Manager/Supervisor Risk Management
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A twice weekly e-mail training for YCPARMIA members

TOPIC: THE INDEMNIFICATION CLAUSE – SIMPLE, DRY LEGAL STUFF

Most public entities have standard contracts that have been drafted or approved as to form by their legal counsel. It is a good practice to stand on that form and resist agreeing to any modifications. Included in virtually all contracts there will be an indemnification clause where the contractor/indemnitor agrees to defend and indemnify the entity/indemnitee against claims growing out of the contracted activity. Note: the indemnification clause does not relieve the entity of its liability to third parties; it merely transfers the obligation to pay damages and defense costs.

There are a few potential issues to note:

- The clause lists who will be protected, including elected, employees, and volunteers. There is sometimes resistance over including volunteers; they can create liability, are covered by YCPARMIA, and should be included in the protection.
- The subject matter of the indemnity clause addresses the relationship between the injury/damage and the risk. It can be broad, like "arising out of the contract," or narrow like "resulting from the contractor's negligence." Obviously the entity wants the connection to be as broad as possible.
- Traditionally there are three types of indemnification agreements distinguished by the scope of the agreed obligation.
    - The broad form transfers the entire risk of harm to the contractor/indemnitor.
    - At the other extreme is the limited or comparative fault form where the contractor's promise to indemnify is limited to the extent that they are at fault.
    - The most common, and preferred, is the intermediate form where the contractor agrees to indemnify the entity for the entire risk except when the entity is 100% at fault. This means that if anyone else contributed to the accident, including the entity, the entity will be completely protected by the indemnification agreement. In real life there is often more than one responsible party (for example comparative negligence by the claimant), so this form provides significant protection, and is generally accepted as standard.
- Contracts sometimes contain reciprocal agreements where the contractor and entity each agree to hold the other harmless for their own acts; the potential for disagreement is obvious.
- It is a good practice to require all subcontractors to contractually agree to defend and indemnify the entity – this gives us multiple targets for tendering the claim/suit, opens additional funding sources, and guards against a bankrupt general contractor.

Indemnification clauses, when you cut through the legal verbiage, are relatively simple. You want an unambiguous promise to defend and indemnify the entity for risk arising out of the contract. Most of YCPARMIA member's standard contracts accomplish this goal, and are consistent with the requirements of virtually all California public entities. If a contractor/indemnitor balks at the entity's standard indemnification language they are probably not very active in the California public entity market.

Next topic: Insurance Requirements