



AMERICAN COUNCIL OF ENGINEERING COMPANIES

*of Indiana*

**Legal Forum**

**April 10, 2018 from 11- 1 p.m.**

**RAM Restaurant & Brewery, 140 South Illinois Street**

**Indianapolis, Indiana 46225**

- A. Introduction of Facilitator, Greg Cafouros, Kroger, Gardis & Regas
- B. Introduction of ACEC Indiana members

## **TOPICS FOR DISCUSSION**

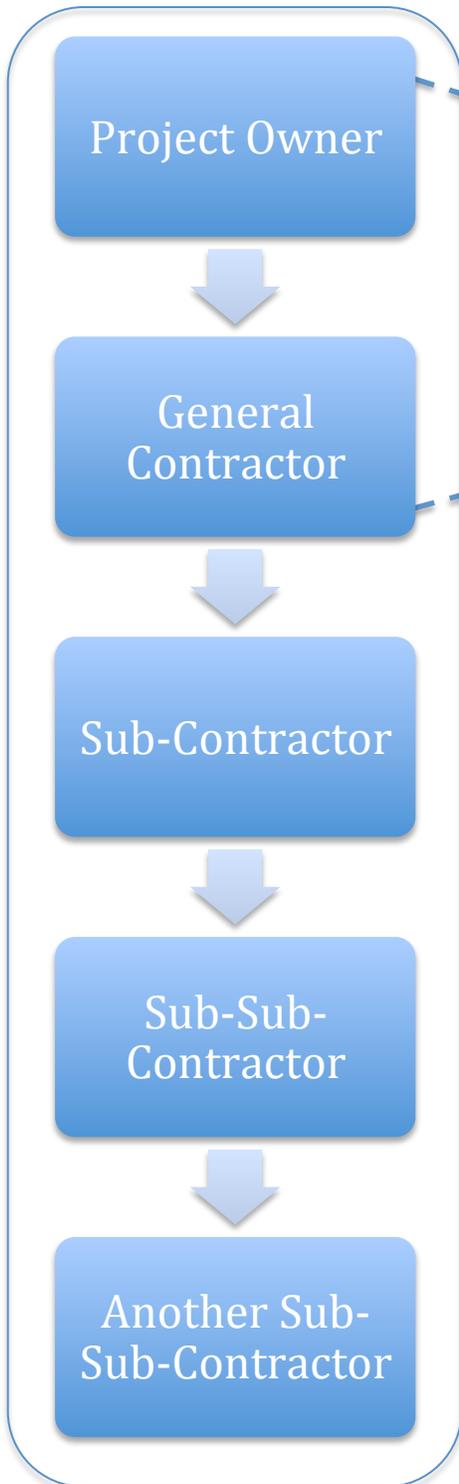
1. Duty to Defend
  - a. Attempt to break contract into two sentences pertaining to duty to defend: one that addresses Contractors General Liability and one that addresses Designers/ Engineers Professional Liability.
  - b. If the word “defend” is tied to negligence, it will still take the whole litigation process to determine who is negligent and therefore the design firm will still be on the hook for litigation fees.
  - c. Work with client/ client’s attorneys to get a contract that is insurable.
  - d. Negotiation tactics—options for clients not allowing design firms to strike the word “defend”
    - i. “Defend to the extent insurable”
    - ii. “Defend, excluding claims covered by professional liability insurance,”
  - e. Crucial for design firm to ask for a fair “duty to defend” for EVERY project, even clients who will object, to make a statement and show the clients that it is important to the design profession.
  - f. Strategy for 2018/2019 to get a Duty to Defend Bill passed
    - i. Members should speak to legislators over the summer and explain the uninsurable nature of professional liability insurance to cover clients’ costs related to negligence from professional services defense.
    - ii. Members should e-mail contracts with “duty to defend” provisions to [staff@acecindiana.org](mailto:staff@acecindiana.org). Also, share any successes you have had with negotiations.

