



AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Florida

American Consulting Engineering Companies of Florida Risk Management Committee White Paper
on Indemnification to Public Clients.

PROBLEM STATEMENT:

One of the core tenants of the American Consulting Engineering Companies of Florida's Risk Management Committee ("ACEC") is to properly allocate and compensate for risk in consulting contracts. In the State of Florida, the Legislature saw fit to establish the framework for indemnification in Florida Statutes 725.08. This Statute includes very specific information relating to what may be required, so the Problem Statement relates to a public agency requiring language in a contract that doesn't meet the specifics of 725.08, or Language Not in Compliance with Statute (LNCS).

SHORT ANSWER TO LNCS QUESTION:

A design professional can enter into a contract with this language, but should a claim be made for something outside of statute, then insurance will likely not cover the expanded condition. This will likely then involve litigation, where the design professional has favorable precedent, but can lead to poor relations with the client. Additionally, while statute renders the expanded indemnification void, it doesn't void the covered language in the contract or insurance policy.

DISCUSSION:

The language in Florida Statute 725.08 is intended to allow the public agency to require the design professional to indemnify and hold harmless the agency (and various parties to the agency) "to the extent caused by the negligence, recklessness, or intentionally wrongful conduct" of the design professional. It also specifically states that a design professional cannot defend a public agency (and those same parties). Under 725.08, such claims would render the contract provision as void. There is reference to a court case below. Our position boils down to two points:

- The professional liability insurance policies held by design professionals are issued in compliance with this state statute, and only provide coverage in instances where negligence is established.
- It is in the best interest of both the County and the consultant to have an indemnification clause that is in compliance with 725.08, to have the provision be enforceable and for insurance to provide coverage.

The case *Auto-Owners Ins. Co. v. Ace Elec. Service, Inc.*, 648 F.Supp.2d 1371, 1380 (M.D. Fla. 2009) found that "section 725.08 of the Florida Statutes prevents a public agency from requiring a design professional to indemnify the agency in instances where the design professional is without fault. A design professional may be held liable only for the negligence of itself or its employees." (citing section 725.08(1)-(2), Fla. Stat. and recognizing that the city could not recover from the consultant unless the consultant is found to be negligent and the city is not).

CONCLUSION: It is recommended that ACEC advise its membership to continue their careful review of any proposed contract that contains contractual provisions wherein the design professional's contract includes language that is outside of state statute. Although examples of such types of clauses are myriad, we recommend that such provisions be avoided to eliminate jeopardizing the professional liability insurance coverage relied upon by your membership and indirectly by their clients.

Approved – 1/21 ACEC-FL Risk Management Committee