

TACTICS TO NEGOTIATE INDEMNITY CONTRACT CLAUSES

Subcontractors and suppliers have some tough decisions to make if their builders or general contractor customers insist that they agree to an indemnity provision contained in their form subcontracts or supplier agreements. This is especially true if the agreement contains either a broad or intermediate form indemnity provision. By agreeing to these types of indemnity provisions, the subcontractor and supplier is agreeing to assume the fault or negligence of the builder or contractor—risk they would otherwise not have.

Builders and general contractors generally believe they have greater bargaining power than their subcontractors and suppliers. Because they are the customers, they think subcontractors and suppliers should concede and agree to whatever they ask, whether it's in the form of risk transfer or something else. In fact, if a subcontractor or supplier requests that an indemnity provision be deleted, or that a broad or intermediate form be replaced with a limited form, the subcontractor and supplier should expect a great deal of pushback from the builder. Builders may respond by saying that if the subcontractor or supplier does not agree to the builder's indemnity provision, they will purchase products from someone else that will. Often customer project managers, superintendents and purchasing personnel are told to reiterate that their customer contract form has been reviewed and approved by legal counsel, which is why it *cannot* and *should not* be changed.

Subcontractor and supplier employees charged with the review and negotiation of customer contracts should be mindful of this type of background when they begin their negotiations. We suggest that subcontractors and suppliers do not simply accept requirements as offered. The goal should be to negotiate for something more reasonable.

Here are some helpful tips to consider when negotiating.

First, keep in mind that the personnel employed by builders or general contractors generally do not understand why their customer contract forms read a certain way. It is also likely that they will not understand the function and rationale behind indemnity clauses. It may be that, with some explanation, you will be able to convince them to make some changes.

Second, builder customer contract forms are always prepared by attorneys, and usually contain either broad form or intermediate form indemnity provisions. Quite often a builder will prepare one type of form that is to apply to all its subcontractors and suppliers. Since the form is to apply to all trades and suppliers, the indemnity provisions are usually either broad form or intermediate form because subcontractors pose greater risks to builders, mainly because they work on the builder's project sites. When the supplier is asked to sign a subcontract form, one tactic is to make it known that you don't agree with being named and treated as a subcontractor. This argument is valid because as a supplier you aren't working on the jobsite.

One explanation that the supplier can use is, unlike a trade contractor, the supplier does not have any type of control over the jobsite. Here's another explanation that can be used, "We will agree to be responsible for our acts and we would expect that you, the builder, should be responsible for your acts and the acts of your subcontractors."

In response, the builder may present a material supplier agreement form. This form may either contain no indemnity provision, or contain a limited form instead of either a broad or intermediate form. The supplier should be aware however that many material supplier agreement forms used by builders do also contain either broad or intermediate form indemnity provisions.

If a builder refuses to present a material supplier agreement with a limited form indemnity provision, or if the agreement contains either a broad or intermediate form indemnity, the supplier should do one of two things. The first option is to negotiate a complete deletion of the provision. Most likely the builder will refuse this option. The second is to modify the broad or intermediate form indemnity clause into a limited form by using strike-throughs, or through the use of a customer contract addendum form.

When modifying an indemnity provision, one of two approaches can be taken. The first approach is to note that you are only indemnifying the builder or contractor for damages that arise directly from a finding of negligence on the part of your

company by a court or a jury. Using this approach, the court or jury must find that what you supplied if you are a supplier was someone defective. In this situation, you are specifically *not* indemnifying for any liability beyond this limitation. An example of this type of modifying 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 Manufacturer are defective in their design or manufacture.

Now let's talk about another approach that can be taken by a supplier when modifying an indemnity provision in the builder's customer contract form. Most likely, the supplier will be delivering its products to the jobsite. Therefore, the supplier may choose to provide indemnification from any injury or property damage caused by the delivery of such products. This would be appropriate because the delivery function is totally within the manufacturer's control. In that event, the above indemnification provision would read 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 products supplied by Manufacturer are defective in their design or manufacture, or in the delivery of the Manufacturer's products to the Contractor's jobsite.

Many builders will strongly resist either of these types of limiting language. This is due to the stipulation that a court or jury must find responsibility on the part of the manufacturer in order to trigger the obligation of indemnity. The builder or general contractor knows this is highly unlikely because most cases do not go to trial—they are instead settled. With settled cases, there will be no jury or court finding and thus no way to trigger the obligation of indemnity.

These builders may accept a broader alternative, similar to the following:

All provisions of indemnification set forth in the Agreement shall be modified to provide that Supplier's obligation to indemnify shall exist only to the extent of Supplier's errors, omissions, negligence or breach of warranty of M Supplier arising out of or relating to Supplier's scope of work, the products to be provided, or the delivery of the Supplier's products to the Contractor's jobsite.

This language should essentially convert the existing indemnity provision, whether it is either a broad or intermediate form, to more like a limited form of indemnity.

The last tactic for suppliers to consider is that, if forced to agree to a broad or intermediate form, they may want to limit the dollar amount exposure of indemnity. Such obligation can be limited to the aggregate amount of insurance coverage the supplier is required to provide under the agreement. Language that can be used to accomplish this limitation is:

All provisions of indemnification set forth in the Agreement shall be modified to provide that extent of Supplier's indemnification obligation shall be limited to those claims that are equal to or less than the applicable insurance coverages required under this Agreement.