



**Association of
Environmental
Professionals**

Use of Indemnity Clauses in Consultant Contracts

The Association of Environmental Professionals Is:

A not-for-profit association founded in 1974 by public and private sector professionals with a common interest in serving the principles underlying the California Environmental Quality Act (CEQA). The specific and primary purposes of the association are to establish and operate a professional association of persons involved in and committed to improving the processing and implementation of environmental assessment, analysis, and reporting.

The AEP Membership

- Our membership consists of environmental professionals with expertise in environmental sciences, air quality, biology, archaeology and paleontology, land use planning, transportation, engineering, land use and environmental law, and other disciplines integral to the environmental review process.
- Our role is to represent common interests of environmental professionals, including but not limited to private consultants, public officials, and federal, state, regional, and local government staff.
- Our members are responsible for implementation of California's most important environmental protection laws, including CEQA, the California Endangered Species Act, the Global Warming Solutions Act, the Natural Communities Conservation Planning Act, the Planning and Zoning Law, and many others.

Mission of AEP

To enhance, maintain, and protect the quality of natural and human environment; encourage and carry on research and education for the benefit of the public and concerned professionals in all fields related to environmental planning and analysis; improve communication and advance the state of the art among people who deal with the environmental planning, analysis and evaluation process; and improve public awareness and involvement in the environmental planning, analysis, and review process.

Issue

A significant number of our members are employed by private consulting firms providing a variety of environmental services to public agencies. In recent years, public agencies have been forcing private contractors to agree to very harsh indemnification clauses in an effort to shift liability from the public agency to private contractors. These clauses have the potential to shift to environmental professionals many significant risks that may not be covered under their professional liability insurance (PLI) policy. To assist our members, AEP has prepared this issue paper to provide information on the use of indemnity clauses and provide some basic advice to help reduce the risk for environmental professionals related to inappropriate indemnification clauses.

Enhance, Maintain, & Protect
The Natural and Human Environment



ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS

What Are Indemnification Clauses Intended to Do?

Indemnification clauses are utilized to shift risk from one party to another. Commonly, the contractor is asked to assume the liability of the client for claims and expenses rising from the service provider's work undertaken for the client. In concept, this seems reasonable in that the party performing the services should bear the risk related to their negligent performance of the work. However, in practice, some clients seek to shift additional risk that is beyond the control of the environmental professional or that extends beyond basic negligence-based liability.

Legislative Background

In the recent past, the Legislature has enacted a number of measures intended to address the use of certain types of risk shifting in indemnity agreements, particularly those that appear in contracts for residential construction and public works. In 2005, AB 758 (Calderon, Chapter 394, Statutes of 2005) was enacted to address alleged abuses of "Type I" indemnification clauses in contracts imposed on subcontractors by builders. These clauses typically required the subcontractor to assume liability for the builder's negligence and misconduct, beyond what the subcontractor would be obligated to pay under tort law in the absence of the Type I agreement. Under AB 758, all provisions contained in residential construction contracts entered into after January 1, 2006, that purport to indemnify the builder by a subcontractor against liability for claims of construction defects are unenforceable to the extent the claims pertain to, or relate to the negligence of the builder or his or her agents. These provisions of existing law may not be waived or modified by contractual agreement, act, or omission of the parties.

The following year, the Legislature built upon AB 758 by enacting AB 573 (Wolk, Chapter 455, Statutes of 2006) in response to concerns that local public agencies were requiring broad indemnity agreements in contracts with design professionals. Those agreements were generally requiring the design professional to hold the public agency harmless against the conduct of the public agency or other third parties in a public works project. AB 573 provided that, for contracts entered into on or after January 1, 2007, with a public agency for design professional services, all provisions that purport to indemnify the public agency against liability for claims against the public agency, are unenforceable, except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional.

That same year, the Legislature enacted SB 138 (Calderon, Chapter 32, Statutes of 2007), which provided that in residential construction contracts, provisions that purported to require subcontractors to indemnify a general contractor or contractor not affiliated with the builder would be unenforceable to the extent they related to the negligence of the non-affiliated general contractor or contractor. SB 138 sought to end a practice in residential construction contracting where existing laws limiting risk shifting agreements were being circumvented through hiring an unaffiliated general contractor or contractor to act in the builder's stead in contracting with subcontractors.

