

SPECIAL REPORT

MANAGING THE RISK OF INDEPENDENT CONTRACTORS WORKING IN YOUR BUILDING

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This Special Report was written by Daniel P. Hale, J.D., CPCU, ARM, CRM, LIC, AIC, AIS, API of Marsh & McLennan Agency LLC. Mr. Dan Hale can be contacted at 734-525-2429 or dhale@mma-mi.com. More Special Reports are available at www.mma-mi.com.

A frequent and major source of claims against business owners is that of employees of independent contractors who become injured while working at the business owner's building. This could involve employees of painting, carpentry, sprinkler, roofing contractors, or other trades people working at the business premises during construction or renovation activities. It could also include employees of independent contractors who are involved in repairing machines, as well as mechanical and electrical contractors performing repair or maintenance or janitorial work.

Other exposures to property owners from the use of such independent contractors involve property damage caused by the contractor, defective work of the contractor, or liens resulting from the contractor's failure to pay subcontractors or material suppliers. Marsh and McLennan attorneys have represented clients in such cases and the purpose of this Special Report is to outline some risk management techniques that can be used to limit your exposures to such risks.

EXPOSURES PRESENTED BY INDEPENDENT CONTRACTORS

A. Injuries to employees of contractors can subject you to a lawsuit.

When an individual working for any of these contractors is injured, they will undoubtedly make a workers' compensation claim against their employer and will then sue the property owner or business owner for damages in excess of the workers' compensation benefits that are available to them. In addition to this, the workers' compensation insurance company can sue, or subrogate, to recover amounts that it pays by way of those claims.

Claims by the independent contractor's employees are generally covered by the business owners' commercial liability insurance policy but because these claims are likely to be sizeable, your premium will be impacted and, of course, the damages could be in excess of the policy limits, exposing your assets to risk.

B. Property damage from acts of contractors.

Another exposure presented is property damage caused by a contractor that creates liability for the property owner that contracted for the work. While the general rule is that you are not liable for acts of independent contractors, there are exceptions to this general rule and suits can result for negligent hiring of a contractor or utilizing a contractor that is involved in an inherently dangerous activity.

C. Liens filed on your property.

Yet another exposure comes from liens filed by subcontractors or material suppliers who have not been paid. These liens are routinely filed but may be difficult to have removed where the contractor you retained goes out of business or becomes insolvent. The Michigan Construction Lien Act provides that an owner can be liable for satisfaction of a lien where the owner contracted for the improvement or required and benefited from the improvement. This Act also provides for foreclosure of your property as a possible remedy in the event a lien goes unsatisfied. Moreover, such liens affect the marketability of your property.

D. Exposure for shoddy workmanship of contractors.

Independent contractors that do not provide the best service or product are often the same ones that are difficult to recover from after-the-fact due to the absence of insurance coverage or assets. Commercial general liability insurance coverage of a contractor will exclude coverage for shoddy workmanship. Even where collection efforts are not at issue, litigation or arbitration can be costly and time consuming.

RISK MANAGEMENT TECHNIQUES TO MINIMIZE EXPOSURES PRESENTED BY CONTRACTORS

Many of the above mentioned exposures can be avoided or limited by managing the risk of independent contractors. This is accomplished by:

1. Using experienced, well-managed, and well-supervised independent contractors.

You should take steps to investigate the background and years of experience of the contractor and its financial size to assure that your job will go smoothly.

2. Establishing lock-out tag-out procedures.

Use such procedures in the manufacturing facility, whereby machines cannot operate while independent contractors are in the area or while they are working directly on the machines.

3. Requiring proof of insurance.

Certificates of insurance should indicate that the property owner or business owner are additional insureds under the independent contractor's commercial general liability insurance and should confirm the existence of contractual liability coverage.

4. Obtaining performance / payment bonds.

These forms of insurance can protect you financially in the event the work is not completed or the contractor does not pay subcontractors or material suppliers. Part of the construction contract should include a requirement for such bonds based on the circumstances of each job.

5. Requiring an indemnity agreement where-by the independent contractor will assume the responsibility for injury or property damage.

This is almost always permitted by their insurance carrier and will not result in an additional premium to them. With this agreement, if a business owner is sued by one of its employees, the independent contractor will have to assume the responsibility for that lawsuit and hold

the business owner harmless from any damages or legal fees. Included in this Special Report is a sample indemnification and insurance requirements provision.

6. Being certain that insurance required of the contractor is clearly spelled out.

Insurance provisions found in construction agreements are often unclear and lacking specificity. This is a complicated area that involves more than requiring a certificate of insurance. Included in this Special Report is sample language to consider.

