



AIA Buffalo/WNY

A Chapter of the American Institute of Architects

February 2010 –Indemnification Issue

President

Paul L. Herendeen, AIA, NCARB

Hello Fellow AIA Members,

This issue will focus on the issue of Indemnification on Erie County contracts. Indemnification has been a complicated and frustrating issue for many of our local Architecture and Engineering firms that have been awarded Erie County Contracts.

I will attempt to explain the background of this issue, the progress that has been transpiring over the last year, and where we are now. I've done my best to try and summarize this issue, from the many conversations and emails that have been communicated to myself and board member Gus Lima, AIA over the last year. I don't personally have any contracts with Erie County. I make no guarantees that all this information is completely accurate, and I apologize for any information that may not be. As President of our local AIA Chapter I feel along with my Board Members, that this information is very important to communicate to our membership. We hope that this helps us in unifying our Chapter, rather than ignoring this issue or similar issues.



Erie County Insurance/Indemnification debate:

In approximately February of 2009 Tom Jaeger, AIA brought to my attention that many of our represented architectural firms were not willing or capable to either enter into a contract with Erie County due to the presence of uninsurable language in the contract proposed by the County. He had attended a meeting with the Engineering Society ACEC (American Council of Engineering Companies), who had representation from an insurance representative, James Maxson, III CPCU from Promark Associated Agencies, Inc., and legal representation from attorney Brian Sutter, Esq. from the Sugarman Law Firm.

The specific issues with the language were that:

- The indemnity was not negligence based.
- Causation was not a substantial factor.
- The Standard of care was not referenced.
- It required our firms to assume the County's defense of any claim presented.

The uninsurable language relates to indemnification. Professional Liability insurance policies carry strict coverage exclusions against the proposed language in the paragraphs discussing indemnity. The language proposed results in the firms not being covered by their insurance providers and thus leaves 100% exposure of the personal assets of the firm owners. If it became necessary to file a claim under this scenario that firm could possibly be forced into bankruptcy. Erie County would not be afforded the protection of that firms' professional liability coverage. The specific issues with the language are that the indemnity is not negligence based, causation is not a substantial factor, there is not a standard of care referenced, and it requires our firms to defend the County for any claim. We do not believe this is the intent of the County as our firms are providers of professional services, similar to attorneys and accountants. Unfortunately, the County has elected to classify us in a manner similar to contractors, whose insurance coverage is treated very differently.

It was decided at our June 2009 AIA Board meeting that I with the help of Board Member Ed Watts, Jr. would compose and send a letter to County Executive, Chris Collins. This letter was very similar in language to the letter that was sent by the ACEC. We also accepted an offer by Brian Sutter, Esq. from the Sugarman Law Firm to speak about the indemnification issue at our September 2009 Membership Meeting. We had approximately five Architectural firms represented at that meeting. We never received a response letter from Chris Collins, so we sent another letter with stronger language.

On November 18, 2009 we did receive a response letter from Cheryl Green, Erie County Attorney. This response letter was very similar in content to the one that was received by ACEC representative, Mr. Ed Watts, Sr. The ACEC has led the charge to challenge this unfair indemnification clause, and our AIA Chapter has coordinated our efforts with ACEC's lead representative, Mr. Tim Hughes (C&S Engineers).

In her letter, County Attorney Cheryl Green stated: "Resulting from thorough research and document review, and months of discussion with design professionals, insurance professionals, attorneys and representatives of the state and local American Council of Engineering Companies, please be advised that Erie County has modified its contractual defense and indemnification language effective immediately."

"We believe that this language is fair, protects the County's interests, and is harmonious with design professionals expressed concerns. The County appreciates the fine work provided by you and looks forward to its continued cordial relationship with our design professional community as we move forward with releasing several new projects for contract in the immediate future."

Over the month of December 2009 we received emails in indemnification information requests from Ron Battaglia, AIA and Laura Goodwin, AIA. The AIA Board met to discuss what our next course of action might be, and to get a consensus from our AIA Board. Past President and State Representative, Kelly Hayes McAlonie, contacted our NYSAIA Attorney to help us with this issue.

On December 17, 2009 AIA Board Member, Gus Lima, AIA was informed that the Erie County Executive Chris Collins set up a meeting that day with the Engineers (ACEC), and the County requested representation from the AIA. I was out of town and Gus Lima went to this meeting as our AIA Board representative.

