Sample and Revised General Indemnification Clauses

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Prime Contractor-Friendly Indemnification Clause:

Subcontractor shall indemnify and hold harmless Prime Contractor and its directors, officers, employees, agents, stockholders, affiliates, subcontractors and customers from and against all allegations, claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses (including without limitation attorneys’ fees and costs) which arise out of, relate to or result from any act or omission of Subcontractor.

Suggested Subcontractor Revisions:

✓ Include obligation to defend and delete hold harmless provision

Subcontractor shall **defend and indemnify and hold harmless** Prime Contractor and its directors, officers, employees, agents, stockholders, affiliates, subcontractors and customers from and against all allegations, claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses (including without limitation attorneys’ fees and costs) which arise out of, relate to or result from any act or omission of Subcontractor.

✓ Narrow definition of indemnified parties

Subcontractor shall **defend and indemnify and hold harmless** Prime Contractor and its directors, officers, and employees, and agents, stockholders, affiliates, subcontractors and customers from and against all allegations, claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments,
costs and expenses (including without limitation attorneys’ fees and costs) which arise out of, relate to or result from any act or omission of Subcontractor.

✓ Narrow scope of clause to third-party claims

Subcontractor shall defend and indemnify and hold harmless Prime Contractor and its directors, officers, and employees, and agents, stockholders, affiliates, subcontractors and customers (collectively, “Indemnified Parties”) from and against all third party allegations, claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses (including without limitation attorneys’ fees and costs) which arise out of, relate to or result from any act or omission of Subcontractor.

✓ Narrow what types of events give rise to indemnity/defense obligation

Subcontractor shall defend and indemnify and hold harmless Prime Contractor and its directors, officers, and employees, and agents, stockholders, affiliates, subcontractors and customers (collectively, “Indemnified Parties”) from and against all third party allegations, claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses (including without limitation reasonable attorneys’ fees and costs) (“Claims”) which arise out of, relate to or result from any act or omission of Subcontractor.

✓ Specify types of indemnified third-party claims

Subcontractor shall defend and indemnify and hold harmless Prime Contractor and its directors, officers, and employees, and agents, stockholders, affiliates, subcontractors and customers (collectively, “Indemnified Parties”) from and against all third party allegations, claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses (including without limitation reasonable attorneys’ fees and costs) (“Claims”) which arise out of or, relate to (1) death or
bodily injury or (2) loss of or damage to real property or result from any act or omission of Subcontractor.

✓ Include language to include only negligent actions or breaches of contract or violations of law by Subcontractor.

Subcontractor shall defend and indemnify and hold harmless Prime Contractor and its directors, officers, and employees, and agents, stockholders, affiliates, subcontractors and customers (collectively, “Indemnified Parties”) from and against all third party allegations, claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses (including without limitation reasonable attorneys’ fees and costs) (“Claims”) which arise out of or, relate to (1) death or bodily injury or (2) loss of or damage to real property or resulting from any negligent act or omission—willful misconduct of Subcontractor.

✓ Exclude Claims involving Negligence of Indemnified Parties

Subcontractor shall defend and indemnify and hold harmless Prime Contractor and its directors, officers, and employees, and agents, stockholders, affiliates, subcontractors and customers (collectively, “Indemnified Parties”) from and against all third party allegations, claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses (including without limitation reasonable attorneys’ fees and costs) (“Claims”) which arise out of or, relate to (1) death or bodily injury or (2) loss of or damage to real property or resulting from any negligent act or omission—willful misconduct of Subcontractor except to the extent that such Losses result from, in whole or in part, (a) the negligence, unlawful or wrongful acts of the Indemnified Parties or any other person acting in concert with them.
Subcontractor-Friendly Indemnification Clause:

Subcontractor shall defend and indemnify Prime Contractor and its directors, officers, and employees, and stockholders, (collectively, “Indemnified Parties”) from and against all third party claims, actions, suits, demands, damages, obligations, losses, settlements, judgments, costs and expenses (including without limitation reasonable attorneys’ fees and costs) (“Claims”) which arise out of or relate to (1) death or bodily injury or (2) loss of or damage to real property resulting from any negligent act or willful misconduct of Subcontractor except to the extent that such Losses result from, in whole or in part, (a) the negligence, unlawful or wrongful acts of the Indemnified Parties or any other person acting in concert with them.