- iii. Members should attend session hosted by ACEC Indiana in the summer of 2018 to educate our members on the issue and offer talking points for legislative action.
2. Examine potential means for limiting frivolous lawsuits from impacting firms similar to those in the medical practice that may "filter" through a professional board for validity (i.e. Certificate of Merit.)
  - a. Although a board exists for medical malpractice suits to make their case before going to court, this is only a "speed bump" and it is still the right of individuals to make a claim.
  - b. Question of what firms can do so not all subs are called into a lawsuit as peripheral defendants, who are associated by charges that support the claim against the primary defendant but, in and of themselves not part of the case directly.
3. Limitation of Liability
  - a. First attempt to use "in-house" liability language, suitable for professional services rather than contractors, in order to mitigate risk exposure.
  - b. Consider language "no more than available insurance coverage."
  - c. Firms' examples of limitations
    - i. No more than \$50,000 or total fee (whichever is larger)
    - ii. No more than a multiple of the fee (3 times the limit?)
4. Economic Loss
  - a. Client can only sue parties that it holds a contract with; cannot sue non-contractual sub-consultants.
  - b. Privity of Contract—some consultants include this clause so the owner can make a claim of a sub-consultant, such as a geotech, when prime considers it a "service to the owner" to hold the contract.
5. Document Retention (Statute of Repose)
  - a. [ACEC's Records Retention Policy](#).
  - b. Legally, a client can't bring a claim after 10 years from when the final plans are delivered, plus two years depending upon when construction starts. Therefore, firms should hold plans for at least 12 years.
  - c. Bottom line: firms should set a policy and stick to it, not having a policy is the worst option.
6. Open Discussion—Prevailing Party
  - a. Firms seeing more from private clients, who are following the instructions of their attorneys.
  - b. Best case: ask client to take out completely.
  - c. Second best: try to define.
  - d. Last case: try to define percent at fault.

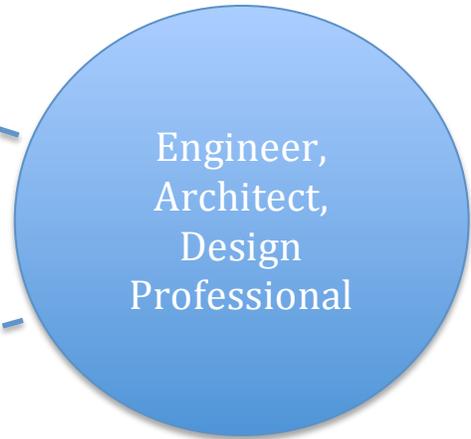
# HB 1015

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## Insured



## Insurance Unavailable



Has professional liability insurance, which excludes coverage for contractual duty to defend. Can't add others as "additional insured" to professional liability insurance. Isn't a sub-contractor. Can't purchase a contractor's general liability insurance. Not present at worksite.

Each is required to have general liability insurance and to name others as "additional insureds." Has responsibility for worksite safety.

Indiana Code § 26-2-5.

Sec. 1. All provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any **construction or design contract** except those pertaining to highway contracts, which purport to indemnify the promisee against liability for:

- (1) death or bodily injury to persons;
- (2) injury to property;
- (3) design defects; or
- (4) any other loss, damage or expense **arising** under either (1), (2) or (3);

from the **sole** negligence or willful misconduct of the promisee or the promisee's agents, servants or independent contractors who are directly responsible to the promisee, are against public policy and are void and unenforceable.

**IC 8-23-2-12.5 "Contractor"; "professional services"; liability of contractors**

Sec. 12.5. (a) As used in this section, "contractor" refers to a person who provides professional services under a contract with the department.

(b) As used in this section, "professional services" refers to engineering, architectural, or surveying services.

(c) Notwithstanding any provision of [IC 26-2-5-1](#) to the contrary, the department may not require a contractor to assume any liability or indemnify the state for any amount greater than the degree of fault of the contractor.

(d) Any contractual provision in conflict with the prohibitions contained in subsection (c) is void and unenforceable.

*As added by P.L.50-2008, SEC.1.*