Subsequently, AB 2738 (Jones, Chapter 467, Statutes of 2008) was enacted as a follow up to AB 758 due to concerns that builders had been circumventing the intent of AB 758 by requiring subcontractors to pay for the builder's defense costs that had no relation to the contractor's work. AB 2738, among other things, provided that a subcontractor would have no defense or indemnity obligation to a builder or general contractor for a construction



ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS

defect claim unless, and until, the builder or general contractor provides a written tender of the claim to the subcontractor which includes all of the information provided to the builder or general contractor by the claimant or claimants relating to claims caused by that subcontractor's scope of work.

SB 972 (Wolk, Chapter 510, Statutes of 2010) was enacted to address issues left unresolved by prior legislation with respect to a design professional's exposure to liability for defense costs in indemnity agreements contained in contracts with public agencies. SB 972 provided, with respect to contracts and solicitation documents between design professionals and public agencies, that all provisions which purport to require the design professional to defend the public agency under an indemnity agreement, including the duty and the cost to defend, are unenforceable, except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional.

Most recently, SB 496, approved by Governor Jerry Brown on April 28, 2017, amends California Civil Code Section 2782.8 to apply to all design service contracts entered into by design professionals on or after January 1, 2018. The amendment takes effect in 2018 and limits indemnification obligations, including the duty and cost to defend, that may be imposed on design professionals with respect to all service contracts. SB 496 extends favorable limits on indemnification that, under existing law, apply only to design service contracts with public agencies. Design professionals include all licensed architects, licensed landscape architects, registered professional engineers, and licensed professional land surveyors. Unfortunately, it does not include planners or environmental professionals.

Problematic Language

Duty to Defend — Watch for duty to defend clauses that are broader than the duty to indemnify. Do not agree to defend a client whereby the consultant is providing the defense and paying the costs of the defense from the moment a suit is filed or a claim has been made, without knowing whether there is any alleged negligence on your part. If there is no claim of negligent actions or errors against the Consultant, do not agree to liability that goes beyond "liability that would have attached in the absence of the contractual commitment." If so, you may not have insurance coverage. In addition, no professional liability policy is priced to include the cost of defending a client against claims that might have some relationship to the services provided by a consultant, but are not be related to your negligence or potential negligence.

"Agents, representatives, subsidiaries, affiliated companies, and lenders" — Watch for overly broad "additional parties" terms. Delete any references to "agents, representatives, subsidiaries, affiliated companies, and lenders." Limit Indemnified Parties to your client, its officers, directors, and employees.

"Any and All" – The wording "any and all" is too broad and implies application of the indemnification to claims that may not relate to negligence.

Lack of Negligence Standard – In order for any indemnification provision to be insurable, it must be tied to the Consultant's negligence. Look out for provisions that fail to include a reference to negligence.



ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS

Attorney's fees – Whenever “attorney's fees” are included in an indemnification provision, it needs to be modified to read, “attorney's fees where recoverable under applicable law on account of negligence.” This is important as not all jurisdictions allow for the recovery of a plaintiff's legal costs against the consultant as a matter of law.

Lack of Proportional Liability – The phrase, “in whole or in part,” should be deleted because leaving it in creates a potential uninsured exposure. It makes the Consultant potentially responsible to indemnify the client 100%, even if the consultant is “in part” negligent by only 1%. Your professional liability insurance policy only covers you for your share of the liability. Anything beyond that is an assumed contractual liability excluded under your professional liability policy since it goes beyond your responsibility under a common law standard of negligence.

Conclusion

Consultants are judged by whether or not they satisfied the professional standard of care (i.e., were not negligent in the performance of their services). That is what is covered under a professional liability policy; therefore, it is critical that the indemnification obligations be limited to damages to the extent caused by the consultant's negligence. Anything more is barred from coverage pursuant to the contractual liability exclusion of the professional policy. By agreeing to more than that, the consultant effectively agrees to a higher standard of care that is uninsurable. When dealing with these types of liability clauses, AEP recommends that consultants check with their insurance carrier before agreeing to those terms.

AEP will continue to work with our State Lobbyist to find opportunities to address this issue through legislation. However, each of the bills described above was a major battle. With SB 496, it was a battle involving labor, local governments, and others, and the only reason the bill passed is because it became part of the deal to get Senator Cannella to vote for SB 1 (the gas tax). If it weren't for that deal, the SB 496 was not going to pass.

