

Contractual Risk Transfer/Hold Harmless/Indemnification

Best Practices to Consider

Many contractors require other contractors and subcontractors with whom they work to sign written job contracts. However, many fail to include in the job contracts hold harmless agreements and insurance requirements outlining required coverages, minimum acceptable limits, additional insured status specifications, and certificate of insurance procedures. Without these controls in place, you may be jeopardizing the financial stability and possibly even the survival of your company.

Hold Harmless Agreements/Indemnification Agreements

Properly written hold harmless/indemnification agreements included in your job contracts and backed up with adequate insurance requirements are essential to protect your business properly. Without proper hold harmless/indemnification wording, your business could be held liable for negligent acts of subcontractors performing work on behalf of your company and for injury to their employees or others over which you have little or no control.

The indemnification provisions in both the standard AIA – Form A201 and Consensus Docs are a starting point for proper hold harmless wording. However, the current versions of these documents provide only “limited” form indemnification and state laws relative to indemnification vary considerably and are subject to frequent changes based on new legislation and court decisions. We have provided some examples in Section 6: Indemnity, but contractors should always have their lawyer review all contracts.

Indemnitee-Indemnitor (the persons involved in a hold harmless agreement)

The indemnitee is the person who, in a contract of indemnity, is to be protected by the other. The indemnitor is the person who is bound, by an indemnity contract, to indemnify or protect the other.

Requirements for subcontractor’s Indemnification Clause:

- Prominently displayed and contains appropriate wording (sample provided – see Section 6: Indemnity).

Adequate Insurance

Once your company has the proper hold harmless agreements in place, it is critical that subcontractors purchase adequate insurance. Certificates of insurance must be obtained from all subcontractors before they begin work.

You should consider requiring subcontractors to carry limits equivalent to yours to protect themselves, and your interest, in the event of a loss. If subcontractors do not carry adequate limits, you will be charged a premium for this exposure at audit.

DISCLAIMER

The materials provided in this manual are for general information purposes only and is not intended to provide and should not be relied upon for legal advice in any particular circumstance or situation. All readers are advised to consult with an attorney to address any particular circumstance or factual scenario.

General Contract Comments

The contract's "Insurance Requirements" should include the following terms or similar wording:

It is understood and agreed that the insurance coverage and limits shall not limit the extent of Subcontractor's responsibilities and liabilities specified within Contract Documents or by law.

It is understood and agreed that authorization is hereby granted to refuse entry to job site and to withhold payments to Subcontractor until a properly executed Certificate of Insurance is received by **General Contractor**.

Subcontractor's Insurance Requirements set forth herein shall become and be part of any purchase order or contract issued by **General Contractor** to Subcontractor as though fully set forth in said purchase order contract.

Should Subcontractor fail or neglect to provide the required insurance, **General Contractor** shall have the right, but not the duty, to provide such insurance and deduct from any money that may be due or become due to Subcontractor for any and all premium or costs **General Contractor** incurs. Equivalent insurance coverage must be obtained from each Sub-subcontractor and Supplier, if any, before permitting them on the site of the project. Otherwise, such insurance for Sub-subcontractors and Suppliers must be included within Subcontractor's insurance policies.

Insurance Requirements

Subcontractors of General Contractor shall purchase and maintain during the entire project, warranty period and statute of repose, insurance with the minimum limits and coverage shown below or, if greater – the requirements set forth in the contract documents, from insurance companies acceptable to the General Contractor.

Commercial General Liability Requirements for Subcontractors:

- Provide copy of Additional Insured Endorsement Form
- Provide a Waiver of Subrogation
- Products and completed operations
 - Maintain coverage for the minimum statute of repose
- The GL should be written on an occurrence basis and include coverage for:
 - Per project aggregate
 - Premises/operations
 - Employees as insureds
 - Explosion, collapse and underground
 - Broad form contractual (including personal injury)
 - Products and completed operations
 - Independent contractors
 - Broad form property damage and personal injury

DISCLAIMER

The materials provided in this manual are for general information purposes only and is not intended to provide and should not be relied upon for legal advice in any particular circumstance or situation. All readers are advised to consult with an attorney to address any particular circumstance or factual scenario.

