

**FACT SHEET FOR HB15-1197: Concerning Limitations on Indemnity Obligations
in Public Construction Contracts**

Bill Sponsors: Representative Jack Tate and Senator Cheri Jahn

HB15-1197 would:

- 1) **Have existing private sector principles expanded to public sector contracts.** There is already a Colorado statute that limits the extent of indemnity obligations in private sector construction contracts. C.R.S. 13-21-111.5(6).
 - a. **This bill is about due process and basic fairness.**
- 2) **Modify existing statute C.R.S. 13-50.5-102 to be fair for design professionals.** Right now, design professionals are being asked to defend public entities against third party claims before there has been any determination that the design professional has committed error.
 - a. Design professionals' professional liability insurance will only cover legal costs to the extent caused by the negligent errors and omissions of the design professional.
 - b. Small businesses are risking their businesses when they sign contracts with uninsurable contract language.
- 3) **The existing law discriminates against all design professionals, including small, disadvantaged, and women-owned businesses, who cannot afford to pay a public entity's legal fees, and have lost projects when they refuse to defend the public entity.**
 - a. Public Entities are asking all design professionals to bear the burden of the public entity's own defense, even in cases of misconduct by the public entity. The public entity should be required to defend itself for its own acts.
 - b. Currently the public entity has no obligation to pay for its own defense costs in these design contracts and is not required to repay the defense costs to the design professional if the design professional is found not negligent.
 - c. The public entity requires the design professional to bear these upfront costs of defense for "any and all claims" even if they have nothing to do with the design professional's work.
- 4) **Align (not eliminate) the obligation a design professional must shoulder to indemnify a public entity to just those situations where the design professional has been found to have committed an error.** The statute's existing prohibition against a public entity requiring a construction professional to indemnify it against the public entity's own negligence is good public policy.
- 5) **Apply to and benefit all companies involved in the construction industry,** including contractors.
- 6) **Benefit the Taxpayer.**
 - a. This will not shift burden to the taxpayers for a design-professionals negligent errors and omissions. That burden is still borne by the design professional as it should be.
 - b. Taxpayers want to know that public entities are treating people and businesses fairly, and would expect that design professionals have due process before having anyone pay for that which they are not responsible.

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In summary, we are asking that:

- Public contracts' statute be amended to include existing principles regarding indemnity obligations that are in private sector contracts - C.R.S. 13-21-111.5(6).
- Legislators continue to adopt a long-standing principle that a party should not be responsible for the mistakes of others. It's only fair.
- Colorado small businesses be able to compete for public sector work without risking their businesses to do it.

Supporters:

- American Council of Engineering Companies (ACEC) of Colorado
- American Institute of Architects (AIA) of Colorado
- American Society of Landscape Architects (ASLA) of Colorado
- Associated General Contractors (AGC) of Colorado
- Building Jobs for Colorado (BJ4C)
- Colorado Association of Mechanical and Plumbing Contractors
- Professional Land Surveyors of Colorado (PLSC)
- Hispanic Contractors of Colorado (HCC)

For additional information, please contact Marilen Reimer, Executive Director, American Council of Engineering Companies (ACEC) of Colorado, 303-832-2200; c: 303-548-3946; mar@acec-co.org.

February 26, 2015

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Samples of Contracts with Acceptable Indemnification Clauses Over Several Years

