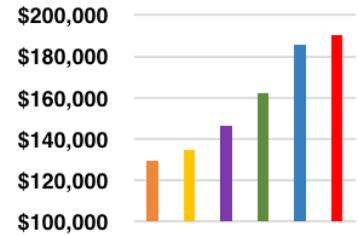


TRENDLINES

Executive compensation



According to Zweig Group's 2017 Salary Survey of Engineering Firms, the national average base salary for a **branch office manager** was \$129,479, **CFO/financial manager** was \$134,707, **vice president** was \$146,565, **executive vice president** was \$162,481, **COO** was \$185,866, and **CEO** was \$190,066. (Special discount to TZL subscribers: Use code **SRVY35off** to order surveys at 35 percent off at zweiggroup.myshopify.com/collections/frontpage)

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Packaging things to sell

“Tell the client what your assessment of their need is, how you will address it, what it will cost or what your contract will be based on, and why they should hire your firm to do it.”



Mark Zweig

EDITORIAL

AEC firms have a big problem. We wait for clients to tell us what **THEY** want or need and then we give them a proposal. That may seem perfectly normal to you. What's wrong with it is that when you play this game you'll almost always have competition and even if you don't, fee will be an issue. Plus, it's slow. You're waiting for the client to act so you can respond. If they don't act you can't respond.

Years ago we did some high-level consulting work for a small firm (about 30 employees). I led the consulting job. After we finished with our process it was apparent these people needed help from three other of our service areas. So I called my three discipline heads together and told them we were going to make these people three proposals for the various things they needed. I gave them my thoughts on what to include and the fee I thought was appropriate for each and they each did a proposal as I asked. We reviewed for format, content, and graphic consistency. Then I called the client and told them we wanted to see them at 9 a.m. on a Monday morning – that I was going to bring three of my key leaders and make them three separate proposals for services I thought would help them. The client agreed to the meeting.

When the day came, I had each department head make their pitch and at the end presented all three proposals to the client who signed them all and gave us six figures' worth of work and a retainer check by 11 a.m. My people and I all went to lunch and reviewed the lessons learned. They were shocked that we were successful but all of

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Mutual respect

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BUSINESS NEWS

ARCONIC ANNOUNCES THREE-YEAR TARGETS AT INAUGURAL INVESTOR DAY Arconic Inc. announced its levers for value creation and three-year financial targets through 2019 at its inaugural Investor Day event in New York.

Arconic is focused on driving shareholder value. The company has substantially improved its portfolio and margins since 2008, and today holds strong market positions across the sectors it serves, with 70 percent of revenues derived from number one or two market positions. Arconic is well-positioned to capture secular growth tailwinds in aerospace and automotive, and achieve margin expansion through cost reductions and share gains across all segments, driven by differentiated technology.

The company's \$1.2 billion retained interest (19.9 percent) in Alcoa Corporation provides further financial flexibility and Arconic plans to monetize this stake responsibly, with timing based on market conditions. Resulting cash would be used for debt pay-down and share repurchases.

The following three-year business targets were announced for the 2017 to 2019 time period:

- Arconic revenue: \$11.8 billion-\$12.4 billion in 2017, with 7-8 percent compound annual growth rate through 2019
- Adjusted EBITDA margin: Approximately 15 percent targeted for 2017, growing to approximately 17 percent in 2019
- Combined segment adjusted EBITDA margin (excluding corporate spend): Approximately 17 percent targeted for 2017, growing to approximately 19 percent in 2019
- Return on net assets: Approximately 9 percent targeted for 2017, growing to 11-12 percent in 2019
- Leverage: In 2019, target of 2.0-2.5 times net debt to adjusted EBITDA
- Free cash flow: More than \$350 million in 2017, increasing to approximately \$700 million in 2019

"We lead the company with an 'owner mindset', strongly focused on shareholder value," said Arconic Chairman and CEO Klaus Kleinfeld.

MARK ZWEIG, from page 1

them learned what is possible through this exercise.