- Provide an Endorsement listing owner and contractor/indemnities as required by contract as:
 - Additional insured using
 - CG 2010 11 85 or equivalent (arising out of completed operations)
 - Provide primary and non-contributory wording
 - Limits
 - \$1,000,000 – Each occurrence
 - \$2,000,000 – General aggregate per project
 - \$2,000,000 – Products/completed operations aggregate
 - \$1,000,000 – Personal and advertising in jury
 - \$100,000 – Fire damage
 - \$10,000 – Medical Payments

**The industry defines adequate insurance (minimum) to avoid additional insurance charges for subcontractors at audit.

Commercial Business Auto Requirements for Subcontractors:

- Provide on an occurrence basis covering all owned, non-owned and hired vehicles
- Provide primary and non-contributory wording
- Provide Endorsement listing owner and contractor as additional insured
 - Limits
 - \$1,000,000 – combined single limit
 - Or \$500,000 bodily injury – each person
 - \$500,000 property damage per accident

Workers' Compensation

Workers' Compensation coverage should be carried by all subcontractors performing work on your behalf. Be sure none of the subcontractors exclude employees that are actively involved in the work at the jobsite. If an injury occurs to a person who your subcontractor excluded, your company may lose the sole remedy provision of the Worker's Compensation Act. Your own Worker's Compensation policy could pay and/or you could face a costly civil lawsuit. If your subcontractors do not carry Worker's Compensation, you will be charged premium on audit as if these workers were your own employees. Be sure to require a Certificate of Insurance evidencing Worker's Compensation coverage before letting other contractors do work for you.

Worker's Compensation Requirements for Subcontractors:

- Employer's Liability coverage to be provided for a minimum of:
 - \$1,000,000 Each Accident
 - \$1,000,000 Disease – Each Employee
 - \$1,000,000 Disease – Policy Limit
- Provide waiver of subrogation
 - In favor of you, your employees and indemnitees as required by contract
- If using an employee leasing firm, you are named as alternate employer

DISCLAIMER

The materials provided in this manual are for general information purposes only and is not intended to provide and should not be relied upon for legal advice in any particular circumstance or situation. All readers are advised to consult with an attorney to address any particular circumstance or factual scenario.

Umbrella Liability and/or Excess Liability Requirements for Subcontractors

- Provide coverages at least as broad as yours
- Per occurrence and aggregate limits of
 - \$1,000,000
 - \$3,000,000 on high hazard work (steel erection, roofing, masonry, etc.)
- You, owner and indemnitees as required by contract are named as additional insureds on primary basis
- Provide coverages equal to coverage requirements stated in the Commercial General Liability coverage requirements stated above.

Approved Insurance Companies

All insurance carriers must be:

- “A-“ rating or higher by A.M.Best
- Financial size category of “VII” or higher by A.M.Best

Additional Insured Status

Contracts with subcontractors should be in writing and require subs to name General Contractor and indemnitees, as required by contract, as additional insureds on their general liability and umbrella policies. Such coverage should include “completed operations” (not just ongoing operations) and should be primary insurance without contribution from your own coverage. (See Section 2: Subcontractor Certificate Verification for more information.)

Being named as an additional insured on your subcontractor’s policy offers a number of advantages:

1. Your company’s policy limits remain available for your use in the event of a loss.
2. Your company’s policy limits are insulated from being exhausted, thereby allowing you to meet future coverage requirements.
3. Additional insured status allows you to maintain a competitive advantage when bidding jobs.
4. Defense is required to be provided by the subcontractor’s insurance carrier, outside or in addition to the limit of liability.
5. Subrogation is avoided.
6. Your company may obtain additional coverage as an additional insured under the subcontractor’s policy.

Certificates of Insurance

- Provided prior to the commencement of any work
- Must state:
 - If any coverages are subject to or are in excess of any deductibles or self-insured retention, the deductibles and/or self-insured retention must be stated on the certificate
 - Deductibles and self-insured retention are the sole responsibility of the subcontractor
- See Section 2: Subcontractor Certificate Verification for examples

DISCLAIMER

The materials provided in this manual are for general information purposes only and is not intended to provide and should not be relied upon for legal advice in any particular circumstance or situation. All readers are advised to consult with an attorney to address any particular circumstance or factual scenario.

Subcontract Agreement Practices

(General Contractor/subcontractor to subcontractor) should have the following in place:

- Require subcontract executed by all subcontractors prior to performing any work for the contractor.
- Assigned person responsible for the insurance program. Individual is properly trained to review certificates of insurance/requirements. This includes monitoring all insurance wording, certificates of insurance, limits, effective dates and carrier ratings to ensure they meet the specified requirements. All appropriate forms are completed and maintained as records.
- An annual audit process to ensure the program is being effectively implemented and the appropriate risk transfer documentation exists.

Work Order Requirement

Prior to performing any work, subcontractors are required to:

- Provide on original Acord Certificate of Insurance evidencing required coverages
- Certificates of Insurance should have copies of applicable endorsements attached (see Section 2: Subcontractor Certificate Verification)
- Subcontractor's insurance agent's certification (sample copy provided)
 - Signed, stating that all the requirements in the provided coverage meet the Subcontract requirements
- Provide evidence that any and all subcontractors to them meet the above insurance requirements

DISCLAIMER

The materials provided in this manual are for general information purposes only and is not intended to provide and should not be relied upon for legal advice in any particular circumstance or situation. All readers are advised to consult with an attorney to address any particular circumstance or factual scenario.