The Soto Law Group, P.A.

CONSTRUCTION PRACTICE GROUP

Legal Information for the Construction Industry

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TOP TEN CONSTRUCTION CLAUSES
PART I-INDEMNIFICATION

Whether you are an owner, general contractor, subcontractor, or supplier, the beginning of the year is the perfect time to analyze the most important contract clauses in your existing construction contracts, as well as any pending or upcoming contracts, to ensure that the responsibilities and expectations of the parties have been addressed and any risks and contingencies inherent in construction projects have been appropriately allocated. Although the extent to which a party to a contract can negotiate some or all of these terms into their contracts will depend upon numerous factors, such as bargaining power, the value of the project, and market forces, it is critical to have a general understanding of these critical construction clauses. This article is the first of a ten-part series analyzing the ten most critical construction clauses, the implication of such clauses on both parties to the contract, and discussing relevant and/or recent decisional authority addressing the clauses. The following is a list of the Ten Most Important Construction Clauses [in no particular order]:

1. Indemnification
2. Consequential Damages Limitations
3. Liquidated Damages
4. No Damages for Delay
5. Termination for Cause/Termination for Convenience
6. Pay When Paid or Paid if Paid
7. Incorporation by Reference
8. Retainage/Interest/Payment Terms
9. Force Majeure
10. Dispute Resolution Procedures

In this first installment, we will analyze the indemnification clause. This provision is critically important because it defines the obligation that the parties have to reimburse each other for damages arising from their work on the project. The following is a sample indemnification provision from the American Institute of Architects (AIA) Form A201-2007 Standard Form of Agreement Between Owner and Contractor:

> **§ 3.18.1** To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18

It is important to recognize and appreciate several clauses within this indemnification provision, which is commonly found in construction contracts between owners, contractors, subcontractors, and suppliers alike. Most important is the fact that the contractor is obligated to provide indemnification even if the claim, damage,

loss or expense ***is caused in part by a party indemnified under the provision***! The contractor therefore must understand and appreciate that its obligation will not be diminished simply because an indemnitee participates in the act that causes the loss. If possible, a contractor should eliminate this portion of the indemnification provision entirely from its contract with the owner and limit its indemnification obligation to losses caused ***solely*** by the contractor's and/or its subcontractors' acts. Where an imbalance in bargaining power prevents elimination of the provision, a contractor should ensure that its indemnification provision in its downstream contracts with subcontractors and suppliers contains the same language.

Second, the contractor's indemnification obligation includes attorney's fees attributable to the claims, damages, losses, and expenses. Florida's courts have interpreted the language of an indemnity clause as tantamount to a prevailing party attorney fee provision. *See Tampa Armature Works, Inc. v. Tom Quinn Co., Inc.*, 654 So. 2d 304, 304 (Fla. 4th DCA 1995). Accordingly, a contractor must be prepared to act expeditiously to recognize and resolve any claims that come within the scope of its indemnification obligations in order to limit its exposure for the legal fees of an indemnitee, as well as immediately notify all applicable insurers of the claim.

Florida law also sets certain limits on the indemnification provisions of construction contracts. Specifically, section 725.06(1), Florida Statutes states that an indemnification provision containing a promise to indemnify a party for damages caused in whole or in part by any act, omission, or default of the indemnitee shall be void and unenforceable *unless* the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract *and* is part of the project specifications or bid documents, if any. *See* § 725.06(1), Fla. Stat. (2001). Moreover, the monetary limitation on the extent of the indemnification provided to the owner of real property by any party in privity of contract with such owner shall not be less than $1 million per occurrence, unless otherwise agreed by the parties. Finally, the indemnification provision may not require that the indemnitor indemnify the indemnitee for damages to persons, or property caused in whole or in part by any act, omission, or default of a party other than:

a) The indemnitor;
b) Any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees; or
c) The indemnitee or its officers, directors, agents, or employees. However, such indemnification shall not include claims of, or damages resulting from, gross negligence, or willful, wanton or intentional misconduct of the indemnitee or its officers, directors, agents or employees, or for statutory violation or punitive damages except and to the extent the statutory violation or punitive damages are caused by or result from the acts or omissions of the indemnitor or any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees.

See § 725.06(1)(a)-(c), Fla. Stat. (2001). Accordingly, any party using an indemnification provision modeled after § 3.18.1 of the AIA A201-2007 would be well-advised to revise the provision so that it complies with Florida law.[1]

The indemnification provision is a necessary and useful mechanism to allocate the risk of loss among parties to a construction contract. It is important, however, that the full implications of such a provision are clearly understood, including whether such provision is legal, prior to entering into the contract so that its true costs and benefits of the contract can be weighed.

[1] Although beyond the scope of this article, section 725.06(2)-(3), Florida Statutes contains important restrictions on indemnification provisions in public contracts. Any company entering into a construction contract with a public entity should consult this subsection.

NOTABLE CASE LAW

- Trial court erred in entering summary judgment in favor of a subcontractor on a contractor's cross-claims for indemnity because Fla. Stat. § 725.06 would only bar the contractor's claims for indemnification if they were based on the contractor's own negligence, and the contractor's suit was based on the subcontractor's failures to correctly install shower pans and drains; whether the defects in the project resulted from the contractor's negligent supervision of the subcontractor or from the subcontractor's own negligence or both were disputed issues of material fact that precluded summary judgment. *Pilot Constr. Servs. v. Babe's Plumbing, Inc.*, 111 So. 3d 955 (Fla. 2nd DCA 2013).

- Judgment for a lessor on its contractual indemnity claim against a lessee was error because the indemnification provision at issue was void under Fla. Stat. § 725.06, Fla. Stat.; the statute meant that if any combination of the parties named therein, including a general contractor, a subcontractor, and a materialman, contracted for indemnification, the provision had to include a monetary limit of liability. The indemnification provision in this case contained no monetary limitation in violation of the statute. *Griswold Ready Mix Concrete, Inc. v. Tony Reddick, & Pumpco, Inc.*, 134 So. 3d 985 (Fla. 1st DCA 2012), reh'g denied, 2012 Fla. App. LEXIS 9245 (Fla. 1st DCA May 24, 2012).

- Under Fla. Stat. § 725.06, certain indemnity provisions between a general contractor and a subcontractor are void unless they contain a monetary limit on the subcontractor's liability or unless the general contractor gives a specific consideration for the indemnity provision. *Barton-Malow Co. v. Grunau Co.*, 835 So. 2d 1164, (Fla. 2nd DCA 2002), reh'g denied, 2003 Fla. App. LEXIS 3749 (Fla. 2nd DCA Feb. 3, 2003), review denied, 847 So. 2d 975 (Fla. 2003).

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