



Construction Contracts: *What Savvy Contractors Need to Know in 2022*

Association of Women Contractors

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SECTION 1

Topic 1: Indemnity/Defense Obligations

Topic 1: Indemnity/Defense

- Typical language:

To the fullest extent allowed by law, Subcontractor agrees to indemnify, defend and hold harmless the contractor for any losses, claims, damages, expenses [etc.] arising out of the subcontract work, the subcontract, payment under the subcontract, [etc.]

Topic 1: Indemnity/Defense

- **What does this mean?**
 - Subcontractor must pay for **losses**, claims, etc. arising out of the subcontractor's work – anything that is found to be caused by Subcontractor
 - It also means that the Subcontractor must pay **attorney fees** and legal costs for the defense of the contractor.
 - Many contracts require subcontractor to **cooperate** – to participate in investigation of claims, attend inspections, etc.
 - Many subcontracts also incorporate the contract between the owner and general contractor – so if there is an agreement to mediate or arbitrate in that contract, you can be forced to mediate, arbitrate, etc.

Topic 1: Indemnity/Defense

- **What does this mean?**
 - Typically includes: subcontractor is required to obtain insurance to secure these defense and indemnity obligations. Further, the insurance section that requires what you need to obtain. These are typically found in another subcontract paragraph, or in a rider to the contract
 - Also typically includes requiring you to add the general, potentially the owner or even the architect, as additional insureds under your own policy. This means that they are covered under your policy to the extent you are covered

Topic 1: Indemnity/Defense

- **Practical Considerations**

- General Rule: Construction contracts cannot force one party agrees to defend/indemnify another party for that party's own negligence
- Before August 1, 2013 – important exception – could force a party to procure insurance that would cover another party for that party's own negligence.
- Contracts entered into prior to August 1, 2013 – exception still applies

Topic 1: Indemnity/Defense

- **337.02 UNENFORCEABILITY OF CERTAIN AGREEMENTS.**

An indemnification agreement contained in, or executed in connection with, a building and construction contract is unenforceable except to the extent that: (1) the underlying injury or damage **is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the promisor** or the promisor's independent contractors, agents, employees, or delegates

Topic 1: Indemnity/Defense

- **337.05 AGREEMENTS TO INSURE.**

(b) A provision that requires a party to provide insurance coverage to one or more other parties, including third parties, for the negligence or intentional acts or omissions of any of those other parties, including third parties, is against public policy and is void and unenforceable

Topic 1: Indemnity/Defense

- **337.01**

“Indemnification agreement” means an agreement by the promisor **to indemnify or hold harmless** the promisee against liability or claims of liability for damages arising out of bodily injury to persons or out of physical damage to tangible or real property

Topic 1: Indemnity/Defense

- **Duty to Defend**
 - August 1, 2013 changes say nothing about contracts requiring one party to **defend** another party for the latter's own negligence
 - 2014 Legislative session – MSA advanced legislation that would also prohibit contracts that require requiring these types of agreements to defend
 - Committee at the Legislature declined to adopt. However, MSA has stated its intention to continue to lobby for this change

Topic 1: Indemnity/Defense

- **Practical Considerations**
 - READ THE WHOLE CONTRACT AND ALL INCORPORATED CONTRACTS
 - MAKE SURE WHOEVER IS RESPONSIBLE FOR GETTING INSURANCE – BROKER, EMPLOYEE, ETC
 - HAS READ ENTIRE CONTRACT AND ALL INCORPORATED CONTRACTS
 - IF YOU HAVE QUESTIONS, ASK, AND DOCUMENT RESPONSES IN WRITING

Topic 1: Indemnity/Defense

- **TAKEAWAYS**

- CHECK YOUR CONTRACT LANGUAGE

- CHECK THE DATE

- CHECK ALL INCORPORATED CONTRACTS

- CHECK YOUR INSURANCE CERTIFICATES



SECTION 2

Topic 2: Force Majeure

Topic 2: Force Majeure

- **Force majeure clauses relieve contractors for delays or disruptions that are caused by unforeseen circumstances**

Topic 2: Force Majeure

- **A201 General Conditions - Section 8.3**
- **[i]f the Contractor is delayed at any time in the commencement or progress of the Work . . . (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2 or other causes beyond the Contractor's control . . . or (5) by other causes the Contractor asserts and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine**

Topic 2: Force Majeure

- What does this mean?
- AIA specifically includes “labor disputes,” “fires,” “unusual delay in deliveries,” and “adverse weather conditions”
- Does not specifically include “epidemic or illness”

Topic 2: Force Majeure

- **What does this mean?**
- **-says “other causes beyond the Contractor’s control . . .”**
- **Is the situation beyond the Contractor’s control?**

Topic 2: Force Majeure

- **Example scenario #1:**
- **Contractor's laborers are ill with Covid and cannot work, which causes contractor to fall behind schedule**

Topic 2: Force Majeure

- **Example scenario #2:**
- **There is a delay in materials delivery because the contractor's suppliers had to close temporarily because its workers are all sick with Omicron**

Topic 2: Force Majeure

- **Example scenario #3:**
- **The cost of materials has skyrocketed, causing the contractor to require both a change in the contract price, and an extended timeframe to perform the work**

Topic 2: Force Majeure

- **Other catch-all:**
- **AIA also excuses delay “by other causes the Contractor asserts and the Architect determines, justify delay”**

Topic 2: Force Majeure

- *WHAT SHOULD YOU DO?*
- Be **PROACTIVE**
- **COMMUNICATE**
- **DOCUMENT**

Topic 3: Specification Conflicts

- Contractor A : must design the exterior façade. Their specification describes the applicable loads and tolerances that the exterior façade system must accommodate.
- Contractor B is responsible for installing components of the exterior façade. Their specification describes how the components must be installed.
- Neither's work complies 100%. They both point the finger at the other. Who is responsible?

Topic 3: Specification Conflicts

- Contractor A : must install various electrical and embeded items.
- Contractor B: must inspect work of trades coming before it before performing work.
- Contractor A's work does not comply with its specification. Contractor B does not catch Contractor A's error.
- Who is responsible?

Topic 3: Specification Conflicts

WHAT DO YOU DO TO AVOID

- Read your entire specification, all related specifications, and consult all reference standards.
- DO THIS BEFORE BIDDING
- Raise questions immediately to the GC, Owner, or architect, as applicable – IN WRITING
- Have a clear directive before proceeding
- RAISE ALL OBJECTIONS IN WRITING

Topic 3: Specification Conflicts

WHAT DO YOU DO TO WHEN PROBLEM OCCURS

- Immediately schedule an inspection
- If practicable, hire your own inspector. Document inspection and any subsequent meetings in writing
- Have a clear directive before proceeding, and clarify each party's position in writing
- **RAISE ALL OBJECTIONS IN WRITING**



Janine Loetscher

Janine is a litigator with substantial large-scale loss experience whose practice focuses in construction, insurance coverage, products liability, and personal injury matters. She has defended contractors and individuals in construction defect lawsuits and has represented both insurers and policyholders on numerous coverage issues.

- Bassford Remele Insurance Coverage Practice Group, Co-Chair
- Bassford Remele Diversity, Equity, Inclusion Team, Co-Chair
- Bassford Remele Compensation Committee
- Minnesota Women Lawyers' Partnership Leadership Council, Firm Representative
- Minnesota Super Lawyers list, *Super Lawyers*



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