

INDEMNITY AGREEMENTS IN STANDARD DESIGN CONTRACTS

Recently, I heard several views expressed concerning indemnity agreements in design and construction documents. The discussion particularly focused upon the practice of requesting prime and subcontractor to indemnify the owner and architect or engineer against their own negligence.

The standard contracts of the American Institute of Architects and the National Society of Professional Engineers for EJCDC contain indemnification provisions.

The AIA Document A201 - 2007, § 3.18 INDEMNIFICATION provides as follows:

§ 3.18.1 To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

§ 3.18.2 In claims against any person or entity indemnified under this Section 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Section 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

In EJCDC C-700 - 2007, the indemnification is found in § 6.20 and provides as follows:

A. To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, members, partners, employees, agents, consultants and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to the performance of the Work, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or

to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom but only to the extent caused by any negligent act or omission of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable.

B. In any and all claims against Owner or Engineer or any of their officers, directors, members, partners, employees, agents, consultants, or subcontractors by any employee (or the survivor or personal representative of such employee) of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, the indemnification obligation under Paragraph 6.20.A shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Contractor or any such Subcontractor, Supplier, or other individual or entity under workers' compensation acts, disability benefit acts, or other employee benefit acts.

C. The indemnification obligations of Contractor under Paragraph 6.20.A shall not extend to the liability of Engineer and Engineer's officers, directors, members, partners, employees, agents, consultants and subcontractors arising out of:

1. the preparation or approval of, or the failure to prepare or approve maps, Drawings, opinions, reports, surveys, Change Orders, designs, or Specifications; or
2. giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.

I do not believe that either of these sections have been interpreted by an appellate court in Wisconsin. Under § 3.18 of AIA Document A201 - 2007, the *contractor* is the indemnitor and the owner, architect, architect's consultants and their agents and employees, are the indemnitees. Under EJCDC C-700 - 2007, the contractor is the indemnitor and the owner, engineer, and their officers, directors, members, partners, employees, agents, consultants and subcontractors are the indemnitees. However, the use of the word *subcontractors* among the indemnitees is confusing but maybe no doubt meant to refer to the subcontractors of the owner or engineer and not the subcontractor of the contractor.

The question arises whether the indemnity provisions in AIA Document A201 - 2007 and

EJCDC C-700 - 2007, are intended to include an indemnification by the contractor against damages or injuries resulting from the architect's or engineer's own negligence, or the owner's own negligence. The answer to that question is arguably different between the two standard documents.

Under § 3.18 of AIA Document A201 - 2007, the indemnification of any damage, loss, or expense in the form of bodily injury or property damage is “only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, or anyone directly or indirectly employed by them or anyone from whose acts they may be liable...” But the sentence continues with the additional phrase, “regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.” That phrase clearly conveys the meaning that the contractor is indemnifying the owner and the design professional against the owner or the design professional's own negligence. However, that phrase does not call for indemnification for the owner's or design professional's *sole negligence*. Rather, the indemnification by the contractor is effective even though the owner or the architect is *partially* responsible for the injury or the property damage.

Under EJCDC C-700 - 2007, the indemnity provision found in § 6.20 A. contains the limiting phrase, “but only to the extent caused by any negligent act or omission of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable.” Therefore, under § 6.20 A., the contractor only indemnifies the owner and design professional against the contractor's negligence, leaving the owner and design professional responsible for their own negligence, whether sole or partial.

EJCDC C-700 - 2007, § 6.20 C. also clarifies that the indemnification obligations of the

contractor does not extend the indemnification to the engineer, its officers, directors, members, partners, employees, agents, consultants or subcontractors arising out of the preparation or approval of, or the failure to prepare or approve maps, Drawings, opinions, reports, surveys, Change Orders, designs or Specifications; or the giving of directions or instructions, or failing to give them, if that is the primary cause of the injury or damage. It appears to this writer that the indemnity called for by EJCDC C-700 - 2007, § 6.20 C. is a more reasonable risk sharing provision than that found in AIA Document A201 - 2007 § 3.18. As the reader can quickly detect, these indemnification provisions are fertile ground for judicial interpretation and argument.

In the next issue of this publication I will discuss whether the provisions are likely to fall within the statutory restrictions found in § 895.447 of the Wisconsin Statutes (formerly § 895.49), which provides:

895.447 Certain agreements to limit or eliminate tort liability void.

- (1) Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void.
- (2) This section does not apply to any insurance contract or worker's compensation plan.
- (3) This section shall not apply to any provision of any contract, covenant or agreement entered into prior to July 1, 1978.