OUR AGENDA

• 537A.5
• VALUE OF A MUTUAL INDEMNITY ... OR NOT?
• INTERPRETATIONS OF INDEMNITY CLAUSES.
  IS IT LEGAL? IS IT INSURABLE?
• WRAP UP - ROLE PLAYING, SCRIPT OF AN ENGINEER INFORMING A CLIENT THAT THEIR INDEMNITY LANGUAGE MAY NOT BE LEGAL

537A.5

IOWA JOINS THE MAJORITY WITH ITS FIRST ANTI-INDEMNITY STATUTE

HERE’S WHAT IT DID
Indemnification

What is indemnification?

What to ask:
- Is there a duty to defend?
- Who is indemnified?
- Who’s actions trigger the duty?
- What is indemnified? Negligence? Other actions?

Always make sure:
- Only the insured’s negligence or that of its subconsultants triggers
- It does not apply to the contractor’s or owner’s actions
- Everyone is responsible for their own negligence
- No duty to defend

INDEMNITY

IOWA COURTS HOLD THAT A PARTY WILL NOT BE INDEMNIFIED FOR ITS OWN NEGLIGENCE UNLESS THE AGREEMENT PROVIDES FOR CLEAR AND UNEquivocal LANGUAGE

WHAT DOES THE LAW COVER

• SECTION 537A.5 ONLY APPLIES TO CONSTRUCTION CONTRACTS
• IT APPLIES EQUALLY TO BOTH PUBLIC AND PRIVATE CONSTRUCTION PROJECTS IN IOWA
• IT RENDERS VOID NOT JUST BROAD-FORM INDEMNITY BUT INTERMEDIATE-FORM INDEMNITY TO THE EXTENT IT REQUIRES INDEMNITY FOR INDEMNITEE’S NEGLIGENCE
• DOES NOT APPLY TO PUBLIC CONSTRUCTION FOR HIGHWAYS, ROADS AND STREETS.

CITY OF DES MOINES

For professional service agreements with a total estimated cost to the CITY of $100,000 or more, above the second paragraph of Section 6 above and replace it with the following:

The professional services rendered to the extent permitted by law, Consultant agrees to defend, pay on behalf of, indemnify, and hold harmless the CITY against any and all claims, demands, suits, damages or losses, together with any and all costs and expenses connected therewith, including, but not limited to, attorney fees and court costs and economic damages that may be asserted or claimed against, recovered from or suffered by the CITY that arise out of any negligent act, error or omission of the Consultant, except to the extent caused by or resulting from the negligent acts or omissions of the CITY or the CITY’s employees, consultants, agents or others for whom the CITY is responsible.

DEFEND? THEY CAN’T SAY THAT... CAN THEY?

ATTORNEY FEES

• GENERALLY, ATTORNEY FEES ARE ONLY ALLOWED UNDER IOWA LAW IF PERMITTED BY A CONTRACT OR STATUTE.
• IOWA’S MECHANICS LIEN STATUTE ALLOWS A CLAIMANT TO RECOVER FEES
• EACH STATE’S LAWS ARE DIFFERENT, SO ENTITLEMENT TO ATTORNEY FEES CAN VARY FROM STATE TO STATE
Indemnification and the Definition Of Damages

DAMAGES shall also include the INSURED’S legal obligation to reimburse any person or entity for their reasonable defense costs, but only to the extent caused by an actual negligent act, error or omission in the performance of PROFESSIONAL SERVICES to which this Policy applies, and only if such defense costs are awarded by a court or arbitrator of competent jurisdiction.

VALUE OF MUTUAL INDEMNITY

OR NOT…..Bad Mutual Indemnity Provision

"Consultant shall defend, indemnify and save harmless the Client and its officers, directors, employees and agents, from and against all claims, demands, causes of action, allegations, liability, loss, cost or expense (including attorneys’ fees), arising out of or relating to, in whole or in part, Consultant’s services, whether caused by or contributed to by the Client or any other party, unless caused by the sole negligence of the Client."

"Client shall defend, indemnify and save harmless the Consultant, and its officers, directors, employees and agents, from and against all claims, demands, causes of action, allegations, liability, loss, cost or expense (including attorneys’ fees), arising out of or relating to, in whole or in part, whether caused by or contributed to by the Consultant or any other party, unless caused by the sole negligence of the Consultant."

INDEMNIFICATION

LEGAL? INSURABLE?
XL CONTRACT GUIDE

THE CONSULTANT AGREES, TO THE FULLEST EXTENT PERMITTED BY LAW, TO INDEMNIFY AND HOLD HARMLESS THE CLIENT, ITS OFFICERS, DIRECTORS AND EMPLOYEES (COLLECTIVELY, CLIENT) AGAINST ALL DAMAGES, LIABILITIES OR COSTS, INCLUDING REASONABLE ATTORNEYS’ FEES AND DEFENSE COSTS, TO THE EXTENT CAUSED BY THE CONSULTANT’S NEGLIGENT PERFORMANCE OF PROFESSIONAL SERVICES UNDER THIS AGREEMENT AND THAT OF ITS SUBCONSULTANTS OR ANYONE FOR WHOM THE CONSULTANT IS LEGALLY LIABLE.

QUESTIONS?

PAULA DIXON, SENIOR VICE PRESIDENT
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