What Clauses Offer Contractor Protection

Strengthening indemnification and arbitration clauses to protect your business

By Kyle J. Meade

Contractors are facing increased scrutiny by clients and third parties, leading to more construction defect, property damage and personal injury lawsuits. This risk often arises in the context of routine work.

A contractor performs water intrusion remediation at a condominium building, entering individual units to cover personal belongings and open drywall and ceilings. Even though the contractor did not cause the underlying water intrusion damage, it may nonetheless be sued by condominium owners who attribute their inconvenience to the remediation work. The contractor is then dragged through litigation with its commercial liability insurance carrier and insurance premiums end up increasing. Contractors can proactively mitigate their litigation risks and liability exposure to avoid these situations by carefully drafting indemnification and arbitration provisions in their construction contracts.

Indemnification provisions govern what liability each party will defend and hold the other harmless from, should a dispute arise. This enables contractors to assign what liabilities the client will be responsible for defending the contractor from.

In the hypothetical described above, if the contractor required the HOA to indemnify and defend them in any dispute arising from pre-existing conditions to the condominium building, the HOA would be contractually liable to defend the contractor in any dispute or lawsuit relating to the water intrusion damage to the condominium building. This would include any dispute or lawsuit pertaining to conditions in a condominium unit during the water intrusion remediation and repair process.

Another important type of indemnification clause that should be included in every construction contract is assigning liability to the client for any type of work beyond the contractor's scope, including prior work performed. Too often, significant construction defect lawsuits are initiated against several contractors and subcontractors that allege damages for work not performed by many of the named parties. By expressly contracting that the client will defend and hold the contractor harmless for any liability arising beyond their scope of work, contractors can exit burdensome litigation through invoking contractual indemnification obligations in their favor.

For indemnification provisions in a construction contract to be enforceable, they must clearly outline when they apply and express their applicability to all disputes, liabilities, claims and lawsuits. Drafting unclear indemnification clauses can be fatal to their enforceability, undermining their purpose to proactively limit a contractor's liability exposure. By making clear what a client will indemnify and defend a contractor for and in what situations this obligation runs, contractors can greatly reduce litigation risk and liability exposure.

Should disagreements directly arise between a contractor and the client, including those involving indemnification, express provisions requiring alternative dispute resolution and arbitration to resolve disputes are favorable as opposed to allowing the parties to pursue litigation. A construction contract can require informal negotiation and mediation to resolve any dispute, so long as it is unambiguous. Any ambiguity in the applicability of dispute resolution provisions to disputes between a client and contractor leaves open the possibility of litigation, making careful drafting of these provisions critical.

When negotiation or mediation fails to resolve disputes between a client and contractor, arbitration is the preferred method to adjudicate disputes. Arbitration saves significant time and expenses for disputing parties and removes uncertainty of jury verdicts. For these reasons, it is essential to draft ironclad arbitration provisions that are enforceable, which first involves clear waivers of the right to a jury trial. As a constitutional right, a contractor and client must clearly and unambiguously waive their rights to resolve a dispute through a jury trial, which, for best results, includes such a clear waiver with a spot for initials of the parties in the contract acknowledging it.

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Without such waiver, courts will often deny motions to compel arbitration and allow jury trials to proceed.

Arbitration provisions must clearly outline the rules or guidelines that will govern the arbitration proceedings, state the applicable substantive and procedural law and include a waiver of any appeal by a judge or jury.

Drafting indemnification and arbitration provisions strengthens liability protections and minimizes the likelihood of litigation.

Kyle Meade *is an attorney in Gray, Duffy, Eisenbaum & Lee, LLP's Southern California office. He may be contacted at kmeade@grayduffylaw.com*