| Agency | Indemnification Clause | Contract | Resolution |
|--|---|--------------------|--|
| 1. Adams County | Years ago didn't have indemnification clause 2015 – includes duty to defend | Wouldn't negotiate | Acceptable Uninsurable |
| 2. Alamosa | Insurable contract language | | Acceptable |
| 3. Arapahoe County | No defend clause | | Acceptable |
| 4. Aurora | Use of "defend" and "even if groundless" Added: except for all professional liability claims Hence, bifurcated defense requirements | Negotiated | Acceptable |
| 5. Boulder | No defend clause; specifies "negligent acts" Separates out insurance coverage | | Acceptable |
| 6. Boulder County | No defend clause; specifies "negligent acts" 2015 – uninsurable but willing to change 2015 another member said insurable at start | Negotiated | Acceptable Acceptable Acceptable |
| 7. Brighton | Uninsurable contract language Don't negotiate as much as they used to | | Negotiated Sometimes |
| 8. Centennial Water & Sanitation District | Insurable | | Acceptable |
| 9. Centennial | Insurable | | Acceptable |
| 10. CO Dept of Public Health & Environment | | Negotiated | Acceptable |
| 11. Clear Creek County | No defend clause; extent caused by "negligent acts" | | Acceptable |
| 12. Colorado Springs | Uninsurable contract language | | Uninsurable |

| | | | |
|---|--|------------------|--------------------------|
| 13. Denver | Uninsurable; duty to defend; | Won't negotiable | Uninsurable |
| 14. Denver International Airport | Uninsurable; | Won't negotiate | Uninsurable |
| 15. Denver Library | No defend | | Acceptable |
| 16. Denver Parking Garage | Limitation on defense costs | | Acceptable |
| 17. Denver Water | Defense based on negligence 2015 – one member said able to negotiate; another said they would sometimes | Negotiated | Acceptable |
| 18. Douglas County | Separated professional negligence; no defend (2015) 2015 – on member said not able to negotiate | Negotiated | Acceptable |
| 19. Eagle | Insurable | | Acceptable |
| 20. Eagle River Water & Sanitation District | Insurable | | Acceptable |
| 21. El Paso County | Uninsurable | | Uninsurable |
| 22. Erie | Insurable at start (2015) Another member said they needed to negotiate good language | Negotiated | Acceptable Acceptable |
| 23. Estes Park | Insurable | | Acceptable |
| 24. Ft. Collins | No defend clause; negligence performance | Negotiated | Acceptable |
| 25. Garfield County | Insurable after negotiation | Negotiated | Acceptable |
| 26. Greeley | Defense related only to "negligent acts" | | Acceptable |
| 27. Jefferson County | No defend clause; liability based on "negligent acts" | | Acceptable |
| 28. Johnstown | | | Acceptable |

| | | |
|----------------------------|---|------------|
| 43. Westminster | In past was uninsurable but recently changed their standard template and removed duty to defend | Acceptable |
| 44. Wheat Ridge | Insurable | Acceptable |
| 45. University of Colorado | Insurable | Acceptable |

| | | | |
|---|---|-----------------|--|
| 29. Lafayette | Uninsurable at start and didn't change (2015) | | Uninsurable |
| 30. Lakewood | Defend included but negotiated it out Another member said good language from start 2015 another member just received contract with uninsurable language must defend the client against claims even if they turn out to be fraudulent | Negotiated | Acceptable Acceptable Not negotiated yet |
| 31. Longmont | Uninsurable | | Uninsurable |
| 32. Louisville | Uninsurable at start but negotiates | Negotiates | Acceptable |
| 33. Loveland | No defend clause; liability based on "negligent acts" | Negotiated | Acceptable |
| 34. Metro Wastewater Reclamation District | Uninsurable | Won't negotiate | Uninsurable |
| 35. Montrose | Liability based on "negligent acts" | Negotiated | Acceptable |
| 36. Northern Water | Insurable to start | | Acceptable |
| 37. Northglenn | Insurable | | Acceptable |
| 38. Pueblo County | No use of "defend" | | Acceptable |
| 39. Ridgeway | Uninsurable to start but changed (2015) | Negotiated | Acceptable |
| 40. State of Colorado | Insurable | | Acceptable |
| 41. Summit County | Insurable to start (2015) | | Acceptable |
| 42. Thornton | Bifurcated indemnification (confirmed for 2015) Member of Hispanic Contractors said recent contract had uninsurable language | | Acceptable Uninsurable |

