

# CONTRACT REVIEW & RISK TRANSFER

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# OVERVIEW OF A CONTRACT REVIEW

Indemnity

Insurance

Notice

Subrogation

Waiver of Subrogation

Limitation of Liability

Waiver of Damages

Waivers According to Coverage

Inadequate Description of Insurance



# SAMPLE CONSTRUCTION INDEMNIFICATION

§ 9.15.1 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 of 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 which would otherwise exist as to a party or person described in this Section 9.15.1.

# CONTINUED

§ 9.15.2 In claims against any person or entity indemnified under this Section 9.15 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, the indemnification obligation under Section 9.15.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.



# OREGON CONSTRUCTION STATUTE

## ORS 30.140

Certain indemnification provisions in a construction agreement are void

(1) Except to the extent provided under subsection (2) of this section, any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void.

(2) This section does not affect any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property to the extent that the death or bodily injury to persons or damage to property arises out of the fault of the indemnitor, or the fault of the indemnitor's agents, representatives or subcontractors.

# CONTINUED

## ORS 30.140 (cont.)

(3) As used in this section, “construction agreement” means any written agreement for the planning, design, construction, alteration, repair, improvement or maintenance of any building, highway, road excavation or other structure, project, development or improvement attached to real estate including moving, demolition or tunneling in connection therewith.

(4) This section does not apply to:

(a) Any real property lease or rental agreement between a landlord and tenant whether or not any provision of the lease or rental agreement relates to or involves planning, design, construction, alteration, repair, improvement or maintenance as long as the predominant purpose of the lease or rental agreement is not planning, design, construction, alteration, repair, improvement or maintenance of real property; **or**

(b) Any personal property lease or rental agreement.

(5) No provision of this section shall be construed to apply to a “railroad” as defined in ORS **824.200 (Definitions for ORS 824.200 to 824.256)**. [1973 c.570 §§1,2; 1987 c.774 §25; 1995 c.704 §1; 1997 c.858 §1; 2007 c.413 §1]

# WASHINGTON CONSTRUCTION STATUTE

## RCW 4.24.115

**Validity of agreement to indemnify against liability for negligence relative to construction, alteration, improvement, etc., of structure or improvement attached to real estate or relative to a motor carrier transportation contract.**

(1) A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, a contract or agreement for architectural, landscape architectural, engineering, or land surveying services, or a motor carrier transportation contract, purporting to indemnify, including the duty and cost to defend, against liability for damages arising out of such services or out of bodily injury to persons or damage to property:

(a) Caused by or resulting from the sole negligence of the indemnitee, his or her agents or employees is against public policy and is void and unenforceable;

# CONTINUED

## RCW 4.24.115 (cont.)

(b) Caused by or resulting from the concurrent negligence of (i) the indemnitee or the indemnitee's agents or employees, and (ii) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title **51** RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after June 11, 1986.

(2) As used in this section, a "motor carrier transportation contract" means a contract, agreement, or understanding covering: (a) The transportation of property for compensation or hire by the motor carrier; (b) entrance on property by the motor carrier for the purpose of loading, unloading, or transporting property for compensation or hire; or (c) a service incidental to activity described in (a) or (b) of this subsection, including, but not limited to, storage of property, moving equipment or trailers, loading or unloading, or monitoring loading or unloading. "Motor carrier transportation contract" shall not include agreements providing for the interchange, use, or possession of intermodal chassis, containers, or other intermodal equipment.

[ **2012 c 160 § 1; 2011 c 336 § 95; 2010 c 120 § 1; 1986 c 305 § 601; 1967 ex.s. c 46 § 2.**]



# CONSTRUCTION INSURANCE

- **Liability**
- **Automobile**
- **Workers Compensation**
- **Pollution**
- **Builders Risk**

# INSURANCE REQUIREMENTS IN CONSTRUCTION CONTRACTS

- Changes made to the AIA Insurance provisions 2007 – 2017.



# INSURANCE REQUIREMENTS IN COMMERCIAL LEASES

- During the Term, Landlord shall maintain in full force a policy or policies of standard multi-peril insurance covering the Building and other improvements (exclusive of Tenant's trade fixtures, tenant improvements and other property) situated on the Property for the perils of fire, lightening, windstorm, and other perils commonly covered in such policies.
- Tenant shall at its own expense during the Term carry in full force and effect (a) a comprehensive public liability insurance policy with limits of not less than Two Million Dollars (\$2,000,000) combined single limit bodily injury and property damage per occurrence and in aggregate, and (b) a business automobile liability insurance covering owned, non-owned, and hired vehicles with a limit of not less than One Million Dollars (\$1,000,000), with an insurance carrier satisfactory to Landlord, naming Landlord, Landlord's management agent, and Landlord's lender as additional insureds.
- On or before the Commencement Date, Tenant shall furnish Landlord with a certificate or other acceptable evidence that such insurance is in effect.

# INSURANCE AND BONDS

**Article 11.1.1** The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business and recognized by the State of Oregon, with a Best Rating of AVII or better and reasonably acceptable to the Owner.