Folks, it is still possible to do this today. Why are you always waiting for your clients to tell you what they want? Figure it out and **PITCH** them. Tell the client what your assessment of their need is, how you will address it, what it will cost or what your contract will be based on, and why they should hire your firm to do it. Throw away all of your boilerplate and other BS on how many years of experience and how many registered professionals you have. That is how successful sellers do it. And when you do there will be less competition and less fee pressure. Try it. Tell me how it works. ▀

MARK ZWEIG is Zweig Group's founder and chairman. Contact him at mzweig@zweiggroup.com.

"Our value creation model has six priority areas – innovation, market share and growth, productivity and overhead cost reduction, capital efficiency, de-leveraging and returning cash to shareholders. Arconic's recent separation from Alcoa Corporation has unleashed distinct advantages; our management team is completely focused on the major end markets we serve, our technology portfolio is wholly concentrated on value-add products and processes, we have an exacting capital expenditure approval process, an efficient operating structure, and are an attractive employer of choice for high performing talent."

Kleinfeld continued, "Arconic's businesses have strong market positions and margin profiles and are positioned to capture near-term growth tailwinds in our major segments. We have a clear execution path to incremental value by improving our businesses, a strong balance sheet profile and financial flexibility, and are attacking all opportunities to drive shareholder value. These strengths, combined with our new three-year targets, provide a clear roadmap for shareholder value creation."

Arconic has a strong track record of delivering productivity savings and expects to achieve \$650 million in 2016. The company is targeting net savings of approximately 2 percent of revenue in 2017. Arconic applies an 'owner mindset' to capital allocation, prioritizing growth, optimization of financial position, debt pay-down, and return of cash to shareholders. The company has an exacting approach to capital expenditure approval, with 2017 expenditures capped at \$650 million.

Arconic's executive compensation structure is aligned with shareholder value creation.

The company is targeting a regular dividend to shareholders of approximately 10 percent of operating cash flows, with periodic, opportunistic share repurchases based on relative return assessment.

Take your advice from Mark Zweig to-go.

thezweigletter.com/category/podcast/

THE ZWEIG LETTERS

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Published continuously since 1992 by Zweig Group, Fayetteville, Arkansas, USA. ISSN 1068-1310.

Issued weekly (48 issues/yr.). \$475 for one-year subscription, \$775 for two-year subscription.

Article reprints: For high-quality reprints, including Eprints and NXTprints, please contact The YGS Group at 717-399-1900, ext. 139, or email TheZweigLetter@TheYGSGroup.com.

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OPINION



The marketing conundrum

You know what you're supposed to do, but since your marketing department is understaffed and disempowered, you can't make it happen.



**Chad
Clinehens**

I'm sure many of you have found yourselves in that familiar seminar or conference listening to a speaker tell you how to better position your firm for opportunities or how to develop more business. I'm also pretty certain that it's something you have heard before and that there's nothing earth shattering about anything that is being shared. Why then if we have heard these things over and over are we not going back to the office and implementing them? Well, there are probably a number of reasons but I will focus on just a few key issues.

BRAND BUILDING

Most of us are or have spent the majority of our careers as design or technical professionals and we do not naturally connect with the marketing side of the business. Our job descriptions dictate a list of priorities that allow little if any time for real marketing strategy. Being billable and maximizing utilization is natural to us and offers instant gratification. This is one reason that firms have trouble investing in marketing anywhere close to where they should be. It's just not in our DNA.

When I spend an hour on a project, I can immediately turn around and send a bill for one hour of work and get the return on that investment directly and almost immediately. When it comes to marketing, I can spend an hour

“Marketing investment requires more faith and risk-taking than we are naturally wired to take. And it doesn't provide the instant gratification that the business is built around – working on billable projects.”

of effort and might never see any direct benefit, and even if I do, it could take time. Marketing investment requires more faith and risk-taking than we are naturally wired to take. And it doesn't

See CHAD CLINEHENS, page 4



BUSINESS NEWS

FLUOR PROJECT NAMED POWER ENGINEERING MAGAZINE'S OVERALL PROJECT OF THE YEAR

Fluor Corporation announced that Brunswick County Power Station in Virginia was named Project of the Year by *Power Engineering* magazine during the keynote address at the Power-Gen International conference and exhibition in Orlando. Fluor designed and built the 1,358-megawatt natural gas combined-cycle facility for Dominion Virginia Power.