AGREEMENT

THIS AGREEMENT FOR ON-CALL DESIGN MECHANICAL SERVICES (“Agreement”), made and entered on the date set forth on the signature page, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado (“City”), Party of the First Part, and **[REDACTED]**, **PROFESSIONAL CORPORATION**, a Colorado Professional Corporation (“Consultant”) Party of the Second Part;

WITNESSETH:

WHEREAS, the City owns and operates Denver International Airport (“DIA” or the “Airport”), and will require on-call professional mechanical design and related engineering and architectural services miscellaneous engineering issues, and such other work as may be requested by the Airport, at Denver International Airport; and

WHEREAS, the City has undertaken a competitive process to solicit and receive proposals for such services, and has selected the proposal submitted by the Consultant as the best responsive proposal; and

WHEREAS, the Consultant is qualified and ready, willing and able to provide the requested professional services to the City, in accordance with the terms of this Agreement;

NOW, THEREFORE, for and in consideration of the premises and other good and valuable consideration, the parties hereto agree as follows:

1. LINE OF AUTHORITY:

A. The City's Manager of Aviation, or his or her designee or successor in function (hereinafter referred to as the “Manager”) authorizes and directs all work performed under this Agreement. Until otherwise notified by the Manager, the City's Deputy Manager of Aviation for Planning and Development (“Deputy Manager”), and the City's Assistant Deputy Manager of Aviation for Planning and Development (“Assistant Deputy Manager”), are designated as the authorized representatives of the Manager through whom services performed under this Agreement shall be directed and coordinated. The Assistant Deputy Manager will designate the Project Manager under this Agreement. Administrative reports, memoranda, correspondence and other submittals required of the Consultant shall be processed in accordance with the Deputy Manager's and Assistant Deputy Manager's directions.

2. SCOPE OF WORK:

A. General: The Consultant shall, upon receipt of a written Notice to Proceed from the Deputy Manager, commence the Work on Tasks authorized by the City and shall furnish all of the technical, administrative, professional and other labor; all supplies and materials, equipment, printing, vehicles, local travel, office space and facilities, testing and analyses, calculations, and any other facilities or resources required to perform the services, complete the

D. The City's acceptance of any submitted insurance certificate is subject to the approval of the City's Risk Management Administrator. All coverage requirements specified in the certificate shall be enforced unless waived or otherwise modified in writing by the City's Risk Management Administrator.

E. The Consultant shall comply with all conditions and requirements set forth in the insurance certificate for each required form of coverage during all periods in which coverage is in effect.

F. The insurance coverage forms specified in this Agreement are the minimum requirements, and these requirements do not lessen or limit the liability of the Consultant. The Consultant shall maintain, at its own expense, any additional kinds and amounts of insurance that it may deem necessary to cover its obligations and liabilities under this Agreement.

G. The parties hereto understand and agree that the City and County of Denver, its officers, officials and employees, are relying on, and do not waive or intend to waive by any provisions of this agreement, the monetary limitations or any other rights, immunities and protections provided by the Colorado Governmental Immunity Act, §§ 24-10-101 to 120, C.R.S., or otherwise available to the City and County of Denver, its officers, officials and employees.

16. DEFENSE AND INDEMNIFICATION:

A. To the fullest extent permitted by law, the Consultant hereby agrees to ~~defend~~, indemnify, and hold harmless City, its appointed and elected officials, agents and employees against all liabilities, claims, judgments, suits or demands for damages to persons or property arising out of, resulting from, or related to the work performed under this Agreement ~~that are~~ due to the negligence ~~or fault~~ of the Consultant or the Consultant's agents, representatives, subcontractors, or suppliers ("Claims"). This indemnity shall be interpreted in the broadest possible manner consistent with the applicable law to indemnify the City. *to the extent*

B. Consultant's duty to ~~defend and~~ indemnify City shall arise at the time written notice of the Claim is first provided to City regardless of whether suit has been filed and even if Consultant is not named as a Defendant.