Additional Bells and Whistles:

✔ Elimination of Consequential Damages

In no event shall Subcontractor be liable for any consequential damages or lost profits under this Indemnification Clause, regardless of the legal theory under which such damages are sought, and even if it has been advised of the possibility of such damages.

✔ Limitation of Indemnification Due to Payments by Third Parties

Subcontractor’s obligation to defend and indemnify Prime Contractor shall not apply to the extent FAR 52.228-7, Insurance – Liability to Third Persons is included in the prime contract.

Subcontractor’s obligation to defend and indemnify Prime Contractor shall not include any amounts paid an Indemnified Party by an insurer as compensation for a Claim or any amounts paid by a third party as payment for the Claim.

✔ Duty to Defend Procedural Provisions

An Indemnified Party shall promptly notify Subcontractor of any actual or prospective Claim for which indemnification is sought. In the event that
any third-party Claim is made, Subcontractor shall have the right and option to undertake and control such defense of such action with counsel of its choice and to settle any such Claims.

✓ Procedural Provisions Modified by Prime

An Indemnified Party shall promptly notify Subcontractor of any actual or prospective Claim for which indemnification is sought, upon actual knowledge of such Claim, provided, however, that failure to give such notice shall not relieve the Subcontractor of its obligations under this Indemnification clause except to the extent that Subcontractor is materially prejudiced by such failure. In the event that any third-party Claim is made, Subcontractor shall have the right and option to undertake and control such defense of such action with counsel of its choice, provided that an Indemnified Party may undertake and control such defense in the event of a material failure of the Subcontractor to undertake and control same, and to settle any such Claims.

✓ Procedural Provisions Modified by Prime v. 2

An Indemnified Party shall promptly notify Subcontractor of any actual or prospective Claim for which indemnification is sought, upon actual knowledge of such Claim, provided, however, that failure to give such notice shall not relieve the Subcontractor of its obligations under this Indemnification clause except to the extent that Subcontractor is materially prejudiced by such failure. In the event that any third-party Claim is made, Subcontractor shall have the right and option to undertake and control such defense of such action with counsel of its choice. Subcontractor shall select qualified counsel with demonstrable experience defending claims of the type to be defended and approved by the Indemnified Party, which approval shall not be unreasonably withheld.

✓ Subcontractor addition to the above revisions

An Indemnified Party shall not concede or settle or compromise any Claim without the prior written approval of Subcontractor.
✓ Prime response

An Indemnified Party shall not concede or settle or compromise any Claim without the prior written approval of Subcontractor, which shall not be unreasonably withheld.
IP Indemnification Clauses

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Partner, Protorae Law

Buyer-Friendly Clause:

Seller will defend, indemnify, and hold Buyer harmless against any allegation that any intellectual property provided to Seller hereunder infringes a copyright or patent or misappropriates a party’s trade secret.

Suggested Seller Revisions:

- Eliminate Hold Harmless provision

Seller will defend and indemnify Buyer *harmless* against any allegation that any intellectual property provided to Seller hereunder infringes a copyright or patent or misappropriates a party’s trade secret.

- Limit to Third Party Claims

Seller will defend and indemnify Buyer against any third-party action, suit or proceeding (“Claim”) allegation that any intellectual property provided to Seller hereunder infringes a copyright or patent or misappropriates a party’s trade secret.

