ACEC New York

American Council of Engineering Companies of New York

Additional Insured Coverage Needed for the Engineer and Construction Manager (CM)

BASIS FOR CONTRACT LANGUAGE CHANGES FOR THE BENEFIT OF THE ENGINEER / CM

At the present time construction contracts with the City of New York have certain provisions requiring that protection from bodily injury claims, including claims arising from death, be afforded to the City and to the general contractor, and in some cases others. This protection is generally carried out by way of indemnification provisions and provisions requiring "additional insured" insurance coverage to the City and the General Contractor by the various contractors and sub-contracts on City jobs. The purpose of this request is to have those protections extended also to the engineer and construction manager, who may often be seen as agents of the City with liability arising from that "agency", but who, under the terms of present contract are not protected.

NEW YORK STATE LABOR LAWS AND WORKERS COMPENSATON LAWS MAKE ENGINEER AND CM TARGETS

Through the application of New York State Labor Law, §§ 200, 240 and 241(6), owners and general contractors can be held liable for injuries even under circumstances where that liability is vicarious and they have no active role in causing the alleged injury. This is so even where the "means and methods" pursued by a contractor itself, the injured party or injured party's co-employee himself has resulted in the injury or death. Under these circumstances the employer, co-worker or injured party himself may be the wrongdoer. Under New York State Workers Compensation Law, an injured worker can not seek a liability determination against his or her employer or co-worker who would generally be protected by the exclusivity of remedy provisions of the Workers Compensation Act.

Having received Workers Compensation benefits the injured employee can seek nothing else directly from the co-worker or employer, however, he or she is free to make a case out against others at the construction site, and the engineer and construction manager are often the targets of that effort. The motivation for searching out others who may be held liable is strong, and the incentives of large damage judgments are irresistible to injured workers otherwise limited to Workers Compensation benefits. These temptations are even more irresistible to their attorneys. The simplest of the claims that can result from this system are claims against the owner and/or general contractor as a result of their vicarious liability under the Labor Law. We have too often seen that this owner and general contractor liability is now being expanded to the engineer and construction manager

INDEMNIFICATION OF THE ENGINEER AND GENERAL CONTRACTOR

Under the current version of the Workers Compensation Law, indemnification claims can not be made against an injured party's employer or co-employee, even if they are the only active wrongdoer, unless there is a contract provision for indemnity for the benefit of the party seeking indemnification, or in other limited circumstances, when there is one of the enumerated "grave injuries" as are set forth within the statute. (Section 11 of the Workers Compensation Law) If the indemnification claim can not be made against the actively negligent employer for its methods or the acts of its employees, that employer escapes responsibility for its wrongdoing.

Importantly, indemnity provisions that do not protect the engineer and construction manager, leave those entities as potential "agents" of the owner and general contractor exposed to liability where "agency" is found to exist and they are "standing in the shoes" of the owner or general contractor, but without the same protection given under New York law. Over recent years there has been a trend finding that the engineer and construction manager are acting as the agent of the owner or general contractor for the purposes of liability under the Labor Law, or that they are acting as the "general contractor" where there is an absence of designated general contractor on the job. This trend has come about as a result of aggressive litigation efforts to expand the number of parties who may be liable to an injured worker, and permit lawsuits to continue to verdict. This trend has also made it more difficult and costly for engineers and construction managers to obtain insurance. For this reason, it is imperative that the engineer and construction manager be added to the list of parties benefited from each contractor's indemnification obligation. Without such provisions, liability is shifted to the innocent engineer or construction manager, and away from the wrongdoer-employer of the injured party. By including the engineer and construction manager along with the City of New York as an indemnified party the loss is shifted back to the wrongdoer properly and provides further incentive for those directly in charge of the injury producing work to take all measures to avoid injuries.

ADDITIONAL INSURED COVERAGE PROTECTION TO THE ENGINEER AND CM

The current construction contracts with the City of New York require that the City and the general contractor be added to the contractor or sub-contractor's commercial general liability policy as an "additional insured," giving the City and/or the general contractor the right to seek defense and indemnity under the contractor or sub-contractor's coverage when the claim or loss arises from the work or actions of that contractor or sub-contractor. By this means, the risk of loss remains with the party (and its insurer) whose actions or inactions bring about the loss or injury. The added benefit of being an additional insured on the contractor's policy is that it provides the additional insured party with the right to have defense to claims provided by the wrongdoing contractor's insurance company, and this expense need not be undertaken and the subject of possible reimbursement claims litigated within the context of the indemnification provisions above. The overall benefit to this provision is to provide protection to the City of New York and its general contractor, and those who may be found to be agents or "standing in the shoes" of the City and general contractor under theories of vicarious liability, primarily under the provisions of the New York State Labor law referenced above.

CONCLUSION

Under New York State law, there is the great possibility that a wrongdoing contractor or sub-contractor may escape liability due to the operation of the New York State Labor Law and the New York State Workers Compensation Law. By operation of these two statutes and their interpretation by the courts, there has been a trend resulting in vicarious liability to a widening class of parties, without the ability to seek reimbursement from the actively at-fault contractor or sub-contractor. The engineer and construction manager have increasingly been targeted as either "agents" of the owner or general contractor, or as a "general contractor" when no other such contractor is designated on a particular job. By expanding the protections of the contractual indemnity provisions to encompass the engineer and construction manager, this trend will be reversed, and liability will be more difficult to shift away from the parties who are actually at fault, and vicarious liability required by legislation such as the New York State Labor Law will be more readily shifted back to the active wrongdoers and their insurers. It is imperative that this language be clear and unmistakable in its mandate that the wrongdoer be responsible for defense and indemnity, and that these obligations attach at the earliest possible moment to avoid the burden on innocent parties providing for their own defense, and ultimately payment of judgment or settlement.

The American Council of Engineering Companies of New York
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