~~C. Consultant will defend any and all Claims which may be brought or threatened against City and will pay on behalf of City any expenses incurred by reason of such Claims including, but not limited to, court costs and attorney fees incurred in defending and investigating such Claims or seeking to enforce this indemnity obligation. Such payments on behalf of City shall be in addition to any other legal remedies available to City and shall not be considered City's exclusive remedy.~~

D. Insurance coverage requirements specified in this Agreement shall in no way lessen or limit the liability of the Consultant under the terms of this indemnification obligation. The Consultant shall obtain, at its own expense, any additional insurance that it deems necessary for the City's protection.

E. This ~~defense and~~ indemnification obligation shall survive the expiration or termination of this Agreement.

17. COORDINATION OF SERVICES:

The Consultant agrees to perform its work under this Agreement in accordance with the operational requirements of DIA, and all work and movement of personnel or equipment on areas included within the DIA site shall be subject to the regulations and restrictions established by the City or its authorized agents.

18. COMPLIANCE WITH ALL LAWS AND REGULATIONS:

All of the work performed under this Agreement by the Consultant shall comply with all applicable laws, rules, regulations and codes of the United States and the State of Colorado, the charter, ordinances and rules and regulations of the City and County of Denver, and all Denver International Airport Rules and Regulations.

19. ~~WAIVER OF C.R.S. 13-20-802, et. seq.:~~

This one appears to be asking us to ignore a state of Colo. Statute

~~Notwithstanding any other provision of this Agreement, the Consultant specifically waives all the provisions of Chapter 8 of Article 20 of Title 13, Colorado Revised Statutes (also designated C.R.S. 13-20-802, et. seq.) relating to any design and construction defects in the Project under this Agreement.~~

20. COMPLIANCE WITH PATENT, TRADEMARK AND COPYRIGHT LAWS:

A. The Consultant agrees that all work performed under this Agreement shall comply with all applicable patent, trademark and copyright laws, rules, regulations and codes of the United States. The Consultant will not utilize any protected patent, trademark or copyright in performance of its work unless it has obtained proper permission and all releases and other necessary documents. If the Consultant prepares any design documents which specify any material, equipment, process or procedure which is protected, the Consultant shall disclose such patents, trademarks and copyrights in the construction drawings or specifications.

B. The Consultant further agrees to release, indemnify and save harmless the City, its officers, agents and employees, pursuant to Paragraph 16, "Indemnification," from any and all claims, damages, suits, costs, expenses, liabilities, actions or proceedings of any kind or nature whatsoever, of or by anyone whomsoever, in any way resulting from, or arising out of, directly or indirectly, the performance of work under this Agreement which infringes upon any patent, trademark or copyright protected by law, except in cases where the Consultant's personnel are working under the direction of City personnel and do not have direct knowledge or control of information regarding patents, trademarks, and copyrights.

21. TAXES AND COSTS:

The Consultant, at its own expense, shall promptly pay, when due, all taxes, bills, debts and obligations it incurs performing work under this Agreement and shall allow no lien, mortgage, judgment or execution to be filed against land, facilities or improvements owned by the City.

22. OWNERSHIP OF WORK PRODUCT:

Premises, except as may otherwise be permitted by the Colorado Clean Indoor Air Act, C.R.S. §§ 25-14-201 to 209. Consultant and its officers, agents, and employees shall cooperate and comply with the provisions of the Denver Revised Municipal Code, §§ 24-301 to 317 et. seq., the Colorado Clean Indoor Air Act, C.R.S. §§ 25-14-201 to 209, City's Executive Order No. 99 dated December 1, 1993, and Executive Order No. 13 dated July 31, 2002.

27. EXAMINATION OF RECORDS:

A. The Consultant agrees that the City's duly authorized representatives shall, until the expiration of three (3) years after the final payment under this Agreement, have access to and the right to examine any directly pertinent books, documents, papers and records of the Consultant involving this Agreement to audit or review said books, documents, papers and records to assure they are in compliance with the terms and conditions of this Agreement.

