AIA Best Practices:
Indemnifying subconsultants: What you need to know

Contributed by Victor

Summary

The implicit indemnification of subcontractors has become an explicit clause in some agreements. Architects seeking to eliminate contractual ambiguity should check with their insurer before adding indemnification language, as modeled in the sample below, to an agreement.

Consult your attorney: *This information is not a substitute for legal advice. Readers are strongly urged to consult an attorney for advice regarding any matter related to indemnification of subconsultants.*

Vicarious liability

As a general rule, an architect is vicariously liable for the negligence of any subconsultants whose services are employed on a project. The architect is required under common law to indemnify the subconsultant for any costs, losses, or damages to the subconsultant caused by the architect's negligence on a project. That's true whether or not the indemnification is explicitly stated in a written agreement between the parties.

In some cases, however, a subconsultant may want the architect to indemnify him or her explicitly in writing so the architect's responsibility is unambiguous. Subconsultants that serve as the project representative of the architect in another state, or that serve as the architect of record on a project, may be vulnerable to undue risk without such explicit indemnification.

A sample indemnification clause

Legal counsel advising the architect and subconsultant might agree on indemnification language such as the following:

[Prime Consultant] agrees to defend, indemnify and hold harmless [Subconsultant] from claims, damages and losses arising out of personal injury, including death or property damage caused by [Prime Consultant's] negligent acts, errors or omissions in performing and furnishing professional services on this Project to the extent and in proportion to [Prime Consultant's] comparative degree of fault.

[Subconsultant] shall give [Prime Consultant] prompt notice of any claims of injury or damage subject to this defense and indemnity obligation and shall, at its own expense, provide its time and efforts to cooperate with [Prime Consultant's] defense of [Subconsultant].

Laws governing these types of indemnity clauses may vary considerably from jurisdiction to jurisdiction; the advice of legal counsel in a matter of this type can be very important.

Check with your insurer

The architect's professional liability insurance policy probably covers the risk to the architect of such an indemnification clause because the indemnity obligation is limited to the policyholder's professional negligence. Since the insurance policy is likely to have a deductible, however, the prime consultant's agreement to defend the subconsultant represents a commitment by the prime consultant to contribute its deductible to the defense of the subconsultant.

Any firm that agrees to indemnify any other party should always consult its professional liability insurer to confirm coverage before adding indemnification language to an agreement.

About the contributor

This Best Practice is a contribution of Victor, a managing general underwriter (MGU). Adapted with permission from their Guidelines for Improving Practice.

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This article corresponds to:

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Chapter 17 – Agreements and AIA Document Program
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