



Risktopics

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Minimizing your risk for liability with contractor control guidelines

Third-party contractor injuries or damages are a leading cause of loss to the industry. These losses can affect your hard-earned bottom line and reputation. However, there are ways you can help control this risk and protect your business, such as ensuring you have a written contract and being vigilant about contractor control protocol.

What is a contractor exposure?

Independent contractor exposures occur when an outside contractor is working on premises owned, leased or managed by you. Contractual employees have the same expectation of a safe workplace as your own employees. It is the express responsibility of the owner or operators of the premises to ensure that contractors are fully apprised of any hazards present on the premises and to ensure that they have working knowledge of various safety prevention measures and emergency protocols. Your hazard communication program with material safety data sheets should be provided to the contractor prior to commencing work. Additionally, the contractor should provide to the owners/operators documentation verifying that all employees have been trained on their hazard communication program. The contractor should also have a safety program for their employees and be familiar with the site's safety and emergency response program.

Guidelines to safeguard yourself and your company from liability

Contractor selection

Selecting a qualified contractor is the single most important element of an effective contractor management program. Contractor selection should be based on experience, level of expertise and proven track record. Contractor selection should never be based on price alone. Reference checks should be done for contractors especially when completing large projects. Work requiring in-depth electrical, plumbing or restoration services mandate that special attention be paid to contractor credentials and licensing requirements.

If you bid work out, fully describe the size and scope of the project and require compliance with all applicable requirements and codes as well as Occupational Safety and Health Administration (OSHA) regulations. You should also add requirements for a documented safety program and safety loss experience.

The safety of completed operations by a contractor depends on compliance with job specifications. Emphasis must be placed on the selection of contractors, final inspection and sign off before accepting completed work.

Insurance and indemnification requirements

Many of the standard contracts developed by professional associations are designed to be advantageous to the contractor or association member. Since most contracts require a state-by-state interpretation, all contracts and amendments should be reviewed by competent legal counsel familiar with the specific jurisdiction. It is advisable to request that your insurance broker or agent also review the proposed agreement to recommend necessary insurance coverage provisions in conjunction with legal counsel.

The selection criteria should include comprehensive insurance requirements. An indemnification or hold harmless clause in the contract may provide protection from a contractor's negligence in the event of an accident causing injury to a contractor's employee, other third parties, or damage to an adjacent property. It is also important to ensure that this indemnity protection is extended to your parent company, officers and directors, trustees and others as it may apply.

You can also have a contractor include you as an "additional insured" in their insurance coverage. If you have this requirement, you should require a copy of the endorsement that confirms your additional insured status. This provides a greater degree of protection including defense costs.

The contract should address the responsibility and liability associated with the use of subcontractors by the contractor. Sometimes a contract might have mirror image reciprocal indemnification terms, which are designed to hold the other harmless for one's own negligence. In addition to the liability issues, the contractor should be required to furnish a release of waiver of liens from the contractor, all subcontractors, material purchased and others in connection with the work performed.

Certificate of Insurance

A Certificate of Insurance is a document that verifies insurance coverage and limits that the contractor carries. The contract should specify the statutory coverage for workers' compensation and employers liability for the contractor. It should also specify the requirements for general liability coverage. The liability coverage should include coverage for premise and operations, independent contractor, products, completed operations and contractual liability. The contract should state that the contractor's liability coverage would be the primary coverage.

However, a Certificate of Insurance does not provide any insurance protection by itself nor does it guarantee that the coverage will continue for the life of the project. If a contractor fails to pay the required premium or allows the coverage to lapse, the owner of the project and his insurance coverage may become responsible for the loss. Therefore, you must be vigilant in ensuring that the contractor's insurance protection does not lapse during the term of the project agreement. It is also important to match the "named insured" on the certificate to the name on the contract. If you are working with a large number of contractors and subcontractors, consider subscribing to a certificate monitoring service to help reduce the risk of contracting with uninsured contractors.

The contract specifications should stipulate the minimum policy limits per occurrence. Although the desired level of coverage for a contractor may vary depending on the expected level of risk for the job, at least minimum limits equal to your own limits or greater should be specified, and the contractor's policies should be primary to respond. If the contracted service includes the use of vehicles for transporting of people or the delivery of products and equipment, the contractor should be required to carry adequate coverage for auto liability. Again, consult with your insurance broker or agent to determine the minimum acceptable limits for this coverage.

Avoid adding a contractor as an "additional insured" on your own insurance policy without the express consideration of its insurance contract ramification, such as in a construction wrap-up or controlled insurance program (CIP).

Coordination

The degree of involvement over contracted operations and services can be complex. Historically, a "hands off" approach was used to make the contractor solely responsible for the safety of the project. Today, with more emphasis on prevention as well as OSHA requirements, you should manage a contractor's job safety in an interactive and cooperative manner but without increasing vicarious liability exposure through direct supervision.

Coordination is especially important for larger, more complicated projects as well as both fast-track and long-term projects. Ensure that appropriate permit controls for high-risk jobs involving hot work, confined space and lock-out/tag-out are enforced. A safety coordinator should be designated as a liaison. A pre-project meeting should be arranged, which includes:

- A tour of the facility
- Contractor familiarization with safety programs, personal protective equipment requirements and emergency procedures
- Identification (photo badges, etc.) for contractor employees
- Isolation and protection of work areas (barricades, walkways and signs) and restricted areas
- Specified entrances and exits for contractors
- Review of specific safety requirements, such as temporary electrical connections, lock-out and/or tag-out of electrical and hazardous energy sources, cave-in protection, hazardous chemicals, fall protection, etc.
- Housekeeping and storage of material, supplies, debris, tools, etc.
- Coordination and ongoing communication with other contractors and subcontractors
- A procedure to notify a contractor in writing if an unsafe act or condition is noted, including a request for follow-up actions and notice of the date the condition was corrected

In addition, periodic meetings are advisable to discuss the progress of the project, problems encountered, resolution of these problems and planning of subsequent work. Records of these meetings should be carefully maintained as evidence of good faith efforts in the event of any future litigation. It is also important to perform periodic inspections of the contractor's work for quality and specifications to achieve satisfactory completion of the work and materials. Before the start of the job, a signed statement should be obtained from each contractor stating that they have been informed of the requirements, they understand the safety rules and regulations, and they will comply with the safety requirements as well as entry and exit procedures for the facility.

This inspection process does not mean providing direct or indirect supervision of a contractor's employees. It is recommended that your personnel do not direct the methods or means of a contractor's employees, including employee scheduling, training, directing, wage payments, etc. The Internal Revenue Service (IRS) has specific requirements for who qualifies as an independent contractor versus their own employee. Direct supervision of the contracted employees or of the project has significant liability implications and should be avoided except in the case of a unique or emergency situation.

Conclusion

By taking a proactive approach in the selection and coordination of contractors and contracted services, you can manage the associated liability risks more effectively. Contractual protection in a written contract backed by a verified and responsive insurance program can help to make the risk transfer process complete and effective. An interactive and cooperative dialogue with the contractor promotes good communication and helps avoid safety lapses due to misunderstandings and confusion.

Resources

1. *Building Maintenance Management*. Chanter, Barrie and Swallow, Peter, Blackwell Publishing, 2007
2. *Effective Contractual Risk Transfer in Construction*. Hickman, Ann Rudd (June 2009 special Report IRMI Construction Risk Manager)
3. Zurich Claims HYPER data

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