
Contract Essentials: Part 2 – Indemnification

In a contract, indemnification is where one party agrees to bear the monetary costs either directly or by reimbursement for losses incurred by the second party. In other words, if you are the indemnified party then an indemnification clause is a promise by the other party to cover your losses if they do something that causes you harm or causes a third party to sue you. For instance, if you lease out county property, such as a park shelter for a community event, then you can add an indemnification clause to the lease agreement stating that if someone is injured while using the park shelter during the event and the county is sued, then the party who leased the shelter is responsible for any financial losses. Put simply, indemnification shifts the liability to the indemnifier.

Why Indemnify

Indemnification clauses protect the party being indemnified and are a fairly standard part of many contracts. If you are entering into a contract where you hold bargaining power you can require the other party to indemnify your entity, its officers, and its employees. Indemnification clauses can be added to construction contracts, requests for bids, service agreements, leases, easement agreements, and various permits or permit applications.

If you are Asked to Indemnify

In some cases, you may be asked to indemnify the other party in a contract. In these situations, weigh the potential benefit from the contract to the risk of indemnifying. Common types of contracts with indemnification obligations are state grants and easements or pipeline agreements with the railroad. Often indemnification clauses are part of a standard contract making them difficult to revise; however, in a contract most things are negotiable.

If the contract is mutually beneficial to both parties (e.g., intergovernmental agreements, mutual aid

agreements), you may consider negotiating no indemnification or a mutual indemnification clause. Run through possible “what if” scenarios before agreeing to these types of clauses to make sure they will work in a real-life situation should either party be sued.

Some Legal Cautions

There is some question about whether a public entity can indemnify a private party (e.g., contractor, corporation). Article XI, Sections 1 and 2 of the Colorado Constitution states:

Neither the state, nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public or private, for any amount, or for any purpose whatever; or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state.

However, a public purpose exception to this has been recognized by the courts, so for instance, if a county leases land for the placement of a cell-phone tower, then they may offer to indemnify the cell tower provider because providing cell service is a benefit to the general public.

What This Means for Counties

The topic of indemnification is complex and the decision to enter into or add an indemnification clause to a contract should be reviewed by your county attorney. For more information about this topic or questions about specific situations, contact CTSI at 303 861 0507. 