

TOWER CRANES NORTH AMERICA CONFERENCE & RECEPTION

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OSHA Update and Minimizing Contractual Risks

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Agenda

- The Critical Importance of Contract Drafting
 - Indemnity
 - Scope of Provision
 - Negligence of Indemnitee
 - State Considerations
 - Additional Insured Coverage
 - Primary, Non-Contributory
 - Certificate of Insurance vs. Endorsement
 - Waiver of Subrogation

Contract Drafting

- Importance of Contract Drafting
 - Defines the rights and responsibilities of the parties if a dispute arises
 - “What does the contract say?”
 - Is the provision applicable?
 - Is the provision enforceable?
 - Contractual terms often determine who has to pay for a loss
 - Who wins and who loses?
 - Who has the better hand/leverage during the dispute?
 - Proactive strategy – not after the fact when too late
 - A primary, necessary form of risk shifting

Critical Contract Provisions

- Indemnification

- transfers risk from one party (the “indemnitee”) to another party (the “indemnitor”); the right to be made whole for liability
- The terms and conditions of the contractual indemnity provision are critical – the enforceability of different types of indemnity provisions varies state by state
- How it works: Company A and B enter into a contract before a job starts; Company B agrees to indemnify Company A for any personal injury or property damage claims/actions asserted against Company A arising from the work performed by Company B; Company A gets sued and “tenders” to Company B pursuant to the contractual indemnity provision.

- Additional insured provision

- Company B agrees to name Company A as an additional insured on its CGL policy
- A critical “risk shifting” strategy (similar to indemnity) – indemnity and additional insured coverage are independent risk shifting strategies

- Waiver of subrogation (prohibits an insurance carrier from recovering the money they paid on a claim from a negligent third party)

Additional Insured Provision

- Procurement of Insurance
 - Additional insured
 - Primary – non-contributory
 - Insured contract
 - Waiver of subrogation
 - Notice of termination of coverage
 - Endorsement, not just Certificate of Insurance

Components of Indemnity Clause

- **“To the fullest extent permitted by law...”**
 - Many states, including NY and CA, have anti-indemnity statutes which limit the extent to which a party can require another party to indemnify it
 - This language at the beginning of any indemnity provision is designed to protect the indemnity provision from being deemed unenforceable by a court
 - If you are a higher tier party contracting with a lower tier party (e.g., owner contracting with GC; GC contracting with Sub), you will want to start the contractual indemnity provision with this language
 - Inclusion designed to permit “partial contractual indemnity”
- **Expressly name the crane rental company as an indemnitee in the contractual indemnity provision**
 - E.g., “Subcontractor shall indemnify and hold harmless the Owner, General Contractor, and [Crane Rental Company]...”

Components of Indemnity Clause

- Scope of indemnity provision:
 - Broad based: Subcontractor to defend, indemnify, and hold harmless the Crane Rental Company “... from and against claims, damages, losses, and expenses, including but not limited to attorney’s fees, *arising out of or resulting from performance of the Subcontractor’s Work...*”
 - Narrowly tailored: Subcontractor to defend, indemnify, and hold harmless the Crane Rental Company “... from and against claims, damages, losses, and expenses, including but not limited to attorney’s fees, but *only to the extent caused by the negligent acts or omissions of the Subcontractor ...*”
 - “*Arising out of*” vs. “*To the extent caused by*”

State-Specific Issues

- Is a party entitled to indemnification if it was:
 - PARTIALLY at fault?
 - SOLELY at fault?
- States differ on the enforceability of indemnity provisions when the party seeking to be indemnified was partially and/or solely at fault; as such, you need to know the law in your state (any applicable statutes and/or case law) and tailor your provisions accordingly!

State Statutes/Case Law: Impact on Indemnity provisions

- New York
 - General Obligations Law (“GOL”) section 5-322.1: precludes contractual indemnification where the indemnification clause in the contract seeks to impose complete and total indemnification notwithstanding the indemnitee's negligence
 - Brooks v. Judlau Contracting, Inc., 11 N.Y.3d 204 (2008): General Obligations Law § 5-322.1 permits a partially negligent general contractor to seek contractual indemnification from its subcontractor for those negligent acts attributable to its subcontractor
- Texas - Chapter 151 of the Texas Insurance Code
- Florida - Florida Statute Section 725.06
- California - Civil Code section 2782(a)

Case Example

- Scenario:
 - Tower Crane Company rents a crane to the GC or owner
 - The subcontractor's worker gets injured on the site and sues the owner, GC, and Tower Crane Company
 - How can the Tower Crane Company proactively transfer its risk prior to this accident?
 - Contractual indemnity provision expressly naming the Tower Crane Company as an indemnitee
 - In a contract between the Tower Crane Company and the GC or owner
 - *In a contract between the GC and the subcontractor*

**Thank You
Questions...**