The *Power Engineering* awards program recognized eight projects as finalists across the four categories of Natural Gas, Renewables, Coal, and Combined Heat and Power. Projects

were evaluated based on technological innovation, local impact, logistical challenges, creativity and capacity. The project was also recognized as the 2016 Natural Gas-Fired Project of the Year.

"We are proud that Brunswick County Power Station has been recognized with this respected industry award," said Wolfgang Greinke, vice president of Fluor's power business. "With a history spanning nearly 50 years in the natural gas power industry, we are privileged to bring our turnkey services to the next generation of new, advanced technology power facilities. This important project also represents the successful

continuation of Fluor's relationship with Dominion Virginia Power, a respected and trusted client."

The Brunswick County Power Station began commercial operations in April 2016 with Fluor providing engineering, procurement, construction, and commissioning services for the facility. Fluor's construction staff and craft peaked at more than 1,500 team members. The construction team successfully installed more than 38,000 cubic yards of concrete, 142,000 linear feet of pipe, and 420 miles of cable. The project was completed ahead of schedule.

CHAD CLINEHENS, from page 3

provide the instant gratification that the business is built around – working on billable projects.

We also have an organizational problem with marketing. It operates off to the side as a support function, often with little leadership or oversight. Until, of course, there is an opportunity to micromanage a proposal or make a thousand changes on the general brochure. But that's not leadership or oversight, that is unqualified meddling. We don't hire people who are strategic or who we trust to make decisions, so when something big is in the hopper, the firm's principals come out of the woodwork to manage things. Because of our chronic underinvestment in marketing, we cannot go to these seminars and conferences and then bring that great information back to the firm for someone to implement. We don't have the staff or resources to make those things happen.

"As you look to 2017, make a commitment to spend more on marketing. Make sure you have the right leadership for your marketing team. Make sure your marketing leader is fully empowered to make decisions and aid in the execution of the overall strategic plan."

Further evidence of this marketing conundrum is provided by our most recent *2016 Marketing Survey*. In it, we ask the open-ended question of what you believe are the most effective marketing strategies/activities. You cite:

- 1) Personal selling/relationship building.
- 2) Website, social media, and content marketing.
- 3) Direct calls to existing clients.
- 4) Provide training/seminars.
- 5) Engaging more employees in marketing.

I cannot disagree with a single one of those priorities. Bravo.

"This is about leadership, seeking opportunities, and building a brand in the marketplace. This is about breaking down the conundrum and focusing on those activities and strategies that are most effective. You know what they are, now see it through!"

Now here are the five least effective marketing strategies/activities:

- 1) Brochures and direct mail.
- 2) Hosting and sponsoring events (open houses, etc.).
- 3) Advertising.
- 4) Responding to too many RFPs or unqualified leads.
- 5) Tradeshow.

Now for the conundrum. Why is it that you spend the most time and money on the very things that you cite as the least effective? It's just crazy!

As you look to 2017, make a commitment to spend more on marketing. Make sure you have the right leadership for your marketing team. Make sure your marketing leader is fully empowered to make decisions and aid in the execution of the overall strategic plan. Make sure the firm principals are sharing those interesting approaches and new ways of marketing that they are learning at those seminars and conferences and that the marketing leader is accountable for making those things happen. This is far bigger than just making sure all of the proposals get out the door. This is about leadership, seeking opportunities, and building a brand in the marketplace. This is about breaking down the conundrum and focusing on those activities and strategies that are most effective. You know what they are, now see it through! ▀

CHAD CLINEHENS is Zweig Group's president and CEO. Contact him at cclinehens@zweiggroup.com.



Strategies to survive the next recession

If firms employ these operational and financial strategies, their chances of weathering a downturn, regardless of how bad it is, will increase.



June Jewell

GUEST
SPEAKER

Last week, June Jewell outlined five ways to insulate your firm from the worst elements of an economic downturn. This week, she provides another five things a firm can do to prepare for a slump, one that is sure to come at some point in the future.

