



GUEST ESSAYS

Client Supplied Contract Forms

I have a lot of trouble with one of my clients. They want me to use their own contract form. My insurer and my broker tell me not to accept some of the conditions like an indemnification that my broker says is too broad. The language is:

The Architect agrees to defend, indemnify, and hold the Owner harmless from any costs, loss, or damage arising out of or allegedly arising out of the Architect's services. Indemnification will include any defense expenses, including attorney fees. This indemnity shall not be limited by any workers compensation acts or allegations of fault by the Owner.

The client says that all of the other architects they deal with accept this form without any concerns and the language seems pretty standard. On one hand I need the work, but on the other hand I do not want to get my self into a jam. Are my insurer and broker being overly cautious?

Cautious sure, and isn't that what you're paying them for? Overly cautious? You decide, after all, it is your practice, not your insurer's or your broker's.

To help you decide, let's recognize this clause for what it is--an indemnification clause. The Owner wants you to serve as their personal bank or insurance company and be prepared to cover them for loss, as they define loss. In other words, not only does the Owner want you to provide architectural services, they want your personal promise to protect them from those services to boot.

Now the devil is in the detail in these clauses. Some are OK, particularly when they reflect common law which traditionally has required architects to be responsible for their own negligence. But let's see what this Owner is asking of you. Putting the controlling words in **BOLD**, this Owner wants you to:

- **Defend** - to agree to pay all the owner's defense costs should anyone sue them, even if they hire the most expensive law firm in the country, and, even if this puts the owner and you into a conflict of interests, and even if you have done nothing to cause the suit.
- **Indemnify** - to agree to the transfer all of the owner's risk to you and, further, to reimburse the owner for their losses after those losses have been determined in negotiation, mediation, arbitration, or litigation.
- **Hold harmless** - to agree to protect the owner even from suits by third parties, such as contractors and building users.

Not bad, eh? On the one hand you have your fee for which they get the benefit and enjoyment of a lasting building AND on the other hand they have your promise to take care of them forever. (I didn't see a time limit to your promise. Did you?)

Now let's see what you are going to protect them from. You're going to cover their costs, losses or damages, whatever they may be, if they:

Arise out of or allegedly arise out of your services--Now pay attention here: The owner is not requiring you to be negligent to trigger this clause. Nor is the owner requiring your services to directly link



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to a loss they have suffered. Big time connections between negligent services and actual losses are not a requirement here. Not even small connections. Nope. All you have to do to trigger this owner-protection clause is "serve" and all the owner has to do to enjoy it is have a loss that they can arguably link to your services. And it doesn't have to be a causal link: They can merely allege a link and your promise to protect kicks in. And you thought owners had no imagination and lawyers weren't creative.

Once your promise to protect kicks in, what will you be responsible for? Pretty much everything, because your promises do not exclude **defense expenses, including attorney fees**--even unreasonable ones. Nor are they **limited by any worker compensation acts**--so if an injured worker is reimbursed, both the worker and the owner can still go after you. In some jurisdictions, the obligation to indemnify the owner for injuries to your employees can provide your insurer with a reason to deny coverage. Nor are they **limited by any fault of the Owner** which allows a 99 percent negligent owner the chance to be 100 percent reimbursed by you. Don't you feel blessed?

Sarcasm aside, since sarcasm gets you nowhere, if you've decided not to agree to this indemnification clause, what do you do with an owner who wants to manage risk by words and not by assigning the risk to the person most competent to manage the risk and then giving that person the responsibility, authority and fee they need to manage the risk effectively? I could be cheeky and tell you to give them a copy of *The Architect's Essentials of Contract Negotiation* and talk them through the chapter on Front-End Alignment, written for owners and architects to help them set their projects up for success. Rather I suggest you ask them what they think the language they want will get for them and help them--through your questions--come to understand there are better ways to manage risk than mere words.

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