

▶ *Hanover Architects & Engineers Advantage*

## Connecting the Dots: Indemnities and Additional Insured Endorsements

Much has been written on the pitfalls of indemnities and what design professionals and surveyors can do to protect themselves against assuming the uninsurable risks that can accompany these contract provisions. Assuring that indemnity provisions do not require an affirmative defense or the assumption of liability for the wrong doings of others is critical to making sure that professional liability insurance coverage is available. Equally important is including similar provisions in all contracts for construction that protect design professionals and surveyors against construction-related liabilities. Design professionals and surveyors must connect the dots from start to finish making certain that appropriate indemnity and additional insured requirements are included in contracts for construction.

**Contractor Indemnities**—Construction is an inherently risky endeavor where providing a safe working environment and protecting the general public is of paramount importance. As an integral part of their risk management programs, contractors rely on general liability insurance for protection against third-party bodily injury and property damage liabilities. While the vast majority of these third-party liabilities arise out of the contractor's operations, it is not at all uncommon for one or more design team members to be sued along with the contractor. To combat these often unwarranted, but unavoidable lawsuits, design professionals and surveyors should seek the protection provided by contractor indemnities that recognize the contractor's responsibility for construction-related risks.

**Additional Insured Endorsements**—Being an additional insured on the contractor's general liability insurance policy is equally important. Additional insureds can be provided with an

immediate defense in cases where the alleged liability is clearly construction-related. Having this "up front" defense avoids "out of pocket" legal expenses and eliminates the need to seek reimbursement of these costs from the contractor. Additional insured endorsements, however, are constantly changing and coverage varies from insurance company to insurance company. Design professionals and surveyors need to work closely with project owners, clients and their insurance professional to secure the best additional insured endorsement available.

As a cautionary note, being an additional insured on the contractor's general liability insurance policy is not a panacea for, or a shield against, professional liability claims. Most general liability insurance policies exclude professional liability claims. Therefore, any third-party claims that relate to negligence in the performance of professional services will very likely be denied by a contractor's general liability insurer.

### Include Protection in Your Professional Services

**Agreements**—Design professionals and surveyors do not always have direct involvement in developing construction contract provisions. Therefore, it is important to include language in professional service agreements that directs the contractor to name the design professional or surveyor as an additional insured on the contractor's general liability insurance policy. Professional services agreements should also require the contractor to indemnify the design professional or surveyor for liability arising out of construction-related risks.

### Use Association Construction Contract Forms—

The American Institute of Architects (AIA) and the Engineers Joint Contracts Committee (EJCDC) standard construction contract forms provide for indemnity and additional insured protection:

## AIA

### Article 3 Contractor

**§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, damage, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease, death, or to injury, to 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 are 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.*

### Article 11 Insurance And Bonds

**"§11.1.4** *The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Client, the **Architect and the Architect's Consultants** as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations....."*

## AIA A201–2007: General Conditions of the Contract for Construction

### EJCDC

### Article 5—Bonds And Insurance

**5.04 B.1.** *with respect to insurance required by Paragraphs 5.04.A.3 through 5.04.A.6 inclusive, be written on an occurrence basis, include as **additional insureds** (subject to any customary exclusion regarding professional liability) Owner and **Engineer**, and any other individuals or entities identified in the Supplementary Conditions, all of whom shall be listed as additional insureds, and include coverage for their respective officers, directors, members, partners, employees, agents, consultants, and subcontractors of each and any of all such additional insureds, and the insurance afforded to these additional insureds shall provide primary coverage for all claims covered thereby;*

### Article 6—Contractor's Responsibilities

**6.07 C.** *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 any infringement of patent rights or copyrights incident to the use in the performance of the Work or resulting from the incorporation in the Work of any invention, design, process, product, or device not specified in the Contract Documents.*

# EJCDC C-700 2007: Standard General Conditions of the Construction Contract

**What's in a Name**—“Architect”, “Engineer”, “Consultant”, “Surveyor”, “Contractor” and other similar terms are often used to describe the contracting parties in the design and construction process. But if these terms are not consistently defined across all design-construction contracts, indemnifying the “Consultant” in a construction contract, may not provide protection to an “Engineer” as defined in the owner engineer agreement. To avoid this disconnect, design professionals and surveyors should attempt to be a specifically-named additional insured and indemnified party in construction contracts.

**Trust But Verify**—Having taken the steps to assure that indemnity and additional insured requirements are addressed in their professional services agreements, design professionals and surveyors need to verify that these requirements are included in the contracts for construction and reflected on contractor certificates of insurance. If not involved in developing the contract, design professionals and surveyors should always ask for an opportunity to review the construction contracts. Checking the insurance certificates to assure that the contractor has followed through in naming the design professional and surveyor as additional insureds is also important.

## **Involve Insurance Professionals and Legal Counsel**

Design professionals and surveyors should always consult with their insurance professional and legal counsel in developing and reviewing indemnity and additional insured provisions. The enforcement of indemnities varies greatly from state to state and additional insured endorsements offered by insurance carriers differ.

**Additional Source Information**—A summary of an actual Hanover professional liability claim is included as an attachment. The summary chronicles the real world issues of indemnities and additional insured endorsements that design professionals and surveyors can face when drawn into a construction-related bodily injury claim.

Taking time to connect the dots that make contractor indemnity and additional insured requirements work is good risk management. Include the appropriate contract provisions in client agreements. Make sure these provisions are reflected in construction contracts and certificates of insurance. Contractual risk transfer takes many shapes and forms and often goes beyond the language in your professional services agreements. Allocating construction risks to the contractor is not unreasonable. It's an allocation of risk that's fair, equitable and appropriate.

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