

Risk Management and Insurance in Contracting

New York State Council of Contracting Agencies (CCA)

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1. Loss exposures associated with public contracts
 - (a) Somebody could get hurt because of a defective product
 - (b) Contractor may not do the work right. Loss of "the work" (property).
 - (c) Bodily injury (BI) or death to contractor employee.
 - (d) Property damage (PD), BI or death of third party because of "the work."
 - (e) PD, BI or death because of defects in the work after completed.
 - (f) PD, BI or death because of a latent condition or something known to the public entity.

2. Risk Management: The process for making and carrying out decisions that will minimize the adverse effects of accidental loss. The organized treatment of loss exposures by...
 - (a) Exposure Avoidance: Just Don't Do It!
 - (b) Retention: Going "bare-back." Retain any loss exposure that can be controlled when you can absorb the loss.
 - (c) Loss Control: Trying to "be safe." Organized programs for inspection and prevention.
 - (d) Loss Reduction: Lower the severity of losses that may be unavoidable. Band aid after the fact.
 - (e) Duplication of Safeguards: "Belts and suspenders"
 - (f) Contracting the Loss Exposures to Others who control the premises or the work
 - (i) Delegating the means and methods to independent contractor
 - (ii) Indemnity provisions
 - (iii) Insurance- Assure contractor's financial responsibility. Make the contractor buy insurance for agency.

3. Reasons for Contractual Protection: Allocate the risk of loss to those who are best able to prevent it.
 - (a) Assure that vendors stand behind their product.
 - (b) Contractor controls site, means and methods of work.
 - (c) Contractor is independent.
 - (d) Contractor is financially responsible.
 - (e) Contractor must **save public entity harmless.**

4. Form of Contractual Protection: Contractual Indemnity- DEFENSE and INDEMNIFICATION.
 - (a) New York law prohibits making another party hold owner harmless unless, and then limited only to the extent of owner negligence.
 - (b) Indemnity extends to any claim arising from "the work."

5. How Contractual Indemnity Works
 - (a) Works in most cases where work is being delegated.
 - (b) Few unpleasant cases of "finger pointing."
 - (c) We avoid many disputes by requiring insurance.
 - (d) Example of partial clause: "To the fullest extent permitted by law, the Contractor shall indemnify and save harmless the State... from ... claims... **arising from the contractor's work under this contract...**"

6. Insurance: Transfer of the financial consequences of a loss exposure to the insurer in exchange for the payment of a premium.

7. Insurance Works Where...
 - (a) There is a pure risk beyond control.
 - (b) Losses of predictable value occur at a known probability and regularity.
 - (c) Losses can be spread between a large numbers of insureds.
 - (d) Everybody won't have a loss at once.

8. Insurance Necessary Where...
 - (a) There is any question about the **financial responsibility** of a contractor.
 - (b) There expertise of professional risk management and adjustment are required or will add value.

9. Problems with Insurance: "The Dark Side"
 - (a) Adverse selection- only people who need insurance will buy it.
 - (b) Moral and morale hazards- causing a loss deliberately, or "who cares, we have insurance."
 - (c) It adds cost- about 15% of the cost of insurance go to underwriting.
 - (d) Defending claims is expensive too.
 - (e) Problems getting the Coverage You Expected
 - (i) Denial of Coverage After a claim, if.... Agency fails to comply with a policy condition such as Notice of claim requirement.
 - (ii) Disclaimer of Coverage After Claim if Claim is "excluded" for reason such as Not arising from "work" or "operations."

10. Types of Insurance for Public Entity Contracts: Remember that Contractors often have MORE insurance and that is fine.
 - (a) Agency requires only what Agency needs.
 - (b) Agency requires only what is available.
 - (c) These are the basic types.

11. Workers' Compensation and Disability
 - (a) Required by State Finance Law section 142.
 - (b) Premium rated by business and payroll.
 - (c) Typically costs 5-10% of payroll.

12. Commercial General Liability (CGL)
 - (a) Loss that an insured "becomes legally obligated to pay" (usually negligence)
 - (b) Covers liability assumed by contract in most cases.
 - (c) Coverage for "completed operations."
 - (d) Agency becomes additional insured.
 - (e) Premium based on payroll.
 - (f) Very expensive for some types of business.

13. Commercial General Liability: "The Dark Side"
 - (a) No coverage for environmental exposures for equipment.
 - (b) Aggregates can be eaten up on other jobs.
 - (c) Insurer may try to dodge responsibility.
 - (d) Policies may exclude losses from NY Labor Law or claims by workers (most expensive type of claims).
 - (e) Additional insured coverage is limited.
 - (f) Independent negligence of state will NOT be covered. Gray area of "general supervision" and "site defects."

