

Indemnification Provisions

INDEMNIFICATION BETWEEN CONTRACTOR AND SUBCONTRACTOR



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Types of Indemnity

In Florida, there are two general categories of indemnity:

- A common law duty of indemnity where one party is constructively or vicariously liable for the actions of another party;
- A contractual right of indemnity included in the parties agreement.

Generally, a contractor remains liable to the property owner where its subcontractor fails to use due care in performing its scopes of work on a project. The contractor may be indemnified by the subcontractor and reimbursed for certain damages the contractor is liable to pay if the damages resulted from the subcontractor's lack of due care and the subcontractor is legally obligated to indemnify the contractor.

Under Florida law, a contractor's right to seek indemnification from a subcontractor can occur if (1) the contractor is entirely without fault; and (2) the contractor has an affirmative obligation to pay a third party because of some type of constructive or vicarious liability for the actions of the subcontractor.

Real World Practicalities

Oftentimes, a contractor and subcontractor will attempt to assert liability against one another in the indemnity scenario. For a subcontractor, they will attempt to establish that the contractor was at a minimum, in part, at fault for damages incurred by the third party. These types of disputes often are factually intensive and will be determined on a case-by-case analysis.

Additional Contractual Obligations

Typically, contractors hold the upper hand in negotiating subcontractors' contractual rights and obligations on project. In addition to indemnification obligations, contractors often include additional obligations of the subcontract:

- **Hold harmless provision:** The contractor requires the subcontractor to hold them harmless from any liability for all work executed by the subcontractor or its agents (sub-subcontractors, material suppliers, etc.) during the construction project.
- **Duty to defend provision:** The contractor requires the subcontractor pay any attorneys fees and costs incurred by the contractor for defending itself if there is a lawsuit that relates to work performed by the subcontractor.

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Limitations on Certain Indemnity Obligations

Under Florida law, contractors must not overextend the indemnity obligations of its subcontractors in certain contractual provisions. For example, if the contractor is seeking indemnification for their own acts of negligence during a construction project, the contract provision must comply with Florida Statute 725.06 by ensuring the provision provides that damages they try to collect must bear a reasonable commercial relationship to the contract value and include a monetary limitation on damages listed in the contract. Failure to do so may result in the contractor losing its right to indemnity.

A review of construction contracts from both a contractor and subcontractor perspective is critical to determine certain risk shifting provisions, including those referenced in this article, to ensure the obligations they are undertaking on each project.

