be deleted. Second, the indemnity language of (ii) requires that the Consultant indemnify the owner for claims arising out of "errors, omissions" without regard to whether those were negligent or not. Moreover, even mere "allegations" of non-negligent errors and omissions" create the duty to defend and indemnify. It would be advisable to attempt to insert the word "negligent" as an adjective immediately prior to the words "errors, omissions."

### Contract 10: Acceptance of Responsibility for "Inaccuracies"

1. "The consultant agrees to report promptly any inaccuracies or discrepancies, of all drawings and other information furnished to Contractor. Consultant agrees to accept responsibility for and pay any associated costs resulting from inaccuracies appearing in the drawings and other information furnished to Contractor, whether said inaccuracies or discrepancies are due to Consultant's work or from consultants hired by Consultant."

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Problem 1: This creates contractual liability by which the consultant agrees to be responsible for every inaccuracy or discrepancy regardless of whether it was within the generally accepted standard of care or was caused by negligence. The E&O policy will only respond to those damages arising out of negligence. Liability that goes beyond damages caused by the negligence of the Consultant are expressly excluded from coverage.

Problem 2: Article xyz of this same agreement requires that the E&O policy include "contractual and prior acts coverage." The only "contractual liability" coverage available under the E&O policy is for that liability arising out of the consultant's negligence. Therefore, the insured and contractor need to understand that the E&O policy will not accept "contractual liability" such as that apparently intended by this contract. To the extent that the consultant agrees to such liability, it does so at its own risk and will not receive the benefit of insurance to cover that risk.

2. Article ABC - Indemnification. "To the fullest extent permitted by law, Consultant shall indemnify, defend (as Consultant's sole expense) and hold harmless the Contractor, Prime Contractor (if any) and owner ... from and against any and all claims.... These indemnity and defense obligations apply to any acts or omissions, and any negligent or willful misconduct of Consultant...."

Problem: The first problem is with the requirement to "defend" the contractor. The should be deleted from the clause. The E&O policy will not cover the costs of defending the contractor. The second problem is that the indemnity agreement itself creates contractual liability going beyond negligence. This is because the word "negligent" has been placed at the end of the clause so that it does not serve as an adjective or modifier of the phrase "apply to any acts or omissions...." As a consequence, the consultant is agreeing to indemnify the contractor for costs arising out of every act or omission even if it meets the standard of care. Again, there is no coverage under the E&O policy for indemnification costs arising out of anything other than the negligent performance by the consultant of professional services. The phrase should be modified to move the word "negligent" up in front of the terms "acts or omissions."

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**Indemnification Clauses** is presented in a three parts discussing the analysis of indemnification clauses in contracts. Future editions of Contract Concerns will provide the remaining parts.

**Part 1** begins with "Issue" and ends with "Conclusion" and is re-printed from a/e ProNet's Risk Management & Contract Guide for Design Professionals by J. Kent Holland, © 2006.

**Part 2** is a series of case notes by Mr. Holland, summarizing developments in the law concerning the application of indemnification clauses and limitation of liability clauses.

**Part 3** contains comments by Mr. Holland on a number of indemnification clauses reviewed from actual contracts. These are offered only for general education purposes and are not to be considered legal opinion or advice. Assistance of qualified counsel and insurance professionals should be sought concerning negotiations of contracts containing indemnification provisions.



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