If you have any questions regarding the information contained herein, please contact William Halligan, Esq., President, Association of Environmental Professionals, at whalligan@placeworks.com.

Examples

The following are examples of problematic indemnification clauses that would most likely not be covered by your professional liability insurance (PLI) policy.

Example 1

8. INDEMNIFICATION

(a) Indemnity for professional liability

When the law establishes a professional standard of care for Consultant's Services, to the fullest extent permitted by law, Consultant shall indemnify, protect, defend and hold harmless the City and any and all of its officials, employees and agents (“Indemnified Parties”) from and against any and all losses, liabilities, damages, costs and expenses, including legal counsel's fees and costs caused in whole or in part by any negligent or wrongful act, error



ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS

or omission of Consultant, its officers, agents, employees or Subconsultants (or any agency or individual that Consultant shall bear the legal liability thereof) in the performance of professional services under this Agreement.

(b) Indemnity for other than professional liability

Other than in the performance of professional services and to the full extent permitted by law, Consultant shall indemnify, defend and hold harmless City, and any and all of its employees, officials and agents from and against any liability (including liability for claims, suits, actions, arbitration proceedings, administrative proceedings, regulatory proceedings, losses, expenses or costs of any kind, whether actual, alleged or threatened, including legal counsel fees and costs, court costs, interest, defense costs, and expert witness fees), where the same arise out of, are a consequence of, or are in any way attributable to, in whole or in part, the performance of this Agreement by Consultant or by any individual or agency for which Consultant is legally liable, including but not limited to officers, agents, employees or subcontractors of Consultant.

(c) DUTY TO DEFEND. In the event the City, its officers, employees, agents and/or volunteers are made a party to any action, claim, lawsuit, or other adversarial proceeding arising from the performance of the services encompassed by this Agreement, and upon demand by City, Consultant shall have an immediate duty to defend the City at Consultant's cost or at City's option, to reimburse the City for its costs of defense, including reasonable attorney's fees and costs incurred in the defense of such matters.

Payment by City is not a condition precedent to enforcement of this indemnity. In the event of any dispute between Consultant and City, as to whether liability arises from the sole negligence of the City or its officers, employees, or agents, Consultant will be obligated to pay for City's defense until such time as a final judgment has been entered adjudicating the City as solely negligent. Consultant will not be entitled in the absence of such a determination to any reimbursement of defense costs including but not limited to attorney's fees, expert fees and costs of litigation.

Example 2

12.0 INDEMNITY

12.1. To the maximum extent permitted by law— including, but not limited to, California Civil Code Section 2778—CONSULTANT, its employees, agents, Subconsultants, and persons whom CONSULTANT employs or hires (individually and collectively, "CONSULTANT INDEMNITOR") shall indemnify, defend, and hold harmless CITY, its officers, agents, employees, and representatives (individually and collectively, "CITY INDEMNITEE") from and against a "liability" [as defined in Subparagraph (A) below], or an "expense" [as defined in Subparagraph (B) below], or both, that arise out of, pertain to, or relate to an act, error, or omission of a CONSULTANT INDEMNITOR:

(A) "Liability" means claims, suits, actions, causes of action, proceedings, judgments, decrees, awards, settlements, liens, losses, damages, injuries, or liability of any kind, whether the liability is:

- (1) Actual or alleged;
- (2) In contract or in tort; or
- (3) For bodily injury (including accidental death), personal injury, advertising injury, or property damage.

(B) "Expense" means fees, costs, sums, penalties, fines, charges, or expenses of any kind, including, but not limited to:

- (1) Attorney's fees;
- (2) Costs of an investigation, litigation, arbitration, mediation, administrative or regulatory proceeding, or appeal;
- (3) Fees of an accountant, expert witness, consultant, or other professional; or



ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS

(4) Pre or post: judgment interest or settlement interest.

12.2. Under this Article, CONSULTANT INDEMNITOR's defense and indemnification obligations:

(A) Apply to a liability, or an expense, or both, that arise out of, pertain to, or relate to the actual or alleged passive negligence of a CITY INDEMNITEE; but

(B) Do not apply to a liability, or an expense, or both, that arise out of, pertain to, or relate to the sole active negligence or willful misconduct of a CITY

INDEMNITEE.

