

# Contractor – Contractual Risk Transfer

## **Introduction:**

When hiring a subcontractor, your business may take on some or all of the liability for that contractor's operations. Whether a subcontractor is hired to perform snow and ice removal, or perform major installation or construction services, proper risk management techniques should be employed to protect your business.

### **1. Who's at risk?**

- a. Your company's assets and reputation
- b. Your customers
- c. Your employees
- d. General contractors
- e. Subcontractors and their employees

### **2. What's at risk?**

- a. Legal expenses – Legal counsel to defend your company.
- b. Awarded damages – Damages awarded to a plaintiff resulting from a lawsuit or settlement. Damages may be awarded above your policy limits.
- c. Repair expenses – If your subcontractor has inadequate insurance limits or no coverage at all, your company could be responsible for repairs to your or others' property.
- d. Reputation – If a loss occurs that directly affects your customer, you want to make sure all damages are remedied in a smooth and expedient fashion.

### **3. What puts a company at risk?**

- a. Work performed without a contract, thus making responsibilities and liabilities ambiguous.
- b. You enter a contract that favors the subcontractor.
- c. Work performed by your subcontractor that causes a loss.
- d. Work performed by your subcontractor that causes an injury.
- e. Employees you obtain through temporary workforce agencies who become injured.

## **How to Protect Yourself:**

The best way to protect yourself is by using proper risk management techniques. Oftentimes, companies believe obtaining a certificate of insurance is enough. Although this is important, it shouldn't constitute your sole method of risk management.

1. Certificates of Insurance – A certificate of insurance is proof of a contractor's insurance coverage. Regularly obtaining certificates of insurance is important to ensure that a contractor has adequate and current coverage. It will show critical information such as the contractor's insurance company and limits for each line of coverage. Coverage limits for General Liability and Motor Vehicle Liability should be at least \$1,000,000. An Umbrella policy should provide an additional \$1,000,000 in limits. Current Workers' Compensation coverage should also be verified.
2. Additional Insured – You should require your subcontractor to add you as an additional insured on their insurance policy, on a primary and noncontributory basis, for all liability and expenses arising out of their work, including completed operations. Being named an "Additional Insured" gives your company all of the same rights provided to your subcontractor by their insurance carrier. This includes damages paid and legal defense. Your company should be named as an additional insured, as should your agents, employees, temporary workforce agencies, and customers. A copy of the additional insured form should be secured.
3. Contract – A formalized contract should be entered between your company and the subcontractor. This contract is one of the most important risk transfer tools as it sets forth the responsibilities of your company and the subcontractor. This contract will be used to determine responsibility of both parties, duties, payment, timeframe, etc. In the event of a loss, your insurance company can use this contract to partially or fully limit your company's liability.

## **What Should be Included in a Contract:**

1. Hold Harmless Agreement – A Hold Harmless Agreement is a clause that states your subcontractor agrees to hold your company harmless against any and all expenses, damages, or loss whatsoever arising from the work performed by the subcontractor.
2. Indemnification Clause – An Indemnification Clause is similar in that the subcontractor agrees to indemnify your company, its agents, employees, and customers for any expenses, damages, or loss whatsoever arising from the work performed by the subcontractor.



3. Waiver of Subrogation – The contract should have a ‘Waiver of Subrogation Against You’ clause that states the subcontractor waives their right to sue or allow someone, such as their insurance carrier, to sue your company in the event of a loss arising from that subcontractor’s work.
4. Insurance Requirements – This section of the contract should state that the subcontractor shall add your company, its agents, employees, and customers as an Additional Insured on a primary and non-contributory basis, including completed operations. This provides all named parties with the same privileges the subcontractor receives from their insurance carrier. In addition, the insurance requirement section should specifically state the limits of coverage for each line of coverage you require the subcontractor to carry (Workers’ Compensation, General Liability, Business Auto, Umbrella, etc.). These limits should be equal to or greater than your own; however, you should consult your insurance agent for a recommendation.
5. Safety – The safety clause should explain that your company is not solely responsible for the condition of the jobsite, and the subcontractor is responsible for protecting their employees from all injury during the performance of their work. Failure to maintain a safe worksite in compliance with all federal, state, and local laws, codes, and regulations may lead to the removal of the subcontractor’s employees from the jobsite.

#### **Additional Items:**

Other components of the contract that are not necessary to risk transfer, but you may find useful include:

1. Payment – Explains that you’ll pay the subcontractor an agreed-upon amount within a certain timeframe for the performance of the subcontractor.
2. Timeliness of Performance – This clause explains that the subcontractor understands that timeliness is important, and they should carry out their duties when you direct it in a timely manner. You can also include exact deadlines in this section (e.g., within 30 days, by a specific date, within a date range).
3. Cleanup Responsibilities – The subcontractor should agree to clean up the jobsite each day and maintain good housekeeping during their performance.
4. Scope of Work to be Performed – Oftentimes there’s a section at the end of the contract that’s intentionally left blank. This section is unique to each contract. In it, you would outline the entire scope of the subcontractor’s work and how you expect them to carry out their duties.

#### **Evaluation and Review:**

Once you’ve developed and implemented your risk management plan, it’s important to routinely review and update the information. Certificates of insurance should be obtained from each contractor at least once a year. Additional insured status should be verified and a review of your standard contract should be conducted to make sure all information is still relevant.

#### **\*NOTE:**

Information in this document should not be considered or relied upon as legal advice. We urge you to consult your own legal counsel concerning your specific operations and exposures and to review contracts and contract language. Additionally, consult your insurance agent or risk manager to determine appropriate insurance limits.

#### **Claims Examples:**

Here are two examples of actual claims that would have had much different outcomes if proper risk transfer techniques had been used. All names have been changed to protect the identities of the parties. Any likeness to any person or company is completely coincidental.

#### **Example 1:**

Great View Properties contracted with a snow-removal contractor, Pete’s Plowing, to provide snow and ice removal services for Great View’s shopping center. The contract did not contain an additional insured or indemnification clause in favor of Great View. After an unusual amount of ice accumulated on the sidewalk, Sally Johnson, a customer of the shopping center, slipped and fell, causing a torn meniscus and ACL. The area where Sally slipped should have been completely cleared by Pete’s Plowing. As a result of her injuries, Sally filed a claim totaling \$125,000 against Great View’s commercial general liability policy. Had Great View Properties required Pete’s Plowing to list Great View Properties as an additional insured on Pete’s commercial liability policy, and had the contract included an indemnification clause in favor of Great View Properties, Great View’s insurance carrier would have demanded that Pete’s Plowing’s insurance provider pay all attorney fees and damages.

#### **Example 2:**

Bob Backhoe, an excavation contractor, was hired by ABC Contracting, a general contractor, to perform utility installation work. Bob hired a subcontractor, Don’s Dirtworks, to perform the trenching work. There was a contract in place, but the contract didn’t require Don’s Dirtworks to add Bob Backhoe as an additional insured to its policy.

Two employees of Don’s Dirtworks were working in a trench that was 12 feet deep and not shored. The trench collapsed, killing one employee and severely injuring the other. The case went to trial and the jury returned a verdict of more than \$9 million. Bob’s insurance carrier paid most of the claim, as well as \$448,000 in legal fees to defend the case. If Bob Backhoe would have required Don’s Dirtworks to list Bob as an additional insured on its policy, the insurance company representing Don’s would have likely been responsible for the entire claim, including legal expenses.