- 1) Improve business management processes.** Many firms are still doing things the way that they have been done for years. Unless you are constantly improving how you manage your business, you are falling further behind and will experience waste. Inefficiency comes in many flavors including redundancy, non-integrated systems, spreadsheets, and inconsistency between offices and teams. A business management assessment is a great first step to understanding weaknesses in business operations and provide a clear path for improving.
- 2) Operate as if the recession has already happened.** Many firms wait until it is too late to make the needed changes to their spending, hiring, and investing practices. By operating as if work is hard to get you will position your business for more fiscal responsibility and lean operations. The only caveat to

“Unless you are constantly improving how you manage your business, you are falling further behind and will experience waste.”

this advice is to ensure that you continue to invest in areas of the business that will give you leverage and improve project performance.

- 3) Focus on client relationships.** Your existing clients are your source of future success yet not all clients are created equal. Make sure you are focusing on those clients that provide the most profit and growth potential for your company. Many firms

See JUNE JEWELL, page 8



SPOTLIGHT ON: **Struct**

PROFILE



Structural Focus designed the seismic retrofit and other structural modifications for the historic Masonic Temple in Glendale, California. / Structural Focus

Mutual respect

Casual leader of engineering firm is doing what he wants to do, surrounding himself with smart people, and getting the job done.

By LIISA ANDREASSEN
Correspondent



David Cocke,
Founder,
Structural
Focus

After 20 years of working for someone else, David Cocke founded **Structural Focus** (#1 Best Firm Structural for 2016) in Gardena, California. It was 2001 and he was ready to make his own business decisions, set a company culture, and have the freedom to pursue the types of projects that most interested him.

Today, Cocke is very active in the preservation of historic buildings and has made numerous presentations regarding the reuse of existing buildings using sustainability principles. He is also co-founder and managing director of SAFEq Institute which serves as a resource for post-disaster inspections and direct services to government entities and

business owners. He is a recognized expert in building business resiliency and continuity related to disaster risks, and believes that pre-planning and partnerships with cities can greatly reduce business interruption after an earthquake or other disaster.

“You are going to fail frequently at some things, learn from those failures and move on.”

A CONVERSATION WITH COCKE.

The Zweig Letter: How have you seen the company evolve since its founding?

DC: Structural Focus was founded with the



Structural Focus:

CONNECT WITH US *Zweig Group is social and posting every day!*



mission “to provide exceptional engineering and superior client service in order to accomplish projects of which both we, and our clients, can be proud.” Through the years, we are very fortunate to have been able to develop loyal relationships with great clients who trust us. It is very rewarding to see the firm’s growth without compromising our mission. Structural Focus started with me as the lone structural engineer and my wife, Kate, providing administrative and accounting support (she had 19 years of project management experience at **Bechtel**). We now have 19 employees.

“I am ‘casual’ in my manner and I believe that humor is important every day. I am very collaborative and I expect mutual respect. I strive to manage with clarity and I require accountability.”

TZL: What are your key leadership strengths?

DC: Honesty, communication skills, and the ability to empathize with others.

TZL: What do you feel the key strengths are for an effective leader?

DC: Effective leaders must have a clear vision, demonstrate integrity, lead by example, and he/she must not be afraid to surround him/herself with smart people and listen to them.

TZL: How would you describe your leadership style?

DC: I am “casual” in my manner and I believe that humor is important every day. I am very collaborative and I expect mutual respect. I strive to manage with clarity and I require accountability.

TZL: To date, what has been a top challenge and how did you deal with it? What was the outcome?

DC: Structural Focus strives to develop a “work family” and although our turnover is very low, every time that someone leaves, it can truly impact our team. Every company has to expect that some employees will leave at some point to explore other opportunities. We have overcome this by showing our employees that change brings opportunities for growth and career advancement.

TZL: What is your vision for the future of Structural Focus?

DC: We are constantly working on becoming a leader in our industry. We want to design structures that we can be proud of, and be proud of how we do it. I want Structural Focus to have the opportunity to design or rehabilitate some of the best projects in the region.

TZL: Tell me about a recent project you are especially proud of and why.

DC: The historic renovation and adaptive reuse of Glendale’s historic Masonic Temple into CBRE’s new offices is one of my favorites. On May 1 of last year we were brought in to evaluate the historic eight-story concrete building, continued to design the seismic retrofitting and other structural modifications, and construction was completed by the end of December. The \$16 million renovation was completed in approximately eight months from beginning of design to occupancy. The contractor’s thorough documentation of unforeseen conditions and the architect’s flexibility in design, coupled with our out-of-the-box solutions, are credited for the success of the project. The project has won numerous structural, architectural, and preservation awards.