7. Paying close attention to Notices of Furnishings / Commencement Forms.

For commercial construction liens to be valid, notice has to be given to the owner that work is being commenced and furnished. Further, if a lien is filed, you should immediately require that the general contractor who has not paid for the work purchase a bond to replace the lien.

8. Obtaining certificates of insurance confirming the existence of commercial general liability and workers' compensation coverage.

If you do not do this, your insurance carrier could pick-up the payroll of the independent contractor at the time of an audit and charge you additional premiums.

9. The following language is an example of language that can be used with independent contractors as part of a contract covering all aspects of the agreement between the parties, or this can be used as a stand alone agreement. This is general in nature and may not be appropriate in all situations.

INDEMNIFICATION AGREEMENT AND INSURANCE REQUIREMENTS FOR INDEPENDENT CONTRACTORS

I. Certificates of Insurance

- A. The Independent Contractor, before the commencement of any work at the premises which is the subject of this Agreement, shall provide a certificate of insurance to the Owner. The certificate of insurance shall provide evidence that the insurance requirements contained herein are satisfied in their entirety.
- B. The certificate shall also provide that at least 30 days prior notice of cancellation or material change shall be provided to the Owner. In the event the Independent Contractor fails to provide said certificate or a certificate is not valid in whole or in part, the Independent Contractor shall have the contractual obligation to pay any additional premiums, whenever incurred, imposed upon the Owner because of such failure.
- C. In addition, the Independent Contractor upon a request of the Owner shall provide a complete and true copy of any of the insurance policies required by this Agreement.

II. Minimum insurance requirements which shall apply to the Independent Contractor each of which shall be placed through an insurer with an A.M. Best rating of "A" or better:

- A. Workers' Compensation and Employers Liability coverage covering the statutory requirements of the state where the work is being done and insuring the independent contractors.
- B. "Occurrence" based Commercial General Liability insurance to cover liability arising out of the operations of the independent contractor.
 - 1) The limit of liability shall be \$1,000,000 combined single limit per occurrence, a general aggregate limit of at least \$2,000,000 and a products/completed operations aggregate of at least \$2,000,000.

- 2) The policy shall have an endorsement applying the policy's aggregate limits by location or project.
 - 3) Coverage shall not exclude products and completed operations insurance.
 - 4) Products and completed operations insurance shall be maintained for at least three years after final payment to the independent contractor.
 - 5) Insurance shall cover the contractual liability assumed by the Independent Contractor in the "Agreement to Defend, Indemnify and Hold Harmless" that is part of this Agreement.
 - 6) The Owner of the property, its officers, directors, members, managers, and employees shall be included as additional insureds. Such an additional insured endorsement shall not limit coverage for any additional insured to the negligent acts or omissions of the named insured, the work of the named insured, or the ongoing operations of the named insured. Such policy shall stipulate that the insurance afforded by the Independent Contractor for the Owner, its officers, directors, members, managers, and employees shall be primary insurance and that any insurance carried by the Owner, its officers, directors, members, managers, or employees shall be excess and not contributing.
 - 7) The Independent Contractor shall also require that each of its subcontractors execute and comply with the insurance requirements herein and shall also require that the Owner, its officers, directors, members, managers, and employees be named as additional insureds on each of the subcontractor's commercial general liability policies in the manner provided by this Section II(B).
- C. Automobile liability insurance shall be maintained by the Independent Contractor for all owned, non-owned and hired vehicles with a limit of at least \$1,000,000 combined single limit for bodily injury or property damage. The Owner, its officers, directors, members, managers, and employees shall be named as additional insureds on such a policy.

AGREEMENT TO DEFEND, INDEMNIFY AND HOLD HARMLESS

III. The Independent Contractor agrees to the indemnification language indicated below and shall also require that all subcontractors retained on its behalf execute this same Agreement as part of the Subcontractor Agreement. The Independent Contractor hereby covenants and agrees to defend, indemnify and hold harmless the Owner, its agents, officers, directors and employees of and from all liability, claims, actions, causes of action, lawsuits and demands including attorneys fees and costs, fines and/or penalties for personal injury, bodily injury, death (including personal injury, bodily injury or death of the Independent Contractor's own employees) and/or property damage arising out of or in any way related to the Independent Contractor's work or operations for or on behalf of the Owner on, about or away from the Owner's premises or associated with the breach of the construction agreement or the construction specifications. The only exception to this provision is claims involving the sole negligence of the indemnitee.

Agreed to this _____ day of _____, 20_____

Independent Contractor, by its authorized officer or manager:

by _____

Name of Independent Contractor:

Owner, by its authorized officer or manager:

by _____

Name of Owner:

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