

CALIFORNIA Strict Indemnity Language

Contractor (*Indemnitor*) shall indemnify, defend, and hold harmless **Authority**, its officers, officials, employees, and volunteers from and against any and all liability, claims, damage, cost, expenses, awards, fines, judgments, and attorney fees (*including, without limitation, costs, attorney fees, expert witness fees, and other expenses of litigation*) of every nature arising out of or in connection with **Contractor's** performance of work hereunder, or its failure to comply with any of its obligations contained in the agreement, except such loss or damage which was caused by the sole negligence or willful misconduct of **Authority**.

CAUTION: While the above type of agreement provides the broadest protection for the Authority if a construction contract is involved, it would be subject to challenge under California Civil Code Section 2782(b) because it purports to indemnify the Authority for losses for its own active or joint negligence. Therefore, the above agreement should not be used if a construction contract is involved. If that is the case, the following example (*intermediate form*) should then be used.

CALIFORNIA Intermediate Indemnity Language

Contractor shall defend, indemnify, and hold harmless **Authority**, its officers, officials, employees, and volunteers from and against all claims, damages, losses, and expenses, including attorney fees arising out of the performance of the work described herein, caused in whole or in part by any negligent act or omission of **Contractor**, any sub-contractor, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, except where caused by the active negligence, sole negligence, or willful misconduct of the **Authority**.

In this second example, the Authority receives indemnity if it was not negligent or if its negligence was only passive. (*There is a great deal of case law on the active/passive distinction. Essentially, active negligence is affirmative participation in causing the harm, or failure to prevent a known danger, whereas passive negligence is failure to detect a danger which the Authority is under a duty to detect, such as a dangerous condition on its property created by the contractor*).

There is a great variety of language used to arrive at this type of intermediate form, because any indemnity contract which does not specifically refer to the indemnitee's negligence will be construed as this type of general clause, considerably limiting the extent of the indemnification. So, if the contract promises indemnity for losses (*however they may be caused regardless of responsibility for negligence arising from use of the premises, facilities, or services, or caused by any person or persons whomever*), the wording will be interpreted as a general indemnity clause.