TZL: How have you helped your firm to outperform some competitors? What do you feel sets your firm apart?

DC: Strong communication skills are essential in all aspects of our lives. My emphasis on great communication has been key to my success. At Structural Focus, we strive to become “trusted advisors” to our clients. Therefore, we hire top quality technical people with the personality and communication skills to develop strong relationships with our team and our clients. We strengthen our skills through continuous education, not only technical but also non-technical training.

“We are constantly working on becoming a leader in our industry. We want to design structures that we can be proud of, and be proud of how we do it. I want Structural Focus to have the opportunity to design or rehabilitate some of the best projects in the region.”

TZL: Any news you care to share about Structural Focus projects or anything else?

DC: We are constantly looking to hire great engineers at all levels! We are currently working on great projects including the renovation of a large historic hotel in downtown Los Angeles and the design of new headquarters for a major entertainment company. Structural Focus is rapidly growing and I am very optimistic about our future! We are also very excited to have been named the #1 structural firm in the Best Firms to Work For list by the Zweig Group in 2016 and Top 5 Best Places to Work in Los Angeles by the *Los Angeles Business Journal*. It’s a wonderful feeling to have our staff validate that we have successfully created the firm that I envisioned at the beginning of this journey.

TZL: Are you married? Children? Pets?

See Q&A, page 8

JUNE JEWELL, from page 5

do not intentionally focus on how to grow their business through existing client relationships. A client retention plan for your best clients is a strategic way to ensure your business will thrive during an economic downturn.

“Many firms do not intentionally focus on how to grow their business through existing client relationships. A client retention plan for your best clients is a strategic way to ensure your business will thrive during an economic downturn.”

4) Create financial rituals. One of the challenges that many A/E industry leaders struggle with is holding project managers and employees accountable for hitting goals and achieving financial results. When I explore further, I often see a lack of financial rituals, including regular meetings, to keep focus on metrics and financial progress. Your teams are very busy and

often we fail to pay attention to key numbers until it is too late. A regular rhythm of meetings and reporting will create better habits and serve to change your culture to one that will benefit you greatly during a recession.

5) Train staff to improve project performance. Many firms lose money on projects because of all the gaps identified above that lead to scope creep, inefficiencies, and lack of accountability. By training PMs and other technical staff about the importance of profitability and financial best practices, you can set your firm up for better financial success and eliminate costly budget overruns.

By increasing the operational and financial performance of your firm, you can make your firm more valuable, efficient, and better prepared for any economic climate. Whether the next recession is big or small, long or short, having a lean and operationally optimized business will go a long way toward long-term survival and growth. ▀

JUNE JEWELL is president of **AEC Business Solutions**. Connect with her on LinkedIn and learn more about how to improve your firm's financial performance at aecbusiness.com.

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DC: Kate and I have been married for 36 years, and we have two grown sons. We have always had at least one or two dogs in our house, currently a rescued French bulldog and a French/American bulldog mix – Ricky and Lucy.

TZL: What's one thing most people at the firm don't know about you?

DC: From age 16 to 21 I worked in the rides department at a theme park called King's Dominion. I started on the kiddie rides and was eventually promoted to one of two park ride supervisors overseeing 26 rides. I can probably still operate any theme park ride out there. That job taught me several life-lessons, including how to handle “unhappy” people.

TZL: Best vacation spot? Dream destination?

DC: Every year, we meet our extended family at a small beach in North Carolina – my family has been vacationing there since I was a teenager. Several years ago, Kate and I sailed the Greek islands with good friends for a couple of weeks. It was very special. We now dream about living in Tuscany for several months when we get a chance. We'll see.

TZL: Last book read?

DC: *An American Caddy in St. Andrews* by Oliver Horowitz. I love golf and was lucky enough to go there this past summer with some friends. *Good to Great* is also a very meaningful book for us, especially in the early stages of the firm's growth.

TZL: What's the last movie you saw in the theater?

DC: *Hacksaw Ridge*.