- Limit to Losses Incurred/Actual Liability

Seller will defend and indemnify Buyer against any third-party action, suit or proceeding (“Claim”) allegation and any losses, damages or costs incurred with regard to same (“Losses”) in which it is determined that any intellectual property provided to Seller hereunder infringes a copyright or patent or misappropriates a party’s trade secret.

- Narrow Exposure to IP delivered by Buyer

Seller will defend and indemnify Buyer against any third-party action, suit or proceeding (“Claim”) allegation and any losses, damages or costs incurred with regard to same (“Losses”) in which it is determined that
any Deliverable intellectual property provided to Seller hereunder infringes a copyright or patent or misappropriates a party’s trade secret.

✓ Narrow Exposure to United States IP and

Seller will defend and indemnify Buyer against any third-party action, suit or proceeding ("Claim") alleging and any loss, damages or costs incurred with regard to same (“Losses”) in which it is determined that any intellectual property provided to Seller hereunder Deliverable infringes a United States copyright or patent or misappropriates a party’s trade secret.

✓ Alternative

Seller will defend and indemnify Buyer against any third-party action, suit or proceeding ("Claim") alleging and any losses, damages or costs incurred with regard to same (“Losses”) in which it is determined that any Deliverable intellectual property provided to Seller hereunder infringes a copyright or patent or misappropriates a party’s trade secret. Subcontractor will not be obligated to defend and does not indemnify Buyer against infringement Claims for non-U.S. patents, copyrights or other intellectual property.

✓ Narrow Exposure to Certain Types of Patent Infringement

Seller will defend and indemnify Buyer against any third-party action, suit or proceeding ("Claim") alleging and any loss, damages or costs incurred with regard to same (“Losses”) in which it is determined that any intellectual property provided to Seller hereunder Deliverable infringes a copyright or patent or misappropriates a party’s trade secret. Subcontractor will not be obligated to defend and does not indemnify Buyer against infringement Claims for non-U.S. patents, copyrights or other intellectual property. Subcontractor’s obligation to defend and indemnify Buyer also shall not apply to the extent the Government has authorized and consented to use of a third party’s intellectual property rights pursuant to FAR 52.227-1, Authorization and Consent.
Seller-Friendly Clause:

Seller will defend and indemnify Buyer against any third-party action, suit or proceeding ("Claim") and any loss, damages or costs incurred with regard to same ("Losses") in which it is determined a Deliverable infringes a copyright or patent or misappropriates a party’s trade secret. Subcontractor will not be obligated to defend and does not indemnify Buyer against infringement Claims for non-U.S. patents, copyrights or other intellectual property. Subcontractor’s obligation to defend and indemnify Buyer also shall not apply to the extent the Government has authorized and consented to use of a third party’s intellectual property rights pursuant to FAR 52.227-1, Authorization and Consent.

Additional Bells and Whistles:

- **IP Indemnification Exclusions**

  Seller will not indemnify Buyer if the claim of infringement is caused by (1) Buyer’s misuse or modification of the Deliverable; (2) Buyer’s failure to use corrections or enhancements made available by Seller; (3) Buyer’s used of the Deliverable in combination with any product not owned or developed by Seller; or (4) information, directions, specifications, or materials provided by Buyer or any third party not under the direction of Seller.

- **Limitation on Available Remedies for IP Infringement**

  If any Deliverable is or is likely to be held infringing, Seller, at its expense and option, shall either (a) procure the right for Buyer to continue using the Deliverable, (b) replace the Deliverable with a non-infringing product, (c) modify the Deliverable to make the product non-infringing or (d) upon return of the Deliverable, refund the Buyer the fees paid for the Deliverable less a reasonable amount for Buyer’s use of the Deliverable up to the time of return.
Limitation on Damages Recoverable

In no event shall Subcontractor be liable to Buyer for any special, exemplary, incidental, consequential, punitive, or other indirect damages of any kind, even if Seller has been advised in advance of the possibility of such damages or such damages could have been reasonably foreseen by the Seller.