

**DATE:** September 8, 2014

**SUBJECT:** Contract Management Section  
Publication 93 – Save Harmless Clause  
Publication 442 – Save Harmless Clause

**TO:** DISTRICT EXECUTIVES

**FROM:** R. Scott Christie, P.E. /s/  
Deputy Secretary for Highway Administration

The intent of this Strike-Off Letter is to amend Strike Off Letter 482-14-14, issued March 25, 2014, and 482-14-04, issued January 10, 2014, to further revise the Save Harmless Clause. *Publication 93, Policy and Procedures for the Administration of Consultant Agreements* and *Publication 442, Specifications for Consultant Agreements for Project Development Services* are revised by updating the existing Save Harmless Clause.

The policy in Publication 93, Section 5.8, Save Harmless Clause, has been revised. Page 5.14 is hereby deleted and replaced with the attached page, also included is a new Appendix 5D Example Insurance Certificate. Additionally, the policy in Publication 442, Section 3.1, Save Harmless Clause, has been revised. Page 3.1 is hereby deleted and replaced with the attached page.

Consultants must attach a Certificate of Insurance to the technical proposal for each agreement and supplement. The revised policy is applicable to all Technical Proposals for agreements and supplements submitted on or after the date of this letter. Legal agreements and legal supplements will not be created without this proof of insurance.

The new policy will be incorporated into the next revision of Publication 93 and Publication 442.

Should you require any additional information, please contact Michele L. Harter, P.E., Acting Chief, Contract Management Section, at (717) 787-7894.

Attachment

4825/JML

CC: R. Scott Christie, P.E., 8<sup>th</sup> Floor, CKB  
Assistant District Executive – Construction, District \_\_\_-0  
Assistant District Executive – Design, District \_\_\_-0  
Highway Administration Bureau Directors  
Project Delivery Division Chiefs  
District Portfolio Managers, District \_\_\_-0  
Michael Kline, Office of Chief Counsel  
Municipal Services, 6<sup>th</sup> Floor, CKB  
Damien Cummings, Office of Comptroller  
Federal Highway Administration  
PA Turnpike Commission  
American Council of Engineering Companies  
Bryan S. Kendro, 8<sup>th</sup> Floor, CKB  
Patrice Grace, 8<sup>th</sup> Floor, CKB  
Christine Reilly, P.E., CKB  
Wenda Sneeringer, 7<sup>th</sup> Floor, CKB  
File

outcome of the team efforts. The ADEC shall recommend a solution to the DE and the CMS Chief that is cost-effective and provides the desired quality.

#### **Assistant Construction Engineer**

The ACE shall oversee the preparation of a construction work order that provides a complete description and consequences of the error and document the additional construction cost. The ACE shall provide a copy of this work order to the ADED.

#### **Assistant District Executive – Design**

The ADED, ADEC and staff shall formalize the evidence of the alleged design error including who is responsible for the error, and necessary corrective action, the estimated cost to resolve the problem, the time schedule for design revisions and potential impacts to any construction schedule to present to the DE. After consultation with FHWA, if applicable, and the Office of Chief Counsel, the ADED shall provide a copy of the construction work order, where applicable, to the consultant and notify the consultant of the amount to pay the Department as a result of the design error. If the consultant agrees with the cost, a payment plan to the Department will be arranged. The Office of Chief Counsel must approve any payment plan that results in the Department not receiving full payment within ninety (90) calendar days. Payment of the determined amount shall conclude the design error process.

#### **District Executive**

If a consultant is unwilling to reimburse the Department for all costs resulting from the determination of a design error, a fact-finding meeting between the DE or designee, a representative of the Office of Chief Counsel and the CMS Chief and the consultant will be conducted. The consultant will be given an opportunity to provide evidence that the cost is incorrect or justification to support the position that the consultant was not negligent or should not be responsible for all, or a portion of the cost. The DE, in consultation with the FHWA and the Director of the Bureau of Project Delivery or designee, shall consider the additional information and make appropriate corrections in the determination of negligence and/or in the cost if warranted. The Office of Chief Counsel will commence legal remedies if reimbursement from the consultant is desired.

