So you want to be an Insurer:
Insurance; everyone hates it, and why now?

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Insurance is one of those expenses subcontractors just hate to incur, because unless there is an actual claim, its pure expense with no immediate benefit. Worse than that, though, is the endless lists of traps and weaknesses encountered with insurance.

Ask any group of subcontractors what they don't like about insurance, and the list will probably read something like this:

• *Costs:* Insurance is expensive! Premiums for all kinds of coverage keep going up, with no end in sight.

• *Limited coverage:* It seems like you have to schedule out every possible kind of exposure or casualty you want to protect against, with additional premiums for every coverage you want combined, and every location you want protected.

• *Exclusions from coverage:* Even when you buy insurance that you think is protecting you from claims, you have to read the policy, cover to cover, to see what all exclusions the carriers come up with - and these exclusions keep getting broader, while the coverage is getting smaller.

• *Claims adjusting:* If something happens, and you need the insurance carrier to adjust the claim, it always seems like the assign it to a claims adjustor who just hasn't got time for you, because he's too busy with someone more important. You wait and you wait, and you just hope that they get around to you. Then, when they do, they send you the silly letter, twenty four pages long, telling you in five thousand words that they are not sure whether your claim is covered and they don't know what they'll do.

• *Limited defense:* When there is a suit or a claim against you, the carrier doesn't really agree that they are obligated to defend you, and they have a lengthy list of things that they won't defend you against. Even then, they expect you to pay for anything that doesn't fit squarely into the agreement of defense in the first place.

• *Choice of counsel:* This one is great - somebody sues you or makes a claim against you, and the next thing you know, you get a phone call from Doogie Howser, attorney at law, who is taking a brief time out between working on the dog bite case, and the minivan wreck, to try and figure out just what it is your business is and just how they can defend you against some huge claim for damages being made by a Plaintiff.

So insurance costs a lot without any assurance of what is received. And when it is actually needed, the insured has no assurance the insurer is actually going to help. Surely, there has got to be a better way? Well, guess what - there is! Wouldn't it be great if there was a special form of insurance that covered a party against everything, and just never said no? Well try this on for size!

For general contractors, it is the typical indemnity clause from a Subcontract Agreement, and it is the holy grail of protection! Costs? It does not cost them anything because the price the subcontractor quoted to do its work was a price for supplying labor and materials for the construction of the construction project. Exclusions from coverage? Read that language - *"to the fullest extent permitted by law...of every kind and character, ..."*

What about limitations on coverage? Well there are no limitations, because the subcontractor agreed to indemnify *"without limitation"* in fact, agreed to indemnify the parties who are indemnified, even if the claim arises out of their sole negligence.

How about the defense, or the counsel who is going to handle it? Well it has already been agreed that the subcontractor would defend without limitation, and agreed that the defense counsel will be *"counsel acceptable to contractor, in its sole discretion."* This clause is especially sweet, because it usually means that the subcontractor is going to be paying the General Contractor's lawyer -- the same one who wrote the Subcontract Agreement with its ridiculous indemnification provision to defend it -- on the subcontractor's nickel. Sweet!

The remarkable thing about all of this, of course, is that by virtue of (1) the subcontractor's agreement to the indemnification provision, and (2) the subcontractor's provision of liability insurance , which includes a contractual liability endorsement, the subcontractor has agreed to provide insurance, underwritten by the insurance carrier who limits the subcontractor's coverage and defense every way from Sunday, with none of the limitations that apply to the subcontractor. Think this it is not costing the subcontractor money? Think again!

This is a dramatic way of reminding subcontractors that there is a very, very real consequence for agreeing to indemnify a general contractor and its other designated entities, under the terms of the typical broad form indemnification provision. In the event of a claim or occurrence which is of substantial consequence, such as a large accident on a job, the subcontractor's insurance can very quickly be completely consumed just dealing with the claims against the general contractor, the owner, and anybody else they feel like having the subcontractor protect, even where they cause the problem in the first place. Even under the Texas Anti-Indemnity Statute in Chapter 151 of the Texas Insurance Code, a subcontractor can still unknowingly indemnify an indemnified party for the party's sole or gross negligence when it comes to a subcontractor-employee injury or death. A simple rule is this: if a claim or loss is caused by something that is not within the subcontractor's reasonable control, it should not indemnify against it. This means that the subcontractor should not indemnify the general contractor, the owner, the architect, or anyone else against the consequences of their own negligence, and especially not for the indemnified party's sole or gross negligence. Be wary of out-of-state general contractor's indemnification provisions.

The general contractors want the subcontractors to believe that they never change indemnification language, for anyone. This simply is not true but like any good game of poker, it comes to who blinks first. It is useful to know, however, that well run subcontractors with effective risk management policies recognize the risk they are taking when they sign a contractual indemnification provision like the one shown above, and effectively run that risk down by negotiating away the worst elements of it. The subcontractor can limit the indemnification to being *"to the extent of Subcontractors negligence,"* and make sure the limitation on indemnification applies to the duty to defend, as well. The indemnification should entitle the indemnified party to a defense, but it should be by any competent counsel, and for goodness sake, never agree to let the general contractor defend itself at your expense.

If you think about, it just makes sense - since a subcontractor is not in the business of underwriting and selling insurance, it ought not to be making promises like an insurance company either. Read the subcontract carefully, making sure to not take on excessive risks. If a subcontractor is unsure about the scope of the indemnity promises it is making, it should run the subcontract language by its insurance agent or counsel. The subcontractor may not like what the insurer has to tell them but at least they will have their eyes wide open.