- General Liability Insurance: Occurrence-based Commercial General Liability with limits not less than \$1,000,000 for injury and/or property damage per occurrence and \$2,000,000 for injury and/or property damage in a project general aggregate (CG 25 03) naming the Owner, its employees, officials and agents as additional insured as respects to work or services performed under this Agreement. Include a CG 20 10 11 85 endorsement or equivalent including products of completed operations. This insurance will be primary over any insurance the Owner may carry on its own. Evidence of the above coverage's issued by a company satisfactory to the Owner shall be provided to the Owner by way of a certificate of insurance before any work or services commence. A 30-day prior notice of cancellation or material change in coverage clause shall be included. Failure to maintain the proper insurance shall be grounds from immediate termination of this contract. The Owner, at its option, may require a complete copy of the above policy.

# SUBCONTRACTORS

- The Contractor shall require all subcontractors to provide and maintain General Liability, Auto Liability, Professional Liability (as applicable), and Workers' Compensation insurance with coverage's equivalent to those required of the General Contractor in this Agreement. The Contractor shall require certificates of insurance from all subcontractors as evidence of coverage.

# WAIVER OF SUBROGATION

§ 17.2.2.7.1 The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other; (2) the Architect and Architect's consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire, or other causes of loss, to the extent those losses are covered by property insurance required by this Agreement or other property insurance applicable to the Project, except such rights as they have to proceeds of such insurance. The Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect's consultants, Separate Contractors, subcontractors, and sub-subcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this Section 17.2.2.7 shall not prohibit this waiver of subrogation. This waiver of subrogation shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property.

# CONTINUED

§ 17.2.2.7.2 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, to the extent permissible by such policies, the Owner waives all rights in accordance with the terms of Section 17.2.2.7.1 for damages caused by fire or other causes of loss covered by this separate property insurance.

# LEASE WAIVER OF SUBROGATION

Neither party shall be liable to the other for any loss or damage caused by fire or any of the risks enumerated in a standard multiperil insurance policy, including sprinkler leakage insurance if the Premises have sprinklers, to the extent that any such insurance actually pays any such loss or damage. All claims or rights of recovery for any and all such loss or damage, however caused, are hereby waived. Without limiting the generality of the foregoing, said absence of liability shall exist whether or not such loss or damage is caused by the negligence of either Landlord or Tenant or by any of their respective agents, servants, or employees.



# ADDITIONAL INSURED ISSUES

Parties to contracts, particularly construction contracts and vendor contracts, require “additional insured” status.

Key for risk managers and producers: understanding the contractual requirement and making sure the right additional insured endorsement is there to support it.

Diligence is especially important in light of changing and evolving coverage forms.

Certificates of Insurance: What Are They Good For?

- Not quite “absolutely nothing,” but not far from it...

# CONTINUED

## Legal Issues Arising From Additional Insured Endorsements

- “Ongoing Operations” vs. “Products/Completed Operations”
  - A potential trap for agents and brokers; make sure that the AI endorsement provides the coverage promised in the underlying contract!
  - Oregon’s broad duty to defend standard applies equally to additional insureds, and the distinction may not matter in the duty to defend context, especially in the face of vague allegations in a complaint:
    - “The complaint alleges that damages had occurred by the time the owners purchased their townhomes. It is possible that the damages occurred earlier. Reasonably interpreted, then, the complaint could result in West Hills being held liable for conduct covered by the policy.” *West Hills Development Co. v. Chartis Claims, Inc.*, 360 Or. 650 (2016).
  - Impact of ORS 30.140

# IMPACT OF ORS 30.140

Subsection (1) of that statute provides that any provision of a construction contract that requires a person to indemnify another for damage “caused in whole or in part by the negligence of the indemnitee is void,” “except to the extent provided under subsection (2)” of the statute. ORS 30.140(1). Subsection(2) then provides that the statute does not affect any provision in a construction agreement that requires a person or that person’s insurer to indemnify another to the extent the damage to property arises out of the fault of the indemnitor.

Even if indemnity and additional insured contractual language is overly broad, subsection (2) can preserve AI obligations to the extent they involve the subcontractor’s negligence: “The unlawful potential of such an insurance or indemnity provision can be excised, while the lawful portion can be enforced.” *Security Nat’l Ins. Co. v. Sunset Presbyterian Church*, 289 Or.App. 193 (2017).

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But ORS 30.140 may limit the scope of the duty to defend:

- “ORS 30.140 circumscribes the insurer’s duty to defend just as it circumscribes the indemnitor’s duty to defend. Accordingly, SNIC’s duty to defend under its policy does not extend to defend all claims; rather, SNIC’s duty to defend corresponds to Andersen’s liability that arises out of the fault of B & B... SNIC’s duty to defend corresponds to the risk of Andersen’s liability for B & B’s fault and no more.”

# CERTIFICATES OF INSURANCE

- Before any presence on site, commencing Work or exposure to loss can occur, the Contractor shall furnish the Owner with Certificates of Insurance, in duplicate, as evidence of all insurance required by the Contract Documents. If the Agreement is executed, no progress payment will be due until all such Certificates are furnished. All policies and certificates must be signed copies and shall contain a provision that coverage's afforded under the policies cannot be materially altered (i.e., the coverage's reduced, the limits decreased, or the additional insured removed), allowed to expire, or canceled without first giving 30 days' prior written notice to the Owner. The Contractor shall furnish to the Owner copies of any subsequently issued endorsements, amending, modifying, altering, or restricting coverage of limits. Furthermore, such policies or certificates shall contain a clause verifying that the policy contains coverage for blanket contractual liability including both oral and written contracts and that the liability coverage's include protection for underground, collapse and explosion.

# QUESTIONS



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