### **5.8 – Save Harmless Clause**

The Consultant, on behalf of itself, its subconsultants/subcontractors, agents and/or employees, agrees to indemnify and save harmless the Commonwealth and other agencies of the Commonwealth and Federal Government as defined herein. The Consultant shall furnish insurance certificate(s) and relevant, supporting insurance policy documents listing the project number and providing the following coverages and requirements:

- (1) property and general liability coverage, naming the Department as an additional insured on the policy; and
- (2) professional liability (errors and omissions) coverage (except for construction inspection agreements); and
- (3) sufficient documentation that its insurer will provide notice to the Department, as an additional insured party, at least thirty (30) days in advance of cancellation for reasons other than nonpayment of premium; and
- (4) sufficient documentation that its insurer, consistent with the requirements of 40 P.S. § 3310 (relating to notice to the first named insured), will provide notice, to the Department, as an additional insured, at least fifteen (15) days in advance of cancellation for nonpayment of premium.

For general liability, procure only occurrence-based insurance coverage in the minimum amounts of \$250,000 per person and \$1,000,000 per occurrence for bodily injury, including death, and \$250,000 per person and \$1,000,000 per occurrence for property damage, with any general aggregate limits on a per project basis, and so note on the certificate.

The Consultant shall notify the Department of material changes to insurance coverages, including, but not limited to, cancellation initiated by the Consultant, at least thirty (30) days in advance of the effective date of the changes or cancellation. This notification must come from the Consultant and is in addition to the requirements above for the insurer to provide notice to the Department.

The Consultant must attach certificate(s) of insurance to the technical proposal for each agreement and supplement. If the certificate(s) does (do) not provide or contain the necessary information concerning the foregoing requirements, please include the relevant endorsements with the certificate(s), including, but not limited to, all insurance policy endorsements that pertain to cancellation. Legal agreements and legal supplements will not be created without this proof of insurance. An example Certificate is provided in Appendix 5D.



## Chapter 3 – Agreement Terms and Conditions

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### 3.1 Save Harmless Clause

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- (2) professional liability (errors and omissions) coverage (except for construction inspection agreements); and
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### Contract Suspension and Cancellation

#### A. Suspension of Work Notice

The Deputy Secretary (or authorized designee), District Executive, and Assistant District Executive shall have the authority to suspend the work wholly or in part, under the terms of the Agreement whenever the Deputy Secretary deems such suspension is in the best interest of the Commonwealth, by issuing a Suspension Order to the Consultant. The Suspension Order may apply to the entire Agreement, or to any part(s), phase(s), or item(s) of work thereof, and upon one or multiple occasions. Upon receipt of such Suspension Order, the Consultant shall cease work immediately in accordance with the Suspension Order provisions and shall order all subconsultant(s) and subcontractor(s) to cease work immediately. The Consultant shall continue the suspension of work until such Suspension Order is subsequently withdrawn in writing by PennDOT. During the time the Suspension Order is in effect, the Consultant shall exercise due care and caution to protect and secure the completed work and work that was in process.

After receipt of the Suspension Order the Consultant may exercise one of the following options:

- 1) **For Cost Plus Fixed Fee Method**, the Consultant may invoice for the Direct and Indirect Payroll costs, for any applicable In-house Direct Costs, and the Direct Cost of Work and Services by Others as of the effective date specified in the Suspension Order.
- 2) **For Lump Sum Method and Unit of Work Method and for the Lump Sum Fee in the Cost Plus Fixed Fee Method**, the Consultant, with the approval of PennDOT, may establish an interim percentage of progress payments for accrued earnings to the effective date specified in the Suspension Order and may submit an invoice for the amount thereof.