TZL: What's the best piece of work-related advice you've ever received?

DC: It was from my father. “Always hire people smarter than you.”

TZL: Who is a leader you admire? Why?

DC: Abraham Lincoln and Robert E. Lee – sounds strange, doesn't it? They both found themselves in incredibly difficult situations and never lost their integrity.

“We hire top quality technical people with the personality and communication skills to develop strong relationships with our team and our clients. We strengthen our skills through continuous education, not only technical but also non-technical training.”

TZL: What advice would you give to someone interested in starting their own firm?

DC: Don't start anything if you do not have the ability to develop client relationships. In addition, have a clear vision, hire only the best, have adequate capital to get you through the cash flow issues, become a sponge for advice and then make up your own mind. You are going to fail frequently at some things, learn from those failures and move on.

TZL: When you're not working, what types of activities do you enjoy?

DC: I ride a road bike three times a week and I love to play golf (my father taught me to play when I was 7 years old). I also love to travel and spend time with my wife and my family.

TZL: Favorite lunch?

DC: Anything. As long as I don't have to eat too late. ▀



Crimes and misdemeanors: Part one

Campaign finance laws, bid rigging, price fixing, and bribery. We hear about this with contractors, but how about design professionals?



William
Quatman

GENERAL
COUNSEL



Several times each year, there is an article about some contractor being debarred or convicted of bid rigging, bribery, or kick-back schemes. We turn the page, shake our heads, and wonder why those contractors are so unethical. But is it just contractors who break the law on ethics? How about design professionals? It is rare for criminal charges to be filed against them, but it does happen, and more often than you would expect. Here are a few laws and related cases that will send chills down your spine, as they should, and would make an excellent training session at your next lunch-and-learn about what “not to do.”

CAMPAIGN FINANCE LAWS. AIA’s ethical Rule 2.102 prohibits bribery by members “with the intent of influencing the official’s judgment in connection with an existing or prospective project,” followed by Rule 2.103, which bars members serving in a public capacity from accepting payments or gifts “which are intended to influence their judgment.” The official commentary notes that these rules do not prohibit campaign contributions made in

conformity with applicable campaign financing laws. However, those rules are sometimes broken. Take for example a 2008 case in which three top executives of a large engineering firm were charged with violating campaign finance laws.

The firm’s chairman and chief operating officer pled guilty to paying a gratuity to influence

See WILLIAM QUATMAN, page 10

BUSINESS NEWS

ARCONIC EARNS PERFECT SCORE ON 2017 CORPORATE EQUALITY INDEX Arconic Inc., a global technology, engineering, and advanced manufacturing leader, announced it has earned a perfect score of 100 on the 2017 Corporate Equality Index, a national benchmarking survey and report on corporate policies and practices related to LGBT workplace equality.

The CEI is administered by the Human Rights Campaign Foundation. This is the eighth consecutive year in which the Company has earned a perfect score; prior years' rankings are listed as Alcoa Inc.

"At Arconic, we understand that our employees contribute their best when they can bring their whole self, every day, everywhere,"

said Vas Nair, executive vice president, human resources environment, health, safety, and sustainability. "We are incredibly proud to once again score 100 percent on the Corporate Equality Index, and we look forward to continuing to champion LGBT-inclusive policies and practices – across our locations and in our communities."

WILLIAM QUATMAN, from page 9

and reward a public official. The third executive, a vice president, pled guilty to concealing material facts. Under the alleged scheme, company employees were invited to make personal donations of \$1,000 each to a public official, which the company promised to pay back, in order to avoid state caps on corporate campaign donations.

"Several times each year, there is an article about some contractor being debarred or convicted of bid rigging, bribery, or kick-back schemes. We turn the page, shake our heads, and wonder why those contractors are so unethical. But is it just contractors who break the law on ethics? How about design professionals?"

BID RIGGING/PRICE FIXING. Federal and state laws prohibit price-fixing and bid rigging schemes which violate the spirit of competitive bidding. These include anti-trust criminal laws like the Sherman Act, and its companion, the Clayton Act, which allows the federal government or private individuals or groups to sue for violation of anti-trust laws. Plaintiffs in these cases may recover "treble" (triple) damages, plus costs, attorney's fees, and interest. The only case dealing with design professionals involved three minority-owned architectural firms in the same city that formed a coalition in which the group agreed to target projects it desired to pursue and, once chosen, its members could not pursue work on such projects in their individual capacities or associate themselves in any way with the project except in their role as members of the group.

