



Bulletin

Indemnification Clauses

INTRODUCTION

Indemnification clauses are often included in subcontracts to transfer risk from the general contractor (GC) to you, the subcontractor. Basically, in that context, indemnification means the obligation of the subcontractor to reimburse the GC for damages arising from future claims for which the GC is or may be held liable.

These clauses protect not only the GC, but usually the owner and possibly designers too, from the consequences of accidents resulting in property damage, personal injury and other described liabilities.

The indemnification clause presents a tremendous potential danger to you, however, and you must recognize that **the indemnification clauses in subcontracts are typically not two-way streets—they work only against the subcontractor**. It is essential, therefore, that before you enter your subcontract, you know precisely the losses for which you will be required to indemnify others.

LIMITATIONS OF INDEMNIFICATION CLAUSES

Certain indemnification clauses make the subcontractor liable for damages though it was in no way responsible for causing them. Because of this, along with the perception that GCs often hold an upper hand in subcontract negotiations, most states have enacted statutes limiting the scope and/or enforceability of construction contract indemnification clauses. These laws are commonly referred to as anti-indemnity statutes. Virtually every anti-indemnity statute is different, so it is important that you know the applicable rules in the states where you work. One helpful starting point can be viewed at http://www.litmgmt.org/LMI/docs/2009-10-28%20Subcontractor_Chart_of_Anti-Indemnity_Statutes_2009.pdf – but be sure to check the current statute in your state.

Although there are several different types of indemnification clauses, for the most part, you will encounter one of three types in your trade subcontracts. These are sometimes described as:

- Limited,
- Broad form, or
- Intermediate indemnification clauses.

A **limited indemnification clause** is the most favorable for subcontractors and makes the subcontractor responsible for indemnification obligations *only to the extent* the damage was caused by the negligent acts or omissions of the subcontractor or those for whose acts the subcontractor is liable. All states allow limited indemnification provisions. You will find this type of limited indemnity provision in both the AIA A401 standard subcontract and the newer ConsensusDOCS subcontract, form CDS750. Although some GCs' proprietary subcontract forms (GC subcontracts) may contain a limited indemnification clause, most GCs choose to use either intermediate or broad form provisions (unless the same would be void or unenforceable under the anti-indemnity statute in the state where the project is performed, if any.)

A sample limited indemnification clause might read as follows:

The Subcontractor agrees to indemnify and hold harmless the Owner, GC and any of their agents and representatives against all claims, damages, losses, expenses and attorney fees arising out of or resulting from the performance of the Subcontractor's work, because of bodily injuries (including deaths) sustained by any person or persons, or on account of damage to property including loss of use thereof, but only to the extent such injuries to persons or damage to property are due to the fault or negligence of Subcontractor or those for whose acts the Subcontractor is responsible.

Broad form indemnification clauses impose the entire risk of loss on the subcontractor even when the damage was caused entirely by the GC, owner or other named, indemnified party. The subcontractor's indemnification

obligation exists even if the subcontractor is not negligent or at fault in any way and even if the loss is due *solely* to the fault of others. This is the harshest type of indemnification clause for subcontractors and is in fact void under many state anti-indemnity statutes.

By entering a subcontract which contains a broad form indemnification clause similar to the sample below, you could be responsible for holding harmless the GC from just about every possible loss contingency on the project. Most state anti-indemnity statutes as discussed above prohibit broad form indemnification clauses. A sample broad form indemnification clause is as follows:

The Subcontractor agrees to indemnify and hold harmless the Owner, GC and any of their agents and representatives against all claims, damages, losses, expenses and attorney fees arising out of or resulting from the performance of the Subcontractor's work, because of bodily injuries (including deaths) sustained by any person or persons, or on account of damage to property including loss of use thereof, whether such injuries to persons or damage to property are due or claimed to be due in whole or in part to the negligence of Owner, GC or any of their employees or agents or any other person. It is specifically understood that this provision shall be interpreted as indemnifying Owner, GC and any of their agents and representatives from their own sole and/or partial negligence.

An **intermediate indemnification clause** is similar to the broad form clause, but expressly excludes damages arising from the sole negligence of the GC, owner or other indemnified party. Under this type of indemnification

clause, the subcontractor might be responsible for all of the liability resulting from an incident where the GC or owner is 99% at fault. An example of such clause is set forth below:

The Subcontractor agrees to indemnify and hold harmless the Owner, GC and any of their agents and representatives against all claims, damages, losses, expenses and attorney fees arising out of or resulting from the performance of the Subcontractor's work, because of bodily injuries (including deaths) sustained by any person or persons, or on account of damage to property including loss of use thereof, whether such injuries to persons or damage to property are due or claimed to be to the negligence of Owner, GC or any of their employees or agents or any other person. This clause shall not apply where such loss, damage, injury, liability, death or claim is the result of the sole negligence or willful misconduct of the Owner, GC and any of their agents and representatives.

By entering into a subcontract with a broad form or an intermediate indemnification clause, you are agreeing to hold harmless the GC and others for damages resulting from their own negligence. Barring the application of a state anti-indemnity statute, court decisions have held broad form and intermediate clauses to be binding despite their blatant inequity.

WHAT CAN YOU DO TO MITIGATE THE EFFECTS OF AN INDEMNIFICATION CLAUSE?

If you are confronted with a proposed subcontract containing a broad form or intermediate indemnification clause, negotiate a modification to that clause if possible (See Bulletin CT 9). You

should exert strong efforts to persuade the GC to eliminate the provision wherein you agree to hold harmless the GC for losses occasioned by events, acts or omissions over which you have absolutely no control.

Try to include specific language limiting your indemnification of the GC and others to losses arising out of the performance of your subcontract that result from negligent acts and omissions by you, your subcontractors, and others for whose acts you are responsible. Another potential solution is to negotiate a cap on your liability to be inserted at the end of the indemnity clause: "In no event shall the Subcontractor's liability hereunder exceed the sum of \$ _____. "

Regarding your sub-subcontracts, be sure that you include, either expressly or by reference a strong indemnification clause compliant with applicable state law. These lower-tier indemnity clauses must be at least as broad as the indemnification clause in your subcontract with the GC. At a minimum, the identical indemnification language and requirements set forth in the subcontract between you and the GC must flow to your lower-tier subcontractors. Otherwise, you may be held responsible to the GC for damages arising out of that lower-tier subcontract that cannot be recovered from your sub-subcontractor under the terms of that sub-subcontract.

CONCLUSION

Always review and understand the indemnification clause presented in any subcontract form as well as the applicable state law in the jurisdiction where the project is located. Seek outside counsel from insurance brokers and attorneys as needed to ensure your understanding of what risks you are accepting. Always try to modify a

subcontract indemnification clause to reflect a limited type provision as discussed above so that you do not end up paying limitless damages resulting from the fault of others.

The information in this bulletin should not be construed as legal advice. Contact your local counsel for specific legal advice regarding the information contained in this bulletin.