WHAT TO DO IF YOU ARE ASKED TO SIGN AN INDEMNIFICATION AGREEMENT TO USE SCAFFOLDING OR OTHER EQUIPMENT OWNED BY A GENERAL CONTRACTOR

CONTRACTUAL INDEMNIFICATION REQUIREMENTS

As discussed in an earlier Sidebar, “What to Look For and What to Look Out For in an Indemnification Provision,” indemnification clauses have arguably the most potential to impose drastic consequences on unwary roofing contractors. An overly broad indemnification clause may force you to assume a wide variety of risks on a project, many of which are uninsured and beyond your reasonable ability to control. When reviewing a contract, remember indemnity obligations may show up multiple times throughout the contract.

It is not uncommon for subcontracts to include indemnity provisions relating to assumption of risk if a roofing subcontractor uses scaffolding or other equipment owned by a general contractor. An example of such a clause follows:

*In the event that Subcontractor utilizes any machinery, equipment, tools, ladders, scaffolding, hoists, lifts or similar items belonging to Contractor, Subcontractor agrees to indemnify, defend and save harmless Contractor from and against any and all claims, demands, suits, actions, expenses, judgments, losses and liabilities arising out of such use, unless such loss or damage is caused by the sole negligence of Contractor’s employees operating the said equipment.*

As written, this provision imposes a broad indemnity obligation on roofing subcontractors in that it requires the subcontractor to pay 100 percent of the damages even if it is only partially responsible. In addition, this clause may require a subcontractor to assume responsibility for damages that may have resulted from the general contractor’s failure to properly maintain the equipment even if inspection of the equipment would not have revealed any defect. As with the – more –
INDEMNIFICATION AGREEMENT—CONTRACTOR EQUIPMENT/2

general indemnity provision, an indemnity provision relating to borrowed equipment should be limited to damages to property or injuries to people and only to the extent caused by the subcontractor’s negligence. The indemnity provision relating to borrowed equipment should be no broader than the general indemnity provision, and you should seek to negotiate or revise these clauses as necessary before signing contracts that contain such clauses.

If a contract does not include a provision similar to the example provided, you and the general contractor must negotiate the terms of the indemnity agreement if the general contractor insists a separate agreement be executed. A separate agreement is not necessarily required, and in the event no separate agreement is executed, liability for damages should be controlled by the general indemnity provision. If the general contractor insists a separate agreement be executed, you must read the agreement carefully and modify the scope of indemnity as described. If you are not sure whether the scope of indemnity is too broad, consult your attorney or least compare the language to an indemnity provision you know to be fair and reasonable, such as the language contained in The American Institute of Architects’ documents.

INSPECTION OF EQUIPMENT OR SCAFFOLDING

To prevent damage or injury arising out of use of borrowed equipment or scaffolding, you may be asked to inspect the equipment for deficiencies. Although it is probably reasonable for a general contractor to insist you assume liability for defects the general contractor observed or should have observed when conducting a visual inspection of the equipment, you should not be liable for hidden defects arising from the general contractor’s failure to properly maintain the equipment. The general contractor should affirm or warrant, in writing, that he or she has
performed routine maintenance or inspections of the equipment or scaffolding in accordance with standard industry practice and that he or she is not aware of any defects. The general contractor also should disclose the most recent inspection of the equipment or scaffolding and the time of its most recent use.

**OPERATION OF EQUIPMENT OR ERECTION OF SCAFFOLDING**

Provided they are qualified to do so, you should use your employees to operate all borrowed equipment and erect scaffolding unless the general contractor has agreed to assume responsibility for all damages to the extent caused by the general contractor’s employees. It is not uncommon for general contractors to include language in a borrowed equipment provision providing that when operating equipment for a subcontractor’s benefit, the general contractor’s employees will be treated as independent contractors or employees of the subcontractor. Such language should not be accepted. You generally cannot know or confirm the experience, training or quality of a general contractor’s employees nor can you exercise control over those employees to the same degree you can control your employees. If a general contractor’s employees are to operate equipment, the general contractor must be liable for their acts or omissions.

**THE GENERAL CONTRACTOR REFUSES TO NEGOTIATE. WHAT DO YOU DO?**

General contractors sometimes refuse to negotiate the provisions discussed because, from the general contractor’s perspective, he or she is not required to lend equipment, and if you do not want to accept the terms, you can rent or purchase the necessary equipment elsewhere. If the general contractor refuses to negotiate any of the terms discussed, you must weigh the additional – more –
cost of obtaining the equipment elsewhere against the additional risk of agreeing to the general contractor’s terms. There are a number of variables that go into this decision, all of which should be evaluated carefully. You should not simply submit to a general contractor’s terms without performing this evaluation.

**CONCLUSION**

When negotiating an indemnity agreement regarding use of scaffolding or other equipment owned by a general contractor, only agree to assume responsibility for things within your control. You can control your employees and observe visible defects in equipment. You cannot control the employees of others or ensure proper regular maintenance was performed before you borrow equipment and should not agree to indemnify a general contractor for damages caused by factors beyond your control.

# # #