INTRODUCTION

Of all the clauses typically contained in a construction contract, the indemnification clause arguably has the most potential to impose drastic consequences upon the unwary roofing contractor. An overly broad indemnification clause may force you to assume a wide variety of risks on the project, many of which are uninsured and beyond your reasonable ability to control. Thus, it is vital to the continued viability of your business that you review and understand the indemnification clause before signing any contract.

WHAT IS INDEMNIFICATION?

Indemnification is the assumption of responsibility and liability that would otherwise belong to someone else. Insurance is a prototypical example of indemnification. In exchange for the payment of a premium, your insurance company agrees to “stand in your shoes” in the event of a covered loss by paying for the damage. The vast majority, it not all, of the contracts you will be asked to sign will contain indemnification provisions. When you agree to indemnify a general contractor, you become an insurer of it’s losses. Thus, it is crucial you are fully aware of what losses you are being asked to insure against.

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WHAT TO LOOK OUT FOR: BROAD INDEMNITY NOT LIMITED BY OR TIED TO YOUR NEGLIGENCE

Most general contractors typically will ask you to sign an indemnification clause that requires you (the “indemnitor”) to indemnify others (the “indemnitees”) against any loss arising out of the work as long as the indemnitees are not solely responsible for the loss. Although these clauses seem fair at first glance, they contain a trap that you must guard against. Such a clause might read as follows:

Subcontractor agrees to indemnify, defend, and hold harmless Contractor, its agents, employees and officers, from any and all liability, cost, or expense, including but not limited to attorneys’ fees, arising out of or relating to the performance of the Work, regardless of whether caused in part by the acts or omissions of Contractor. Nothing herein shall be interpreted as obligating Subcontractor to indemnify Contractor against its sole negligence or willful misconduct.

The trap in this clause is the word “sole” in the final sentence. If damage is solely caused by the contractor’s negligence, there is no indemnification obligation. But what if the damage is mostly caused by the contractor’s negligence? Under this provision, if the roofing contractor is 10 percent responsible for the loss and the general contractor is 90 percent responsible for the loss, the roofing contractor may be required to pay 100 percent of the damages because those damages were not caused by the general contractor’s “sole negligence.”

WHAT TO LOOK FOR: NARROW INDEMNITY LIMITED AND DEFINED BY YOUR NEGLIGENCE

An indemnification clause should be more narrowly defined so the
Indemnification obligation is limited to damages “to the extent caused by the subcontractor’s negligence.” There are two key phrases you should ensure are included in the indemnification provision. First and foremost is the word “negligence.” It is critical that any indemnification obligation you undertake applies only to damages caused by your negligence. You cannot control the actions of the general contractor; thus, you should not be held responsible for its negligence. Second, the clause “to the extent” ensures you are not caught in the trap illustrated above. If your negligence is only partially the cause of the loss, you should only be required to pay part of the damages.

Insertion of the phrase “to the extent” and the word “negligence” into the first sentence of the sample indemnification clause and deletion of the word “sole” from the last sentence is the best way to avoid the trap. Thus, the indemnification clause with insertions italicized and deletions struck would read as follows:

To the extent caused by Subcontractor’s negligence, Subcontractor agrees to indemnify, defend, and hold harmless Contractor, its agents, employees and officers, from any and all liability, cost, or expense, including but not limited to attorneys’ fees, arising out of or relating to the performance of the Work, regardless of whether caused in part by the acts or omissions of Contractor. Nothing herein shall be interpreted as obligating Subcontractor to indemnify Contractor against its sole negligence or willful misconduct.

Note how similar this clause is to the original one. Yet despite the similarities, the difference in terms of liability can be enormous. Using this clause, the roofing contractor who was 10 percent responsible for the loss will only be required to pay 10 percent of the - more -
damages as opposed to 100 percent. This idea is rooted in the fundamental rule of fairness that each party should be responsible for its share of the damages. This concept is embodied in the standard documents promulgated by The American Institute of Architects, which you should use as a reference if you are ever in doubt.

When negotiating an indemnification clause, you also should try to impose reciprocal liability on a general contractor to indemnify you. If you are asked to assume the risks of your negligence, it is only fair that the general contractor similarly assume the risks of its negligence. Although these clauses are somewhat uncommon, they can be a useful negotiating tool.

**WHAT TO LOOK FOR: INDEMNITY CORRESPONDING WITH YOUR INSURANCE COVERAGE**

As indemnitor, you are insuring the indemnitees in certain situations. Ideally, your indemnification obligation should correspond with your insurance coverage so you do not take on any independent financial obligation but instead only act as a conduit for money to pass from your insurance company to the indemnitees. Bear in mind your insurance policy probably does not cover obligations simply because you assume them in a contract. Instead, Commercial General Liability policies only cover bodily injury and property damage, excluding damage to the work itself. Moreover, these policies typically are limited to your legal liability for damages and, more particularly, only to the extent

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that liability is caused by your negligence. When you assume broader liability or the liability of others, the risk is entirely your own.

**CONCLUSION**

Despite the sometimes convoluted and arcane language used in indemnification provisions, discerning their meaning does not have to be an arduous process. The key question to remember is: Are the damages limited to the extent caused by your negligence?

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