



Contractual Risk Transfer: Best Practices

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Contractual Risk Transfer

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Presenters

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Disclaimer

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Agenda

OCIPs

- Owner Controlled Insurance Program (OCIP)
 - OCIP versus traditional insurance
 - Why choose an OCIP?
 - OCIP key considerations
 - OCIP pros and cons
 - OCIP pitfalls to avoid
 - Considerations when terminating an OCIP

OCIP vs. Traditional Insurance

	OCIP	Traditional
Insurance Protection	Owner purchases the on-site coverage, therefore is assured interests are covered.	Each contractor purchases own insurance and evidences coverage with certificate of insurance. Rely on contractor's insurance for protection with no guaranty coverage will not be cancelled or premiums paid.
Safety Program	One coordinated safety program used by all contractors.	Each contractor's insurer requires their own safety programs.
Capitalizing on Safety	OCIP Sponsor receives economic benefit of operating safely and minimizing loss.	Insurers and contractors receive the economic benefit of operating safely.
Economic Benefit	Purchasing "bulk" plus ability to select large deductible provides opportunity to reduce insurance cost.	Contractor selects program and includes insurance & broker cost PLUS their profit margin in bids.

OCIP vs. Traditional Insurance

	OCIP	Traditional
Stability of Coverage	Sponsor and owner are assured that coverage exists if subcontractor becomes insolvent.	Insolvency of contractor may impact coverage availability (if claims made policy non-renewed).
Insurance Carriers	Owner can select carriers of the highest quality.	Little control over the quality of insurance carriers the contractor selects.
Legal Liability Disputes	One insurance company insures all enrolled contractors on the jobsite—claim is paid without disputes over legal liability.	Each contractor buys own insurance and must be found legally liable before their insurer pays the claim. Claims involving several contractors can become lengthy and lead to litigation.
Policy Terms and Conditions	Broadest possible coverage for sponsor, owner, and all contractors.	Each contractor negotiates own coverage (unknown exclusions).

WHY Owners Choose an OCIP?

4 C's: cost, control, coverage and contract compliance

- Cost savings
 - Tool to monetize contractor insurance cost and provide a competing alternative to drive best contractor pricing
 - Pools purchasing of insurance – volume discount
 - Sponsor pays same insurance rate for ALL contractors in OCIP due to spread of risk, regardless of individual line of work or loss experience. Contractor-provided insurance based on actual NCCI rate which can fluctuate based on line of work, loss history, etc...

WHY Owners Choose an OCIP?

4 C's: cost, control, coverage and contract compliance

- Control

- Retain control over breadth of insurance coverage (no hidden exclusions)
- Reduces litigation and encourages a unified defense to claims
- Eliminates competing interests of multiple insurance companies each striving to avoid paying their portion of claim

WHY Owners Choose an OCIP?

4 C's: cost, control, coverage and contract compliance

- Control

- Decreases potential for third party over-actions for alleged failure to provide safe workplace; channels all claims to workers' compensation
- Excellent tool for controlling safety and losses by having owner and one insurer establish and enforce safety standards

WHY Owners Choose an OCIP?

4 C's: cost, control, coverage and contract compliance

- Coverage

- Ensures coverage remains in place, is not cancelled, and all premiums are paid

WHY Owners Choose an OCIP?

4 C's: cost, control, coverage and contract compliance

- Contract compliance

- Eliminates significant administrative burden of continually verifying contractors' insurance is in place and meets owner requirements
- Broadens pool of contractors – ensures any contractor can meet owner's site insurance requirements

OCIP Key Program Considerations

- Contractor leverage
 - OCIP is a great tool for managing contractor insurance mark-up
 - Specialty contractors with little competition may be difficult to get to remove insurance costs
- Guaranteed cost
 - Seek quotes for both guaranteed cost and retro programs for workers comp. Guaranteed cost may well be worth extra cost to reduce long claim tail. LONG TAIL considerations cannot be underestimated!