12.3. To the extent that CONSULTANT INDEMNITOR's insurance policy provides an upfront defense to CITY, CONSULTANT INDEMNITOR's obligation to defend a CITY INDEMNITEE under this Article:

(A) Means that CONSULTANT INDEMNITOR shall provide and pay for legal counsel, acceptable to CITY, for the CITY INDEMNITEE;

(B) Occurs when a claim, suit, complaint, pleading, or action against a CITY INDEMNITEE arises out of, pertains to, relates to, or asserts an act, error, or omission of CONSULTANT INDEMNITOR; and

(C) Arises regardless of whether a claim, suit, complaint, pleading, or action specifically names or identifies CONSULTANT INDEMNITOR.

12.4. Paragraph 12.3 does not limit or extinguish CONSULTANT INDEMNITOR's obligation to reimburse a CITY INDEMNITEE for the costs of defending the CITY INDEMNITEE against a liability, or an expense, or both. A CITY INDEMNITEE's right to recover defense costs and attorney's fees under this Article does not require, and is not contingent upon, the CITY INDEMNITEE's first:

(A) Requesting that CONSULTANT INDEMNITOR provide a defense to the CITY INDEMNITEE; or

(B) Obtaining CONSULTANT INDEMNITOR's consent to the CITY INDEMNITEE's tender of defense.

12.5. If CONSULTANT subcontracts all or any portion of the Services under this Agreement, CONSULTANT shall provide CITY with a written agreement from each Subconsultant, who must indemnify, defend, and hold harmless CITY INDEMNITEE under the terms in this Article.

12.6. CONSULTANT INDEMNITOR's obligation to indemnify, defend, and hold harmless CITY will remain in effect and will be binding upon CONSULTANT INDEMNITOR whether the liability, or the expense, or both, accrues— or is discovered— before or after this Agreement's expiration, cancellation, or termination.

12.7. Except for Paragraph 12.3, this Article's indemnification and defense provisions are separate and independent from the insurance provisions in Article 11. In addition, the indemnification and defense provisions in this Article:

(A) Are neither limited to nor capped at the coverage amounts specified under the insurance provisions in Article 11; and

(B) Do not limit, in any way, the applicability, scope, or obligations of the insurance provisions in Article 11.

Example 3

15. INDEMNIFICATION

[RFP No. B2016-62 Consulting Services Agreement over \$40000.6doc] CONSULTANT will indemnify, defend, and hold harmless CITY, the Successor Agency to the Former Redevelopment Agency of the City of XXXXXX, the City Council, each member thereof, present and future, members of boards and commissions, their officers, agents, employees and volunteers (collectively "City Affiliates") from and against any and all liability, expenses, including



ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS

defense costs and legal fees, and claims for damages whatsoever, including, but not limited to, those arising from breach of contract, bodily injury, death, personal injury, property damage, loss of use, or property loss however the same may be caused and regardless of the responsibility for negligence. The obligation to indemnify, defend and hold harmless includes, but is not limited to, any liability or expense, including defense costs and legal fees, arising from the negligent acts or omissions, or willful misconduct of CONSULTANT, its officers, employees, agents, subCONSULTANTS or vendors. CONSULTANT's obligations to indemnify, defend and hold harmless will apply even in the event of concurrent negligence on the part of City Affiliates, except for liability resulting solely from the negligence or willful misconduct of City Affiliates. Payment by CITY is not a condition precedent to enforcement of this indemnity. In the event of any dispute between CONSULTANT and CITY, as to whether liability arises from the sole negligence of City Affiliates, CONSULTANT will be obligated to pay for the defense of City Affiliates until such time as a final judgment has been entered adjudicating City Affiliates as solely negligent. CONSULTANT will not be entitled in the event of such a determination to any reimbursement of defense costs including but not limited to attorney's fees, expert fees and costs of litigation.

Example 4

Consultant shall indemnify, defend and hold harmless the Client, the Client's employees, directors, officers, agents, representatives, subsidiaries, affiliated companies, and lenders from and against any and all liability, costs and expenses including, but not limited to, attorney's fees, that occurred in whole or in part, as a result of the Consultant's acts, errors or omissions.



ASSOCIATION OF
ENVIRONMENTAL
PROFESSIONALS

This page intentionally left blank.