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BEFORE YOU SIGN YOUR NEXT CONTRACT...

From a negligence and liability insurance point of view, be aware of what you may be assuming from others before you sign any contract for services that you provide to them. Ideally, each party to a contract should be responsible for their own negligence. However, in the real world, it is not unusual for there to be an indemnity requirement in a contract wherein one party (you, the indemnitor) assumes responsibility for the sole negligence of the other party (the indemnitee). This means, if you are the indemnitor, that your general liability insurance will have to investigate, defend and pay for damages that may be assessed against the negligent party (the indemnitee), due to their negligence, as long as your general liability insurance is broad enough to afford protection. If your insurance contains limitations or exclusions, which preclude coverage, you are on your own as you have now self-assumed this exposure.

In addition, many contracts require one party to add the other party to its general liability insurance as an additional insured and most additional insured endorsements provide protection for the sole negligence of that added party. It is also not unusual to have both requirements in a contract wherein there is an indemnity provision as well as a requirement for additional insured status.

It is of paramount importance for you to carefully read every contract you are negotiating to understand its implications before you sign it. From a negligence assumption and liability insurance perspective, have your insurance agent/broker review the proposed contract to inform you of your legal responsibilities. He/she should be asked to recommend ways to handle the indemnity agreements and additional insured requests to best benefit you. In addition, have your attorney perform the same task. This may cost money up front, but it will be less costly than not being aware of what liabilities you may have assumed.

Some suggestions to consider regarding indemnity agreements and additional insured requests from others before you sign the contract:

1. Negotiate to have any onerous indemnity agreement amended wherein you are responsible for the sole negligence of the other party to being responsible only for your own negligence;
2. If unsuccessful above, negotiate to be responsible only when both parties are jointly negligent;
3. Negotiate to have any request for additional insured status eliminated;
4. If additional insured status is required, negotiate to have the additional insured endorsement reflect that the sole negligence of the additional insured is not covered; and
5. Negotiate to have an owners and contractors protective liability (OCP) insurance policy satisfy the requirements of your contract, thus eliminating the need for contractual liability insurance and adding the other party to your general liability insurance.

(over)

In your negotiations, be prepared to deal in good faith and expect no less from the other party. To eliminate or reduce the assumption of another's negligence, be willing to give up something on your end (quid pro quo), including a reduction in your pricing in order to get the business.

Assuming responsibility for the sole negligence of another can erode your own insurance limits, adversely impact your liability insurance loss experience, increase your liability insurance premiums and even create a situation wherein your insurance company may not desire you as an insured in the future.

While the other party may have superior bargaining power, it is incumbent upon you to protect your interests by being aware of the implications of assuming the sole negligence of others and doing whatever you can to eliminate or reduce this exposure.

Actual claims that have occurred:

1. A Security Guard firm is required to indemnify a Property Owner for a slip and fall that occurred in the parking lot of the building, even though the Security Guard firm had no responsibility for the parking lot. The contract they signed required the indemnification even though the insured had zero liability.
2. A Janitorial Contractor is required to indemnify a Property Management Company for a fire that occurred that was not the Janitorial Contractor's fault. Adding the client as an additional insured and also indemnifying them for any and all occurrences required this contractor to pay a claim for which they had no fault.
3. A Sprinkler Contractor's employee is injured at the work site. The employee submits a traditional Workers' Compensation claim but also sues the general contractor of the work site for negligence in not keeping a safe work environment. Because the contract added the general contractor as an additional insured and also indemnified the general contractor for any and all losses, our insured is forced to defend and pay damages when the general contractor was at fault. The contractor pays the claim twice – on both its Workers' Compensation and General Liability policies.

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