Design Professional Indemnification Clauses: Are You Overexposed?

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Introduction to Indemnification Clauses

- Also known as "hold harmless agreements."

- Contractual agreement whereby A (indemnitor) agrees to protect B (indemnitee) from certain monetary damages.

- Problematic because they can hold engineers responsible for damages caused by negligence of an owner, contractor, or others.
Example of a Common Indemnity Provision

“To the fullest extent permitted by Laws and Regulations, and in addition to any other obligations of Contractor under the Contract or otherwise, 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.”

EJCDC C-700 7.18
What if roles are reversed?

“To the fullest extent permitted by Laws and Regulations, and in addition to any other obligations of ENGINEER under the Contract or otherwise, ENGINEER shall indemnify and hold harmless Owner and Contractor, 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 ENGINEER, any Sub-consultant, 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.”

EJCDC C-700 7.18 (modified)
When Does an Indemnity Clause Go Too Far?

In other words, when is the clause too broad?

- NC has an anti-indemnity statute that declares certain indemnity provisions unenforceable as a matter of public policy.

N.C. Gen. Stat. § 22B-1: “Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable. Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees . . . ”
N.C. Gen. Stat. § 22B-1

- Voids agreements that indemnify against liability caused “in whole or in part” by indemnitee’s negligence.

- Does not prohibit engineer from indemnifying another party for engineer’s sole negligence.

- Despite §22B-1’s protection against broad indemnity clauses, sometimes they can be valid & enforceable if void language can be redacted without altering remaining contract language.
So, Two Aspects of Indemnity Clauses Determine Whether They’ll Be Enforceable in NC:

• (1) whether indemnity provision seeks to protect a negligent party against *its own negligence*, as opposed to the sole negligence of the indemnifying party

• and (2) whether any offending indemnity provision can be *adequately excised* from the remainder of the agreement.
Other States

Like South Carolina, Virginia, West Virginia, Georgia, and Tennessee have similar provisions.
Best Practice Tips

• When reviewing indemnity clauses, look for language such as “to the fullest extent permitted by law” or “as permitted by law” at beginning of clause.

• This language is cited as a factor in finding an indemnity clause enforceable or could support argument for court to strike offending provisions of the clause.
**Other Indemnity Pitfalls**

- Even if indemnity clause complies with NC law, it can still be problematic for engineers.

- **Example 1:** A provision that makes *attorneys fees* recoverable pursuant to the indemnity clause.
  - “To the fullest extent permitted by law, Engineer agrees to indemnify & hold harmless Owner, the officers, directors, employees, agents, **parents**, subsidiaries & affiliates of each of them ("Indemnified Parties" or individually, "Indemnified Party"), from & against all claims, losses, liabilities, judgments, damages, costs, expenses, demands & suits (**including but not limited to attorney’s fees**), experts, consultants, arbitrator(s) fees & arbitration administrative costs, and all other costs of (litigation/arbitration) arising out of or related to, or alleged to arise out of or be related to the performance, condition or existence of Engineer’s work under this Contract, or the work of its [Subcontractor/Sub-subcontractor] or anyone directly or indirectly employed by Engineer or for whom Engineer may be liable, regardless of whether such claim, damage, loss or expense is caused in whole or in part by the negligence or culpable conduct of any Indemnified Party.”

- **Example 2:** A provision that includes a “**duty to defend**” on behalf of the indemnified party.
**Duty to Defend**

**Example:** “Engineer shall: (i) at its own cost, expense and risk, defend any and all claims, demands and suits defined in this Contract that may be brought or instituted against any Indemnified Party by any third party, including but not limited to any governmental, state or local agency, or any employee of the Engineer and any party for whose acts they may be responsible; and (ii) reimburse the Indemnified Parties for any and all legal costs (including attorney’s fees) and related expenses incurred by any of them in connection herewith or in enforcing the indemnity granted in this Section”

- **Broader** than duty to indemnify & obligates indemnitor to provide indemnitee with a defense without regard to whether its ultimately required to indemnify indemnitee for any losses.
Limitation of Liability Clauses

• NC courts have upheld the enforceability of limitation of liability clauses and have not held that they violate § 22B-1.

• Courts in North Carolina have held that § 22B-1 applies to agreements seeking to hold one party responsible for the negligence of another & not to agreements to limit or cap liability.
“ENGINEER AND CLIENT AGREE THAT ENGINEER’S (INCLUDING ENGINEER’S OFFICERS, DIRECTORS, MEMBERS, PARTNERS, AGENTS, AND EMPLOYEES) TOTAL LIABILITY TO THE CLIENT AND TO ANYONE CLAIMING BY, THROUGH, OR UNDER THE CLIENT FOR ANY AND ALL INJURIES, CLAIMS, LOSSES, COSTS, DAMAGES, AND EXPENSES ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE SERVICES PERFORMED HEREUNDER, WHETHER ARISING IN CONTRACT, TORT, EQUITY, STRICT LIABILITY, BY STATUTE, OR OTHERWISE, SHALL BE LIMITED TO $25,000 OR ENGINEER’S TOTAL FEE FOR THE SERVICES PERFORMED HEREUNDER, WHICHEVER IS GREATER.”
Incorporation by Reference

- Common for written contract to incorporate numerous other documents, even other contracts, by reference.
  - **Example:** If a document incorporated by reference into a written contract contains an **arbitration clause**, such clause might be **binding** on the parties.

- Carefully examine documents to see whether the document containing the clause purported to be incorporated by reference was actually was incorporated into the contract.
  - **Example:** City opted not to use the standard general conditions commonly used on the particular type of federally-funded contract & substituted conditions more to city's liking. The general conditions selected by city & incorporated into contract didn’t contain the arbitration clause providing for mandatory arbitration that was commonly used on those projects. Thus, city wasn’t required to arbitrate disputes with defendant engineering company that arose from construction of improvements at wastewater treatment plant. **City of Statesville v. Gilbert Engineering Co.**
REMEMBER

ALWAYS MAKE SURE THAT A CONTRACT FOR WORK IN NC IS GOVERNED BY NC LAW.