

# SURETY BONDING & CONSTRUCTION RISK MANAGEMENT 2020 CONFERENCE

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**AGC's Surety Bonding & Construction  
Risk Management 2020 Conference**

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# Navigating Uninsured Indemnity Obligations

**Balfour Beatty**



PARKER | SMITH | FEEK

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OLES MORRISON RINKER BAKER LLP | YEARS

# Introduction of Panelists:



- Tom Krider – Oles Morrison Rinker & Baker LLP
- Meghan Douris – Oles Morrison Rinker & Baker LLP
- Earnest DeLoach, Jr. – Balfour Beatty Construction
- John Claeys – Parker Smith and Feek, Inc.

# Overview of Indemnity Obligations



- Contractual Indemnity
- Does the contract language always control?
- Jurisdiction governing the contract matters
- What happens when your contract requires indemnity for which you do not have insurance?

# Contractual Indemnity

# Key Aspects of an Indemnity Clause



- Every indemnity provision has two key parts that define the scope of the indemnity obligation
  1. Who is doing the indemnifying (the indemnitor) and who is being protected, or indemnified (the indemnitee(s)) (e.g. Owner, Contractor, Design Professionals, lenders, agents, etc.)
  2. The type of losses from which the indemnitor agrees to hold the indemnitee harmless (expenses, costs, attorney's fees, consequential damages, punitive damages, etc.)

# Indemnity Clauses



- Usually an indemnity clause will contain broad language detailing the type of losses that will be indemnified:
  - all claims, damages, expenses, etc.
  - categories of losses it covers
    - i.e. all losses stemming from personal injury or property damage.
- Is there a duty to defend?

# Indemnity Clauses



- Indemnity provisions typically fall within two categories:
  1. provisions that only protect against losses where the indemnitor is wholly or partially at fault—even if the indemnitee is also partially at fault; and
  2. “fault free” or general provisions that create indemnity regardless of fault.

# Indemnity Clauses



- Depending on the specificity of the type and category of losses, these details can drastically alter obligations for an indemnitor.
- **Indemnity Clause Mirroring Insurable Risk**
- **Indemnitor's Fault** (indemnitor agrees to indemnify the indemnitee against loss that is caused wholly or partially by the indemnitor)
- **Indemnitee's Sole Fault** (indemnification regardless of whether the loss was caused by the indemnitee's sole negligence)
- **Fault Free Provisions** (operates regardless of the indemnitor's fault)

# Sample Indemnity Clauses: Mirroring Insurance



- **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 attorney's 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 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 ...**

*AIA A201 - General Conditions*

# Sample Indemnity Clauses: Indemnitor's Fault



- The **CONTRACTOR** will indemnify and hold harmless the OWNER and the ENGINEER and their agents and employees from and against all claims, damages, losses and expenses including attorney's fees **arising out of or resulting from the performance of the WORK**, provided that any such claims, damage, loss or expense is attributable to **bodily injury, sickness, disease or death, or to injury to or destruction of tangible property** including the loss of use resulting therefrom; *and is caused in whole or in part by any negligent or willful act or omission of the CONTRACTOR, and SUBCONTRACTOR*, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable

*Bradford v. Kupper Associates*, 662 A.2d 1004 (N.J. 1995)

# Sample Indemnity Clauses: Indemnitee's Sole Fault



- The Subcontractor shall hold the General Contractor harmless from all liability ...for injuries ... from any cause occasioned in whole or in part by **any act or omission** of the Subcontractor ... and **whether or not it is contended the General Contractor contributed thereto in whole, or in part, or was responsible therefor by reason of non-delegable duty.**

*Corrente v. Conforti & Eisele Co., Inc.*, 468 A.2d 920, 922 (R.I. 1983).

# Sample Indemnity Clauses: Fault Free Provisions



- **[Contractor agrees to] indemnify and hold [the owner] harmless from all claims, suits, actions, losses and damages for personal injury, including death and property damage, even though caused by the negligence of [the owner], arising out of [the contractor's] performance of the work contemplated by this agreement**

*Perkins v. Rubicon, Inc.*, 563 So.2d 258 (La. 1990)

# Sample Indemnity Clauses: Consensus Docs



- 9.1.1 INDEMNITY To the fullest extent permitted by law, **Subcontractor shall indemnify** and hold harmless Constructor, Design Professional, Owner, and their agents, consultants, and employees (the “Indemnitees”) from **all claims for bodily injury and property damage other than to the Work itself** that may arise from the performance of the Subcontract Work, including reasonable attorneys’ fees, costs, and expenses, that arise from the performance of the Work, but only to the extent caused by the negligent or intentionally wrongful acts or omissions of Subcontractor, Subcontractor’s subcontractors, or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. **Subcontractor shall be entitled to reimbursement of any defense costs paid above Subcontractor’s percentage of liability for the underlying claim to the extent attributable to the negligent or intentionally wrongful acts or omissions of the Indemnitees.**

# Sample Indemnity Clauses: California AGC



- 15.1 Subcontractor's Indemnification and Defense of Contractor. **Subcontractor shall defend, indemnify, and save harmless Contractor** ... from any and all claims ... arising out of or in connection with Subcontractor's obligations under this Subcontract. Subcontractor's duties .. Shall apply to Claims for, but not limited to:
  - a. Personal injury ... and/or property damage ...
  - b. Damages and penalties on account of violation of the law ...
  - c. Infringement ...
  - d. Claims for liens ...
  - ...
  - h. Any failure or alleged failure to comply with the terms of this Subcontract ...

# Anti-Indemnity Statutes



- In order to limit the obligations of indemnitors, many states have passed anti-indemnity statutes, which prohibit certain types of indemnity clauses as a violation of public policy.
- 40 states have some type of anti-indemnity clause that limits the types of indemnity provisions that can be enforced.
  - Florida Statute 725.06
- Why have an anti-indemnity statute?

# Uninsured Indemnity Issues

# The Construction Indemnification and Insurance Process



Review Contract



Contract Indemnity Provisions



Insurance Broker Discussions



Bid/Negotiate Job (public vs. private)

# Key Insurance Issues:



Identify all exclusions in the policy



How do your indemnification provisions compare to your exclusions?



Which way can you negotiate? The Indemnification Obligations or the Insurance Obligations?



Which obligations are you passing downstream?



What does the state law governing the Contract say about the provision?

# Insuring Indemnification Obligations



**Contract Requires  
Contractor to indemnify  
Owner and its Designers  
for Contractor's Defective  
Work**

**What does your CGL policy  
say? Is there a “your work”  
exclusion?**

**What insurance options are  
available for this?**

(Uninsurable Risk?)

**What if Contractor argues its  
not its Work, but the  
Owner's Design?**

# Insuring Indemnification Obligations



**Contract Requires  
Contractor to indemnify  
Owner for Anything  
Arising from “the Work”**

**What does your CGL policy  
say if it’s not Personal Injury  
or Property Damage?**

**If not insurable, what are  
your options?**

**What insurance options are  
available for this?**

# Conclusion

# Conclusion



**Identify and understand your indemnity type**



**Understand the Contractual Indemnity in Relation to your Insurance Product**



**Is there an anti-indemnification statute in play?**



**Identify the Risks/Gaps in Coverage**

# Thank you



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