ASSOCIATION OF CONSULTING ENGINEERING COMPANIES BRITISH COLUMBIA

ACEC British Columbia Position Paper

Indemnities and Claims Against Individual Engineers

Indemnities

An indemnity clause is a contractual provision that can operate to extend a consulting engineer's liability beyond the scope generally recognized by law and beyond the scope of professional liability coverage.

Indemnity provisions are a common source of dispute during contractual negotiations, often due to a lack of understanding of their legal implications. Clients, particularly large project owners, will typically seek to have consultants provide a contractual indemnity similar in nature to the indemnities given by contractors. Contractors, however, are in a much different position from consulting engineers on a construction project. Contractors assume control of an owner's property, and occupy it for the purpose of constructing the project. It is often therefore reasonable for the owner to ask the contractor to indemnify the owner for all damage or injury that arises on the site. The same logic does not apply to consulting engineers. Consulting engineers do not occupy or exercise control over the site. Consulting engineers also do not control the workers or the manner in which the work is carried out. Consulting Engineers should not be prepared to accept indemnity clauses which cause them to assume liability greater than what would otherwise be imposed by law.

Indemnity clauses are often easy to identify in a contract. They use terms such as:

> *"The Consultant shall defend, indemnify and hold harmless..."*
>
> *"The Consultant assumes the responsibility and liability for..."*

If one identifies this language in a contract, the clause should be reviewed carefully to assess its potential for unnecessarily expanding the consulting engineer's exposure to liability.

Our courts have identified three elements which define an engineer's liability to its client. First, the damages suffered by the client must be reasonably foreseeable. Second, the engineer must have been negligent in carrying out its services. Third, the engineer's negligence must have "caused" the damage.

Many indemnity provisions seek to expand liability well beyond this scope. For example, a recent standard form agreement reviewed by ACEC British Columbia included an indemnity provision with language similar to the following:

> *"The Consultant hereby assumes the entire responsibility and liability for all damage and injury of any kind and nature whatsoever, caused by, resulting from, arising out of, incidental to, or accruing in connection with the Contract or the Services, ..."*

An engineer who agrees to such a term does so at significant risk. Such a clause has no limits on the type of damage recoverable (the damages need not be foreseeable or even expected or anticipated by the parties at the time the contract was entered into). Further, liability falls upon the engineer without a need to establish negligence or fault. Instead the engineer has simply assumed responsibility for the client's losses.

Lastly, and perhaps most significant for many consulting engineers, the liability assumed under an indemnity may not be insurable. Most, if not all, professional errors and omissions policies specifically exclude coverage for any claim arising as a result of liability assumed by the insured under a hold

harmless or indemnity clause. It is therefore important that prior to agreeing to any indemnity clause, an engineer seek advice from an insurance broker, insurer or lawyer regarding potential uninsured exposure.

A standard indemnification clause developed by ACEC British Columbia and adopted for use by all provincial ministries and ENCON Insurance Managers Inc. reads as follows:

> *"Notwithstanding the provision of insurance coverage by the Client, the Engineer hereby agrees to indemnify and save harmless the Client, its successor(s), assign(s) and authorizes representative(s) and each of them from and against losses, claims, damages, actions, and causes of action, (collectively referred to as "Claims") that the Client may sustain, incur, suffer or be put to at any time either before or after the expiration or termination of this Agreement, that arise out of errors, omissions or negligent acts of the Engineer or their Subconsultant(s), servant(s), agent(s) or employee(s) under this Agreement, excepting always that this indemnity does not apply to the extent, if any, to which the Claims are caused by errors, omissions or the negligent acts of the Client, its other consultant(s), assign(s) and authorized representative(s) or any other persons."*

ACEC 31, GC 14.10 also is an acceptable indemnification clause for use.

Claims Against Individuals

While a client contracts with a consulting engineering firm, the courts in British Columbia have determined that employee engineers who actually carry out the services may individually owe a duty of care to the client and may be personally liable if those services are negligently performed. The British Columbia Supreme Court described its view on this issue as follows:

> *"It cannot be plausibly argued that a limited company purporting to offer professional services of "consulting engineers" and indicating that its employees have special skill and experience is not inducing its clients to rely on those individuals' expertise."*

As a result of the current state of the law, steps should be taken to protect the personal interest of the engineers employed with consulting engineering firms. It is recommended that all members incorporate a term in Client-Consultant Agreements that specifically excludes employees (and others providing services for the company) from liability to the client.

ACEC 31, Clause GC 14.7 limits claims against individuals:

> ***GC 14.7*** *Where the Engineer is a corporation or partnership, the Client and Consultants of the Client will limit any claim they may have to the corporation or partnership, without liability on the part of any officer, director, member, employee, or agent of such corporation or partnership.*

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