Accompanied by Cannon Design's attorney, James Appler, Esq., Gus Lima, AIA joined Tim Hughes, PE and a number of local ACEC members, as well as Insurance and legal representatives to speak on behalf of the professionals. The County was represented by County Executive Chris Collins, County Attorney Cheryl Green, and representatives from Lawley Insurance.

The following statements describe the outcome of this meeting:

- a. The county noted that the main reason for the existence of the policy is that the General Liability policies provided by the contractors are very weak and full of exceptions, so the County finds itself having to spend substantial funds defending itself. To cut costs, the County would prefer to pass this liability to the professionals. The professionals rejected this approach and argued that the County should instead work on making sure that the CGL policies provided by the Contractors were adequate. The County stated that they don't have the manpower to do that.
- b. The County presented an insurance policy (OPPI), provided by Lawley but not available in the open market, the purportedly provided additional insurance coverage for professionals, and which purportedly allowed the County's language to stand. The professionals and our insurance advisors pointed out that the policy still requires that the County makes an allegation of negligence, so it isn't any different than current policies. There is no agreement as of whether the policy presented by Lawley (OPPI) actually accomplishes the goals of the County.
- c. The professionals suggested that if the County wants to obtain additional coverage, all it has to do is ask for it in the contract. The County responded that it does not want to mandate that all professionals buy additional OPPI coverage, because doing so would increase the cost of professional fees across the board. Similarly, they do not want to demand that the contractors provide OCP coverage.
- d. The professional does not want to lower the Standard of Care and do not want to have to finance the County's defense in the absence of an allegation of violation of said Standard.
- e. Ms. Green acknowledged that it is not her intention to demand professional performance at a level that is stricter than the standard of care. However, she perceives that the word "negligence", which is in many older agreements, is a standard which is more demanding than just the Standard of Care. Consequently, the words chosen to describe the extent of this risk allocation are important to her. The County would like to make sure that the insurers do not deny coverage simply because the verbiage in the claim does not match that of the policy.
- f. The professionals also suggested that the County brings to the table the brokers who are writing the CGL policies that the county finds lacking, and to ask them to remedy those deficiencies.
- g. The professionals pointed out that the concerns that the county has regarding any additional burden on the contractors having the result of eliminating contractors from the bidding pool will also apply to the pool of professionals interested and able to work with the county. The fact that some professionals may have agreed to sign the current language is only due to the current dire situation in the marketplace.

In the end, the County agreed to discuss this issue in more detail, but only with a single person who could speak for the entire professional community. The professionals stated that it would be impossible to find a single person representative of the entire professional community. However, the County insisted.

Accordingly, Tim Hughes (ACEC) attended a second meeting with County Attorney Cheryl Green, at which time a revised more acceptable language for indemnification was crafted. Our AIA Chapter feels that this updated language is an improvement, but there are still serious concerns about it. The ACEC has found the language acceptable and it appears that most of its members would be willing to sign a contract containing it. The County is standing its ground and expressed that the aforementioned language is as far as they are willing to go.

I also received disturbing news from James Radwan, AIA (Trautman Associates), indicating that their Erie County contract may be voided due to a lack in Indemnification insurance coverage. Our local AIA Chapter is trying to help them in their efforts, and we're hoping the County will cooperate.

A position paper from James Maxson III CPCU, from Promark Associated Agencies, Inc. was issued on January 19, 2010 to design consultants that seemed to summarize many efforts to date. Please call their office to receive the full letter (633-8401). I would like to include a portion of this position paper for reference only.

“The greatest hurdle to overcome in reaching this compromise was the County’s diametric position on the use of “negligence” as the main trigger for the indemnity obligation. Without this modifier, Promark, and a representative number of insurance companies judged the original indemnity to be uninsurable. The County was implacable and could not be persuaded that negligence is intrinsic to professional liability coverage. However, the County was amenable to the term “wrongful act, error, or omission” as an acceptable qualification for the indemnity obligation.”

In conclusion, we're better off than we were a year ago, but we are not out of the woods yet. We wish the contract language was fairer to the professional community, in particular to the issue of first costs of defense. Our working together with the Engineers in ACEC is a welcome development. It doesn't look like the County Attorney will be amenable to further modifying the contract language. We believe the professionals, in particular the Architects, need to take a hard look at the language and decide whether it fits their particular situation. To help us understand the details of the proposed language, and where we go from here. I'm working with Phil Galbo, PE, ACEC VP, to organize a joint ACEC/AIA meeting in March 2010. I hope you'll join us

With regards,

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