B. In connection with any services performed hereunder the Manager of Aviation, the City Auditor and any other authorized official of the City and County of Denver, the Federal Aviation Administration, the Comptroller General of the United States, and any of their duly authorized representatives, shall have access to any books, documents, papers and records of the Consultant which are directly pertinent to a specific grant program for the purpose of making audit, examination, excerpts and transcriptions. The Consultant further agrees that such records will contain information concerning the personnel, hours and specific tasks performed, along with the applicable federal project number.

28. INFORMATION FURNISHED BY CITY:

The City will furnish to the Consultant available information concerning DIA and any such other matters that may be necessary or useful in connection with the work to be performed by the Consultant under this Contract. ~~The Consultant shall be responsible for the verification of the information provided to the Consultant.~~

29. CITY REVIEW OF PROCEDURES:

The Consultant agrees that, upon request of the Deputy Manager, at any time during the term of the Agreement or three years thereafter, it will make full disclosure to the City of the means, methods, and procedures used in performance of services hereunder.

30. TERMINATION:

A. The City has the right to terminate this Agreement without cause on thirty (30) days written notice to the Consultant, and with cause on ten (10) days written notice to the Consultant. However, nothing herein shall be construed as giving the Consultant the right to perform services under this Agreement beyond the time when such services become unsatisfactory to the Manager.

B. If the Consultant is discharged before all the services contemplated hereunder have been completed, or if the Consultant's services are for any reason terminated, stopped or

Work and produce all of the deliverables described and set forth in this Agreement, including the attached **Exhibit A**, "Scope of Work" and all of the other exhibits, appendices and attachments to this Agreement. The Consultant's Scope of Work, as authorized by the City, is referred to in this Agreement as the "Scope of Work" or "Work."

B. Professional Responsibility; Standard and Remedies:

1. Consultant's Performance: The Consultant shall faithfully perform the Work required under this Agreement in accordance with standards of care, skill, training, diligence and judgment provided by competent professionals who perform work of a similar nature to the Work described in this Agreement. Consultant shall provide to the City in a timely manner all designs, documents, submittals and services necessary to achieve completion of the Work in accordance with Milestone Dates established for authorized Tasks. All designs, documents, submittals and services provided by Consultant shall be:

- a) Fully coordinated and integrated with related work being performed by the Consultant's sub-consultants, the City and the City's consultants, and all of their respective suppliers and sub-consultants of any tier; and
- b) Checked for compliance with applicable laws, ordinances, codes, rules, regulations and current industry standards applicable to the Work. Codes and laws are often subject to differing interpretations. Consultant will use due diligence to ascertain interpretations which will be acceptable to the City and relevant regulatory authorities.

2. Acts and Omissions: The Consultant shall be liable to the City for acts and omissions of Consultant's employees, Consultants, subconsultants, agents and any other party with whom the Consultant contracts to perform any portion of the Work, including any design elements of any authorized Task.

← negligent

3. City's Remedies: In the event Consultant fails to comply with any provisions of Sections 1 or 2, above, Consultant shall be liable to the City for all costs of correcting the Work, without additional compensation, including but not limited to:

- a) All costs of correcting and replacing any affected design documents, including reproducible drawings;
- b) All removal and replacement costs of any improvements or other work installed or performed pursuant to and in accordance with design documents containing negligent errors or omissions; and
- c) Additional costs incurred by the City or its other consultants or Consultants, if any, arising out of such defective Work.

These remedies are in addition to, and do not limit the provisions and requirements of Section 15- Insurance, and Section 16 – Indemnification, below.

Work and produce all of the deliverables described and set forth in this Agreement, including the attached **Exhibit A**, "Scope of Work" and all of the other exhibits, appendices and attachments to this Agreement. The Consultant's Scope of Work, as authorized by the City, is referred to in this Agreement as the "Scope of Work" or "Work."

B. Professional Responsibility; Standard and Remedies:

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