OCIP Key Program Considerations

- Aggregate deductibles
 - Ensure you understand any aggregate deductibles under your OCIP and if it is a rolling or maintenance OCIP, work hard each year to ensure the aggregate remains appropriate
- Fully understand collateral obligations and timing of any adjustments
- Defined project site
 - OCIPs are only effective when losses can be actively managed. Best used on projects that have a definable site(s) where access can be controlled and a safety program administered and enforced

OCIP Key Program Considerations

- Project period
 - OCIPs best on projects of three years or more. Frictional cost of setting up and managing the OCIP on lower duration project will typically exceed the potential savings.
- Payroll
 - OCIPs typically not cost-effective on projects with annual payroll of less than \$30 million
 - Be sure you are comfortable with any minimum payroll/premiums. Consider aggregate versus annual minimum.
 - Understand payroll audit timing and terms

OCIP Pros and Cons

Pros

- Consistent coverage without gaps
- Potential for cost savings as insurance is bought in “bulk” and claims managed by Owner
- Dedicated project insurance limits that are not shared with other projects

Cons

- Extremely long tail – depending upon state workers’ comp laws
- Difficulty obtaining contractor insurance cost and deducts
- Potential cost volatility due to losses and deductible payments

OCIP Pros and Cons

Pros

- Reduced administrative burden as it is no longer necessary to check contractor insurance certs for contract compliance
- Potentially expands contractor diversity, allowing more bids from small, minority, and women owned businesses who may not have been able to obtain ample insurance on their own
- Decreased risk of cross litigation between contractors and insurers

Cons

- Administrative burden to enroll and administer OCIP program
- Limits are only the amount which is provided by the OCIP and no contractor coverage is accessible
- Budgeting of project cost can be difficult due to need to estimate contractor's payroll, which differs greatly from contractor's invoice amounts

OCIP Pitfalls to Avoid

- Ensure solid process exist to manage contractor deducts AND that contracts / project management is committed to tracking them down and ensuring appropriate reductions are obtained
- Use realistic modeling and cost justification and assumptions
 - Don't assume 100% of contractor deducts — stress test model assuming varying deducts
 - Factor in time-value of money (premium paid in advance plus loss reserve funding)

OCIP Pitfalls to Avoid

- Use realistic modeling and cost justification and assumptions
 - Admin support can't be ignored
 - Losses!!! Manage them and consider a maintenance deductible for contractors (\$10,000 - \$25,000) so they keep some "skin in the game"
- Establish clear enrollment criteria – should all contractors participate in OCIP?

OCIP Pitfalls to Avoid

- Ensure limits / capacity provided by OCIP are sustainable
 - once contractors have high limits, they won't give them up without a fight
- Screen contractors and require ex-mod info as part of bid package
- To avoid financial surprises, check OCIP actual performance to forecast regularly and don't forget to account for long tail of claims

Considerations when Terminating an OCIP

- Develop and implement
 - Communication plan
 - Identify OCIP stakeholders and communicate termination plan (supply chain, legal, safety, HR, and contractors)
 - Determine final date for contractor enrollment in OCIP
 - Notify all OCIP stakeholders at least three months prior to cancellation date
 - Contract plan
 - Verify existing contracts allow OCIP termination and determine applicable notice provisions
 - Establish contractor insurance requirements and negotiate new / amended contracts if not already part of existing contracts

Considerations when Terminating an OCIP

- Develop and implement
 - Administration plan
 - Implement process to verify contractor-provided insurance
 - Be prepared to share list of potential brokers or insurers with contractors
 - Be prepared to share OCIP loss history with contractors for insurer marketing / underwriting
 - Determine any changes to contractor on-boarding process
 - Set plan for managing claims for run-off period

Considerations when Terminating an OCIP

- Develop and Implement
 - Financial plan - budget realistically for several years beyond closure
 - Assess loss reserve fund adequacy, likelihood of retro adjustments, and when any posted collateral can be reduced / refunded to you
 - Budget for payroll audit adjustments
 - Negotiate broker run-off scope and terms
 - Evaluate and budget for insurer claim buyouts

What Is OCP?

- Owners and Contractors Protective (OCP) Liability insurance is an alternative to the traditional approach of pushing liability down to contractors and requiring the owner to be an additional insured on the contractors policy
- OCP is a special type of general liability insurance providing a specific project cover for the owner's vicarious liability of its contractors and subcontractors
- It is often used when a project is inherently dangerous and / or State / Federal laws impose non-delegable duties upon the owner (can also be used for professional liability)

OCP Advantages

- Reduces likelihood coverage can lapse without owner's knowledge
- Contractor responsible for premium payments and can not cancel coverage. Only owner, as the named insured, may cancel coverage.
- Ensures project has dedicated limits and avoids sharing contractor's insurance among several other projects

OCP Advantages

- Reduces administrative burden of confirming contractor has insurance
- Facilitates accurate allocation of insurance cost to project
- Eliminates risk of owner's cover becoming primary or contributory
- Loss experience is assessed to the project and will therefore not impact the owner's or contractor's CGL loss experience

OCP Limitations

- OCP insurance requires purchase of separate policy, adding cost to the project, versus low-cost alternative of being added as an additional insured to contractor's existing policy
- OCP covers only the specific project(s)
- OCP coverage ends at project completion – completed operations coverage is uninsured and must be addressed through other means

OCP Limitations

- Commercial General Liability (CGL) insurance is broader than OCP as OCP does not cover the owner's direct or contributory negligence – only liability for acts of others
- OCP typically considered "other insurance." Will contractor's be non-contributory?

