PITY THE POOR SUBCONTRACTOR
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At a recent NARI meeting, one of our subcontractor clients complained that we don't write much about them. True enough; fair enough. So this one is for you, Mr. Subcontractor.

Recently one of our subcontractor clients was sitting around on a Wednesday morning, idly throwing playing cards into the hat in the corner, when he was personally served with a lawsuit. The rightfully irate fellow gave us a call. Unhappily, we periodically get these calls.

The Scenario. The following – admittedly an oversimplification - is how it typically seems to go with some of my subcontractor guys and gals.

You are a subcontractor on a large project (perhaps a glazier). You have signed the subcontract written by the general contractor. You performed with requisite skill, are complimented by both the general contractor and the client - and paid in full. It is on to the next job.

You later hear that a pipe burst in the building and there were damages from flooding. Your thought at the time; "This is an unhappy circumstance, but it is not on my watch."

Some time later, you receive a letter from the general contractor's counsel – there is a big beef between the contractor and the owner. Counsel is requesting indemnification from you pursuant to the indemnification provision in the written subcontract. You are puzzled; this has nothing to do with your work. You thus ignore it.

A good business rule – never ignore letters from attorneys.

Several months later (or a year later) you are served by a process server with a lawsuit. (It is myth that one can defeat service by not physically accepting the document that is being served. There are alternative methods to serve someone with a lawsuit if after reasonable attempt, the person cannot be personally served.)

You read the document from the process server. To your great surprise you see it is something called a cross-complaint and you have been named as a defendant by the general contractor in this response to the main lawsuit between the general contractor and the owner. The next day you receive a 3-inch stack of papers from the general contractor's attorney that is not only the complaint but all of the documents that have been attached.

Why Are You Named as a Party? (Spoiler alert: Indemnification) You are convinced (probably correctly) that you have nothing to do with the problem. But there was an indemnification provision in the subcontract agreement that is now being utilized. A very brief overview of indemnification follows; this issue is certainly complex enough to require its own article on the topic.

Indemnity is essentially the compensation for loss or damage sustained. There are always at least two parties to an indemnification provision/agreement – the indemnitor and the indemnitee. The indemnitor is the party with the obligation, the indemnitee is the party who receives the benefit.

Usually, the general contractor is the indemnitee and the subcontractor is the Indemnitor. This means that, if there is a claim, damages, or award by a third party against the indemnitee, the indemnitor owes a duty to pay those claims on behalf of the indemnitee.

To what extent the indemnitor is responsible for those claims - depends on the language in the indemnification provision. There should be limits, such as the obligation to indemnify only applies to those claims, damages, etc., that are related to or arising out of the work performed by the indemnitor. Sometimes the provision is further limited and states that the obligation to indemnify is only to the extent the claims, damages, etc., arise directly out of the negligence of the indemnitor.

Often the duty to defend is coupled with the indemnity obligation. The defense obligation is actually its own obligation, and generally requires the subcontractor to not only pay and claims or damages under the indemnification agreement, but to pay for the defense of those claims on behalf of the general contractor.

This is why it is important to read and understand indemnification provisions prior to signing the contract. It seems the general practice that the attorney for the general contractor names all of the subcontractors as defendants in his/her cross-complaint. The legal theory: if one throws enough crap against the wall, some will stick.

What Next?/What to Do. Your first call should be to your counsel. Your next call should to be your commercial general liability insurance carrier. Under its agreement of liability insurance, a contractor has a responsibility to let its insurer know promptly of claims. So, why your attorney first?

We suggest you call your counsel first because he or she - assuming construction is their specialty – will prepare and send the "tender" letter to your insurance on your behalf. A tender letter is a written notice of a claim to insurance carrier requesting that the insurer provide a defense for the claim.

For better or for worse, a letter from counsel tends to get a more prompt and hopefully more positive and complete reply. With all respect to my many friends in the insurance world, it sometimes seems that with some carriers their first reply to a tender - regardless of its merit - is "no coverage".

What Happens Next? The good lord willing and the river don't rise, you should shortly thereafter be assigned to "panel counsel" - those law firms that are hired by your insurance to defend you in covered claims.

A question often asked – whose is the panel counsel's real client, you or the insurer? Sometimes this is an interesting question, but also subject of another article.

The Moral of the Story. It makes sense for the subcontractor to have his/her own subcontract agreement with a neutral indemnification clause. If the general contractor insists on using his/her subcontract agreement, have your attorney look at the indemnity provisions and explain it to you. A more favorable indemnification agreement may not prevent being named in the lawsuit, but it makes it easier to get out of it sooner.

Canadians. While not apropos to this article, I was recently north of the border and need to compliment our neighbors. It must be said: Canadians are the most cordial and polite of people and wonderful hosts to the barbarians from the southern badlands. (And their currency is also pretty cool.)

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