

## INDEMNITY CLAUSE EXAMPLES

*In this Business Insights issue we will discuss indemnity provisions that are used by builders and general contractors in their customer contract forms. These provisions are also referred to as hold harmless provisions.*

*Here is an example of an indemnity provision taken from a builder's customer contract form. We will breakdown this provision into its parts to understand it better. When reviewing an actual contract form, the builder will not make it so easy on the reviewer. Note that our example is much shorter than many indemnity provisions that some builders and general contractors require.*

*Our example indemnity provision reads:*

**To the fullest extent permitted by applicable law, the Supplier agrees to defend, at Supplier's expense and with counsel acceptable to Contractor, indemnify, and save and hold harmless Contractor and all of its officers, directors, shareholders, employees, agents, successors, and assigns, from and against any and all claims, suits, losses, causes of action, damages, liabilities, and expenses of any kind whatsoever arising out of the performance or non-performance of the Work, including without limitation, all expenses of litigation and/or arbitration, court costs, and attorneys' fees, arising on account of or in connection with injuries to or the death of any person whomsoever, or any and all damages to property, regardless of possession or ownership, which injuries, death or damages arise from, or are in any manner connected with, the Work performed by or for the Supplier under this Agreement, or are caused in whole or part by reason of the acts or omissions or presence of the person or property of the Supplier or any of its employees, agents, representatives, suppliers, including without limitation injuries, death, or damages to property which arise from or in connection with, or are caused by, any act, error, omission or negligence of the Contractor, the Owner, the Architect, the Engineer and all of their officers, directors, shareholders, employees, agents or suppliers, including injuries or property damages caused by the sole negligence of the Contractor.**

*The following statement tells us this is a type of indemnity clause, and that the supplier is the indemnitor.*

**...Supplier agrees to defend, at Supplier's expense and with counsel acceptable to Contractor, indemnify, and save and hold harmless Contractor.**

*Next, the clause states that the indemnitee includes the*

**...Contractor and all of its officers, directors, shareholders, employees, agents, successors, and assigns**

*The scope of the indemnity is found in the following statement:*

**...any and all claims, suits, losses, causes of action, damages, liabilities, and expenses of any kind whatsoever arising out of the performance or non-performance of the Work, including without limitation, all expenses of litigation and/or arbitration, court costs, and attorneys' fees, arising on account of or in connection with injuries to or the death of any person whomsoever, or any and all damages to property, regardless of possession or ownership, which injuries, death or damages arise from, or are in any manner connected with, the Work performed by or for the Supplier under this Agreement, or are caused in whole or part by reason of the acts or omissions or presence of the person or property of the Supplier or any of its employees, agents, representatives, suppliers, including without limitation injuries, death, or damages to property which arise from or in connection with, or are caused by, any act, error, omission or negligence of the Contractor, the Owner, the Architect, the Engineer and all of their officers, directors, shareholders, employees, agents or suppliers...**

*This statement further provides an indication that this is a one-sided indemnity provision in favor of the indemnitee contractor. The reason this is the case is that the indemnity covers acts or omissions of persons other than the supplier—including the contractor, the owner, the architect and the engineer.*

*The last clause of this provision makes it very clear that this is a broad form indemnity provision:*

**...including injuries or property damages caused by the sole negligence of the Contractor.**

*With this language, the supplier would have to defend and pay for injuries and/or property damages arising out of its scope of work regardless of who is at fault. We therefore assign this type of provision a risk rating of F. Even if the customer was 100 percent at fault, the supplier would still have to defend and pay.*

Here is an example of an alternative provision the supplier could add to a customer contract form addendum in order to neutralize the indemnity we have just discussed:

**Supplier's obligation to indemnify Contractor shall exist only to the extent of the acts, errors, omissions, negligence or breach of warranty of Supplier, its agents or subcontractors, arising out of or relating to Supplier's scope of work or the products to be provided and the delivery of the products to Contractor's jobsite.**

We assign this type of provision a risk rating of B, if the builder agreed to it, because it significantly counterbalances our sample indemnity provision.

While this provision is helpful, there is an even better approach for suppliers to consider. The alternative is to state that the supplier will only indemnify the builder for damages arising from a court or jury that finds product design or fabrication defects or damage caused by product delivery. An example of this type of language is as follows.

**All provisions of indemnification set forth in the Agreement shall be modified to provide that Supplier's obligation to indemnify shall exist only upon a court or jury finding that the manufactured products supplied by Subcontractor are defective in their design or manufacture, or in the delivery of the Supplier's products to the Contractor's jobsite.**

We assign this provision a risk rating of A-. When it comes to indemnity provisions, the only way a component manufacturer could be assigned a risk rating of A would be to delete the indemnity provision in its entirety.

Many builders will strongly resist this type of limiting language because it requires a court or jury to find the manufacturer responsible in order to trigger the obligation of indemnity. The builder knows this is highly unlikely because most cases do not go to trial; rather, they are settled. And, with settled cases, there will be no jury or court finding, and therefore no way to trigger indemnity. If the builder were to reject this provision, he or she might be more receptive to the first alternative provision we discussed.