



May 16, 2012

Ronald W. Brenke, PE  
Executive Director  
American Council of Engineering Companies of Michigan  
215 N. Walnut Street  
Lansing, MI 48933

RE: Insurance Coverage for Indemnification Provision

Dear Mr. Brenke:

The legislators of the State of Michigan should be aware that no professional liability insurance policy indemnifies a party harmed by the professional services of an engineering, architecture, surveying, landscape architecture or construction contractor for anything other than for the costs, losses and damages to the party to the extent they are the result of the policyholder's failure to meet the standard of care for the services performed. Any public entity demanding a contractual indemnification, or defense and indemnification, obligation that goes beyond the proportion of fault attributable to the insured firm's negligently performed professional services or that clearly requires an upfront defense obligation irrespective of fault creates an uninsured business risk to the firm. Prudent firms are therefore forced to internalize the risk.

Requiring anything beyond the normal legal liability of professional service firms to correct harm caused by their negligence creates problems for firms and for public agencies. Doing so stifles competition by eliminating firms that understand and attempt to manage their risk, jeopardizes the financial viability of professional service firms that accept such uninsurable contractual obligations, and probably raises the costs of the services public agencies are procuring.

Contractual indemnity obligations are often meant to shift the liability for many types of exposures. But legislators should understand that nothing in a contractual indemnification provision will enlarge the coverage provided by a professional liability policy. If a policyholder agrees to indemnify and hold the client harmless from damages, costs and losses arising out of personal injury or death and property damage caused by the policyholder's negligent acts, errors or omissions in performing and furnishing services to the extent and in proportion to the policyholder's comparative degree of fault, the indemnification obligation tracks with the scope of the professional liability insurance coverage. If the obligation extends beyond the proportion of policyholder's negligence, that part of the indemnification obligation is not within the coverage. Contractual obligations that go beyond the normal legal liability of a firm trigger the contract liability exclusion in a professional liability insurance policy.

Many public agencies are concerned with the possibility of third-party claims. In most situations involving harm to a third party related to an insured firm's performance of professional services, the professional liability policy would respond if the actual cost, loss or damage was the result of the firm's failure to meet the standard of care for its services. However, neither the CNA program nor any other



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professional liability program of which I am aware, will assume the defense of an indemnitee such as a public entity based solely upon allegations that harm might have been the result of professional negligence in the services provided by the indemnitor. Those allegations must be proven before a professional liability insurance carrier will cover the defense costs through an indemnification agreement.

Professional liability insurance coverage has a very important role in enabling firms to meet the infrastructure design needs of public agencies. It stands behind insured firms and rectifies damages and compensates for harm caused by the failure of an insured firm to perform its professional services in accordance with the standard of care for those services. It facilitates the ability of firms to manage their risk of responding to the public demand for innovative, cost-effective solutions for the creating of capital assets. But it does not respond to contractual obligations assumed by insured firms that require them to indemnify another party for anything other than a cost, loss or damage to the extent caused by the insured firm's negligent performance of professional services.

Please let me know if you have further questions about how unreasonable risk shifting through contractual language is excluded from professional liability insurance coverage.

Sincerely,

Katherine Enos Frownfelter, Esq., Assoc. AIA  
Senior Vice President  
Construction Industry Group

c.c. Stephanie C. Mulligan  
Assistant Vice President  
Professional Underwriters, Inc.

KEF/ksc