



## **Install Back-Flow Prevention When Transferring Risk on a Construction Project**

**J**ust because it's signed, doesn't mean it's insurable. Risk transfer is making sure the risk ends up on somebody else's lap should an injury, fire or some other mishap occur during construction.

Risk should flow downhill, like a vertical relay race where the baton of risk is passed off from the general contractor to the subcontractor to all the other workers down the construction food chain. If the general contractor hires a subcontractor, and that sub-contractor's worker drops a pipe, causing an injury, the GC wants to make sure that injury liability doesn't swim upstream like a salmon. Subsequently, the subcontractor is going to try to pass the insurance baton off to the injured worker's insurance company further downstream.

### **How to Install Back-Flow Prevention of Risk**

GCs must have a contract with all subcontractors that contains all the normal terms and conditions (the where, what, how and how much relating to the job) with no exceptions. The contract should include a hold harmless and indemnification agreement clause. However, given that most courts' rulings basically throw out contracts where GCs attempt to pass sole negligence to another party, it would be wise to limit the clause or to have a mutual hold harmless and indemnification agreement clause.

GCs need to be named as Additional Insureds. There are two types of Additional Insureds. The "standard" Additional Insured provided by insurance companies will apply while the subcontractor is working for the GC. If the GC hires an electrician to wire a building and, in the course of wiring it, causes damage or injuries, the GC would be able to invoke Additional Insured status. However, once that electrician leaves the premises, the GC no longer has that status.

The second type of Additional Insured provides Additional Insured status, including Completed Operations, so if a fire occurs two months after the subcontractor is done, the GC can invoke the electrician's policy. GCs should request the broadest Additional Insured versions available and always obtain copies of all endorsements from subcontractors.

Some risk managers request the use of the Alternative Employer endorsement on the workers' comp policy. The Alternative Employer endorsement is applicable when two companies are in essence the dual-employer or have dual control of an employee. Some risk managers perceive the Alternative Employer Endorsement as means to receive Additional Insured status; the problem is that unless the rules relating to dual employment do apply, they should not be requesting the endorsement. A GC

would, however, request this if he is using a staffing company that is providing workers.

In addition, there should be a Waiver of Subrogation on the policy; not just for workers' comp but for all liability coverages. This way, should the GC cause a subcontractor to have an injured employee or sustain property damage; the subcontractor's insurance company cannot come after the GC or his insurance company in terms of subrogation.

Wording on a Certificate of Insurance is tricky. The biggest issue is that the old certificate system used to say the agent would "endeavor to" provide notice of cancellation but is not obligated to. New certificates state that the insurance company is only obligated to notify those required under the terms and conditions of the policy. In other words, a subcontractor will be the only one notified if a policy is cancelled. Basically, Certificates of Insurance are a snapshot in time; good only the day signed. Request to be specifically added by endorsement to the subcontractor's policy under a version of a Named 30-day Direct Notice of Cancellation endorsement so the insurance company is contractually obligated to give direct notice of cancellation.

On the general liability of subcontractors, check to make sure that their General Aggregate and Completed

Operations Aggregate applies on a per project, per location basis. This way the coverage for that job is the full limit of the policy and will not be eroded by or reduced by a claim that occurred under a different contract.

Make sure that the general liability of the subcontractor applies on Primary and Non-Contributory basis. This way, the subcontractor's general liability insurance policy responds first and would need to be exhausted before the GC's policy needs to step in. In addition, make sure subcontractors are responsible for their own OSHA or regulatory fines or actions from things such as pollution should their actions cause the GC to be fined. And remember, if the subcontractor is using or is near chemicals of any kind, ask for proof of pollution liability coverage.

GCs should only ask for what subcontractors can actually obtain. Have counsel familiar with insurance coverages review documents. There is no value in asking subcontractors for something no insurance company can offer. With the advent of Photoshop or PDF editing software, ask for the certificates directly from the agent to avoid receiving fakes. Don't get into a situation where subcontractor complexities eat up profits.



This article by David Leng appeared in *EHS Today*, *Construction Executive*, *Workers' Compensation*, and the *Hudson Valley Business Journal*, among others.

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