The court found that this agreement violated the Sherman Act. The court clarified that although the "arrangement is not bid rigging nor price fixing as such, there is little difference in terms of the anticompetitive impact ... An agreement between competitors that creates a joint venture having the power to direct individual competitors to refrain from bidding on contracts interferes with the free market price structure."

BRIBERY. There are numerous federal statutes that prohibit bribery of public officials in order to influence any official act. These include the Anti-Kickback Act, the Hobbs Act, and the Copeland Act. In one Alabama case, the owner of an engineering firm was convicted of paying bribes in

exchange for contracts, including giving one official stacks of \$100 bills in envelopes containing from \$1,000 to \$4,000. In return the firm received 48 new contracts and more than \$1 million in professional fees. In addition, the official was given free architectural plans and hunting trips from an architect whose firm had entered into contracts with the county. The official was found guilty and sentenced to 120 months in prison. The engineer was also convicted and sentenced.

In a 2010 case, multiple officials, government contractors, and engineers were convicted of conspiracy to commit bribery, bribery, and public corruption relating to a \$3 billion repair and rehabilitation of a sewer and wastewater treatment system. The evidence showed that two county officials received hundreds of thousands of dollars in bribes, in addition to free work on their homes, gift certificates, trips, and even a college scholarship from the defendants, who obtained hundreds of millions of dollars-worth of construction and engineering contracts with the county. One engineering firm was awarded more than \$50 million in contracts during the sewer rehabilitation project. When one defendant argued that the gifts were merely to foster good will with the county, the court held: "A finding that a gift was made or accepted with corrupt intent necessarily excludes friendship and goodwill gifts," adding that the extent to which the parties went to conceal their bribes was powerful evidence of their corrupt intent. In addition to prison terms, one defendant was ordered to pay a \$19.4 million fine.

"If an owner, contractor, or another design professional makes you a proposal that does not feel right, go with your 'gut instinct' and talk to your lawyer before proceeding."

BE CAREFUL OUT THERE! Most of these criminal convictions involve conduct that you would recognize as unethical and illegal even before reading this article. But sometimes the pressure to bring in a project, or avoid competition, is just too tempting for those with a lower moral compass. If an owner, contractor, or another design professional makes you a proposal that does not feel right, go with your "gut instinct" and talk to your lawyer before proceeding. ▀

WILLIAM QUATMAN is an architect and general counsel at Burns & McDonnell Engineering Co. Contact him at bquatman@burnsmcd.com.



Onerous indemnification clauses

If improperly worded, they not only can shift significant risks, but do so in ways that leave design professionals exposed to potentially large claims.



Dan
Knise

GUEST
SPEAKER

A critical component of effective risk management for design firms involves practicing good contract hygiene. This includes reviewing any prospective contract to evaluate the risk associated not only with the professional services to be performed, but also related to any contractual risk transfer that can create or expand liability for the architect, engineer, or construction manager.

While many provisions can shift risk (e.g., standard of care, warranties, and guarantees, etc.), one of the most important is indemnification clauses. If improperly worded, these clauses not only can shift significant risks, but do so in ways that leave design professionals exposed to potentially large claims that may not be covered under their professional liability insurance.

In assessing the potential impact of an indemnification clause, A/E firms must first recognize that their coverage under professional liability insurance policies is typically restricted to liabilities that arise from negligent acts, errors, or omissions in the rendering of, or the failure to render, their services.

“When architects or engineers agree contractually to indemnify a client for anything unrelated to the design firm’s negligence, it won’t be insured.”

Significantly, the policies exclude contractual assumption of liability other than “liability that would have attached in the absence of the contract.” So, when architects or engineers agree contractually to indemnify a client for anything

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unrelated to the design firm's negligence, it won't be insured.

