Contractual Risk Transfer & Insurance Review of Contracts

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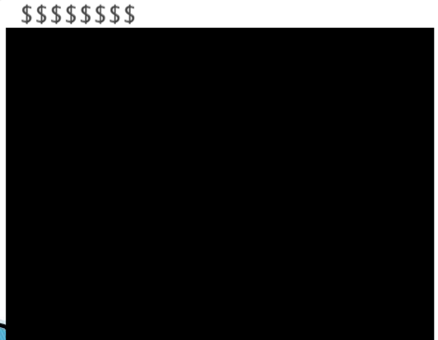
SETTING THE STAGE FOR YOU!

Always Read a Contract Completely. Don't get caught not doing your job? $$$$$$$$



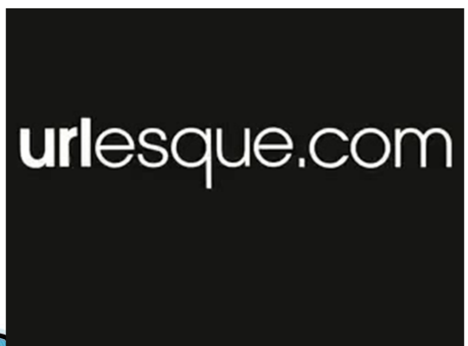
Contract Review

Contract review is all of our jobs. It will matter in the end.

ASK YOURSELF QUESTIONS PRIOR TO REVIEWING A CONTRACT

- What is the contract for?
- What about Safety?
- What kind of insurance do we need?
- Have you ever heard,
  - "Someone else will review it?"
  - "Doesn't Risk or Purchasing review these""

Removing/Cutting Down Tree



Landscaper/Arborist Causes Damage

- Large tree falls on building/auto/person
- Third party claim against the YOU
- Is there a contract in place?
- Is the contractor insured?
- Are YOU named as additional insured on their liability policy?

What Can Go Wrong?

- Damage to financial statements
- Loss of Personal property
- Loss of Rent & Loss of Revenue
- Injury to Employees
- Interruption of Activities & Services
- Damage to Contractor Equipment
- Injury to Contractor Employee
- Damage to Property of Others
- Injury to Third Party
- Bad Press/Indirect Losses

Stage 1
Risk

Risk Transfer – What Is It?

- Shifting responsibility for loss or damage arising from the activities of a contract from one party to the other
- Hold harmless or indemnification clause does NOT absolve you of liability, it gives you a pocket from which to pay
- Risk Transfer is only as good as the person making the promise – that's why you require insurance

Risk Transfer – When To Do It?

- Construction projects
- Professional services
- Outsourced functions
- Property leases
- Special events
- Permits
- Supplier contracts
- Project / ventures / partnerships

Stage 2 Terms

Terms and Language Within a Contract

- Defend and indemnify
- Waiver of Subrogation
- Costs paid as incurred
- Full extent as permitted by law
- Hold harmless
- Apply to any subcontractors
- Severability
- Primary and Non-Contributory
- Jurisdiction

Types of Hold Harmless Agreements

Broad Form
- Covers all acts or omissions with no exceptions. Unenforceable in most states, including OR

Limited Form
- Covers only negligent activities of contractor
- May also limit to property damage or bodily injury

Intermediate
- Covers all acts or omissions except for your sole negligence or willful acts

Hold Harmless "Magic Words"

Sample provision:

CONTRACTOR agrees to indemnify, defend and hold harmless the City and its officers, agents and employees against all liability, loss and costs arising from actions, suits, claims or demands for the acts or omissions of CONTRACTOR, and CONTRACTOR'S officers, agents and employees, in performance of this contract. In accordance with the Oregon law, the City agrees to indemnify, defend and hold harmless the CONTRACTOR and its officers, agents and employees against all liability, loss and costs arising from actions, suits, claims or demands for the acts or omissions of the City and the City officers, agents and employees, resulting from the City sole negligence in performance of this contract.

Recommendation for your contracts!

- Update bid documents & Hold Harmless with help from legal counsel
- Draft contract language that closely tracks the statutory language
- Specify that plans meet all codes, conform to all other plans, etc.
- Be specific regarding the work to be performed and the standard to be used.
- Make it clear you are relying solely on their expertise for the design and for compliance with applicable codes.

Stage 3
Review & Insurance

Identify & Measure Risk

- Type of activity(ies)
- Who or what could be harmed? How bad?
- Ability to contract?
- Vehicles used, if any. Passengers?
- Professional liability exposure?
- Hazardous activities?
- What will the City be doing under the contract?
- Our we in a good position?

Contract Review

- What is your employers process?
- Who can sign a contract?
- What does Primary mean in relationship to insurance?
- What is waiver of subrogation?
- What is the City?
- Can we be held to a contract?

- Have you heard this, " They will not change their contract."

Why Require Insurance?

- Gives you a pocket to pick
- Insurance increases chance there will be money in the pocket
- Viability of contractor
- Want protection of the insurance policy:
  - Policy amended to provide extra protection
  - Additional insured status
  - Contractor's insurance primary

TYPES OF INSURANCE COVERAGE

Required in all contracts

1. Work Comp and Employers Liability (unless contractor is exempt)
2. Commercial General Liability & Completed Operations
3. Automobile Liability

Coverage Required as Needed

- Workers Compensation Maritime
- Professional Liability
- Surety, Fidelity, Performance Bonds
- Pollution Liability
- Marine Vessel & Liability
- Aviation Hull & Liability

Stage 4
Limits & Strength

Required Insurance Limits

1. Workers Compensation = Statutory; Employers Liability $500,000 or $1,000,000
2. Commercial General Liability = $2,000,000 per occurrence, $3mil or $4mil aggregate
3. Automobile Liability = $2,000,000 per occurrence
4. Professional Liability = $2,000,000 per claim

5. **Higher Limits Sometimes Depend On The Size Of The Contract**

What to Ask For

- Certificate of Insurance ("proof" of ins.)
- Endorsement(s) or in the policy language:
  - Additional insured status
  - Contractor insurance is primary
  - Waiver of subrogation
- Deductible or SIR declared/approved
- A.M. Best rating – A:VII or better, or otherwise acceptable

A Contract – Let's Review

And Remember the Question …

- At what point will you be so exposed that the proposed indemnity clause is too risky?
- **To answer**: Focus on the **RISK**, *before* the indemnification, *before* the insurance.
- Start from the best case for you and work your way backward.
- Involve others – staff, experts, B&B NW and/or legal counsel in review of risk and language.
- Final result is a combination of perceived risk, your options, and how much you want to press your bargaining power –you've got the money

Questions?