14. Commercial Automobile Policy: Covers registered cars and trucks.
 - (a) Liability and no-fault.
 - (b) Includes coverage for fuel spills.
 - (c) Does not cover mobile equipment.

15. Excess (umbrella) Liability Insurance Policy
 - (a) Excess over CGL and Auto.
 - (b) \$1 million doesn't buy what it once did.
 - (c) Premium is about 25% of CGL premium for up to \$5 million.

16. Owners & Contractors Protective Liability Policy (OCP)
 - (a) Policy bought for Public Entity.
 - (b) Premium based on contractor payroll.
 - (c) Site specific.
 - (d) Finger pointing less likely with at least some contractor involvement.
 - (e) Provides primary coverage
 - (f) Duplicate coverage where contractor is negligent or where claim stems from contractor work or operations.
 - (g) Expensive coverage for small projects.
 - (h) Less costly on big jobs where same carrier writes the CGL.

17. Builders' Risk: Covers physical damage to buildings in the course of construction.
 - (a) Must be written on a completed value form.
 - (b) The amount of the insurance must be the anticipated full value of the completed building.

18. Professional Liability- Errors & Omissions: Covers liability for the failure to use the degree of skill expected of a person in a particular field.
 - (a) Professional Liability coverage is required whenever any part of the contracted activity requires the services of a professional consultant.

19. Putting Insurance Requirements in Public Contracts
 - (a) Develop insurance specifications with your legal advisor or risk manager before getting bids or quotes.
 - (b) Always assure that you are using a good indemnity clause recommended by your legal advisor or risk manager.
 - (c) Commit to the limits that you will require for each contract or types of contracts.

20. Council of Contracting Agencies Model Insurance Requirements
 - (a) Flexible.
 - (b) Depends upon the type of work.
 - (c) Depends upon the value of the contract.
 - (d) Necessary protection.
 - (e) NO unnecessary costs.

21. Model Insurance Requirements: Recommended Types of Insurance. Rules of Thumb.
 - (a) Always require workers' compensation/DBL.
 - (b) Almost always require general liability.

- (c) Additional Insured Protection: In case you get sued because of the contractor's work.... You need to be added to the policy by endorsement.
- (d) Require auto whenever automobiles are used for the work.
- (e) Require excess limits depending upon the size.
- (f) Everything else... order off the menu.
- (g) See your legal advisor or risk manager for the types that should be required by your agency.

22. Model Insurance Requirements: Limits of insurance that should be required.

- (a) Risks tend to be relative.
- (b) Cost of insurance is relative.
- (c) CCA recommends a matrix approach tied to expected contract value.

23. Suggested Typical Insurance Requirements: Goods or Commodities Contract

- (a) Insurance as an indication of contracting responsibility.
- (b) Responsible to claimants injured by defective products sold to you and used by your employees or others.
- (c) \$2/\$2 million CGL with products' liability endorsement.
- (d) Workers' compensation/disability where required.

24. Suggested Typical Insurance Requirements: Small Services Contract- No roofs, ladders or scaffolds, or falling hazards.

- (a) \$2/\$2 million CGL with additional insured endorsement.
- (b) Commercial auto (\$1 million) only if using vehicles for job (commuting doesn't count).

25. Suggested Typical Insurance Requirements: Construction Contract Less than \$10 million value

- (a) \$5/\$5 million CGL & excess with additional insured endorsement.
- (b) \$1 million auto.
- (c) Commercial auto (\$1 million) if using vehicles for job
- (d) OCP for \$1 million.
- (e) Environmental.

26. Suggested Typical Insurance Requirements: Mega-Construction Contracts Greater than \$50 million value

- (a) \$10/\$10 million CGL & excess with additional insured endorsement.
- (b) \$1 million auto.
- (c) Commercial auto (\$1 million) if using vehicles for job
- (d) OCP for \$1 million.
- (e) Environmental \$10 million.

27. Assuring Protection = Checking Compliance: Nobody starts work until they present proof of insurance

- (a) Checking Compliance on every project
- (b) Get certificate(s) of insurance.
 - ACORD forms
 - Workers' Compensation/Disability
- (c) Assure that required insurance is in place.
- (d) Assure that liability limits meet minimums required.
- (e) Assure that there are no large deductibles.
- (f) Assure that policy or policies have been endorsed to add all affected public entities.
- (g) Keep certificates with project file, follow-up for the term of the contract.
- (h) Somebody has to provide notice when there is an accident!!!!