Further, in case law the issue of "privity" and the "economic loss doctrine" provide additional protection for design firms. Typically, absent a contractual commitment to the contrary, design professionals cannot be sued for economic loss incurred by a third party not in a contractual relationship with the design professional. However, when design firms agree contractually to an indemnification clause that extends to contractors, financial institutions and other third parties, this protection may be eroded.

"The first step in reducing uninsured or inappropriate risk is to understand what terms in an indemnification clause can hold the potential for uninsured exposures."

PROBLEMATIC INDEMNIFICATION WORDING ADDS RISK. While owners may have logical reasons to require indemnification, some try to protect themselves with language that is unfair, poorly worded, ambiguous, and uninsurable. For instance, consider the following example of an inappropriate indemnification clause:

Consultant shall indemnify, defend and hold harmless the Client, the Client's employees, directors, officers, agents, representatives, subsidiaries, affiliated companies, and lenders from and against any and all liability, costs and expenses including, but not limited to, attorney's fees, that occurred in whole or in part, as a result of the Consultant's acts, errors or omissions.

This clause has several issues, including:

- **Duty to defend.** The word "defend" in the first line needs to be deleted, as the duty to defend can be broader than the duty to indemnify. If unchanged, this implies the design firm will provide the defense and pay the costs from the moment a suit is filed or a claim is made – regardless of any allegation of its negligence. Without a claim of negligence, the design firm has accepted a liability that would not exist without the contract and may not be insured.
- **"Agents, representatives, subsidiaries, affiliated companies, and lenders."** Agreeing to indemnify these additional parties can create two problems. First, you may be indemnifying parties for whom you would otherwise not have liability, which is an uninsured exposure. Second, this language could be interpreted as creating a contractual relationship (i.e., "privity") with these parties, thereby increasing the odds that a suit for economic loss against your firm will be upheld. So, the references should be deleted and design firms should limit indemnified parties to the client, its officers, directors, and employees.
- **"Any and all."** The wording "any and all" should be deleted. It implies application of the indemnification to claims that may not relate to negligence.
- **Lack of negligence standard.** In order for any indemnification provision to be insurable, it must be tied to the consultant's negligence. The provision, as worded, makes no reference to negligence. So, the word "negligent" should be

inserted prior to "acts, errors or omissions."

- **Attorney's fees.** Whenever "attorney's fees" are included in an indemnification provision, it needs to read: "attorney's fees where recoverable under applicable law on account of negligence" or something similar. Not all jurisdictions allow the recovery of a plaintiff's legal costs against the architect or engineer. In states with such laws, the fees are likely covered under a professional liability policy if the award is based on a finding of negligence, but not solely due to a contractual obligation to reimburse such fees.
- **Lack of proportional liability.** The phrase "in whole or in part" should be deleted and replaced with "to the extent caused by." If unrevised, it creates a potential uninsured exposure. A professional liability insurance policy only covers a firm for its share of the liability.

Given the revisions outlined, here's the corrected version (with deleted text in brackets and strikethrough; inserted text in bold type) of the uninsurable indemnification provision:

*Consultant shall indemnify, [defend] and hold harmless the Client, the Client's employees, directors, **and** officers [~~agents, representatives, subsidiaries, affiliated companies, and lenders~~] from and against [any and all] liability, costs and expenses including, but not limited to, attorney's fees **where recoverable under applicable law on account of negligence** [that occurred in whole or in part, as a result of] **to the extent caused by the Consultant's negligent acts, errors or omissions.***

One other important point with regard to indemnification clauses: Be sure they "flow down" to any subconsultants the architect, engineer, or construction manager may be using on the project with wording identical to that of the primary agreement.

"While owners may have logical reasons to require indemnification, some try to protect themselves with language that is unfair, poorly worded, ambiguous, and uninsurable."

The first step in reducing uninsured or inappropriate risk is to understand what terms in an indemnification clause can hold the potential for uninsured exposures. Once these are recognized, the design firm should attempt to negotiate improvements that ensure a fair allocation of risk. Often, we find changes are possible simply by asking and explaining the unintended result of eliminating insurance coverage for a claim. Where the owner won't make necessary changes, the firm then has the information it needs to make a "business decision" about whether or not to move forward with a less than acceptable clause.

In such instances, we are aware that some design firms may add a "risk charge" to their project pricing to help minimize any potential financial impact. ▀

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