Questions



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Contractual Risk Allocation and Mitigation

An in-house counsel's perspective as part of the internal team negotiating major equipment and construction contracts

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Three Major Areas of Risk Allocation

- Equipment / facility failures / deficiencies (performance risk)
- Damage to property and persons (physical risk)
- Price increases / cost overruns / schedule (financial risk)



Contract Methodologies

Contractual Approaches	Risks to Owners			
	Performance	Financial Risk	Physical Risk	Cost
Lump sum turn-key fixed price (traditional EPC)	<i>Low</i>	<i>Low</i>	<i>Low</i>	<i>High</i>
Target price-cost reimbursable	<i>Negotiated</i>	<i>High – limited to fee</i>	<i>Negotiated</i>	<i>Medium to High</i>
Multiple prime (fixed price)	<i>Higher</i>	<i>Low</i>	<i>Higher</i>	<i>Lower</i>

Commercial Terms

- Limitation of liability exclusions
 - Fraud
 - Gross negligence
 - Intentional misconduct
 - Punitive damages
 - Indemnification obligations for third parties
- Dispute resolution/ forum / jurisdiction / governing law

Commercial Terms

- Schedule / performance liquidated damages
 - Major equipment
 - Balance of plant (BOP)
- “Gap risks”
 - Warranty
 - Schedule
 - Performance

Commercial Terms

- Performance security
 - Letters of credit
 - Performance bonds, payment bonds
 - Escrow accounts
 - Parental guarantees
 - Retention
- Contractor's "at-risk" amount – "skin in the game"

Management of Costs

- Owner's project controls
 - Schedule
 - Costs
- Open book process with contractor / vendor
 - Audit rights
- Incentivize contractor / vendor to limit costs
 - Cost sharing of over runs or under runs
 - Creation of contingency and escalation buckets

Stakeholder Management

- Disclosure of contract terms to management
 - Clearly describe and define the allocation of risk in the contract
- External confirmation of contract terms
 - Experienced outside counsel
 - Owner's engineer
 - Market conditions

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Management of Contractual Risk Transfer Issues

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Contractual Risk Transfer Process

- Insurance risk management as key coordinator
 - Coordination among stakeholders
 - Legal
 - Supply chain
 - Engineering / operations
 - Real estate
 - Energy / fuel procurement
 - Environmental
 - Suppliers, vendors, contractors, counterparties

Contractual Risk Transfer Process

- Insurance risk management as key coordinator
 - Establishment of guidelines
 - Exposure identification
 - Act as advisor and expert resource

Contractual Risk Transfer Evaluation Process

- Establish relationship with each stakeholder
 - Educate on issues of concern
 - Key contract provisions
 - Indemnification
 - Risk of loss
 - Limitation of liability
 - Damages / remedies

Contractual Risk Transfer Evaluation Process

- Establish relationship with each stakeholder
 - Educate on issues of concern
 - Exposure identification
 - Differentiation based on size and type of exposure (e.g., environmental, design work, aircraft, delay)
 - Size of contract
 - Nature of work (e.g., services vs. construction)

Contractual Risk Transfer Evaluation Process

- Standardize requirements
 - Manage by “exception”
 - *Resource constraints preclude review of all contracts*
 - Majority of agreements can be executed with standard provisions
 - Risk management consulted for non-standard or large exposure agreements

Contractual Risk Transfer Evaluation Process

- Standardize requirements
 - Review and control process for most “routine” agreements can be delegated to stakeholders
 - Requires risk management to provide
 - Well written guidelines
 - Standardized contract language
 - Education & training for those executing agreements

Contractual Risk Transfer Guidance

Identify types of third party vendors / contractors

- Services, construction
- Agreements
 - Large construction agreements
 - Engineer procure & construct (EPC) agreements
 - Real estate
 - Easements, lease arrangements
 - Pole attachment agreements
 - Energy agreements
 - Power purchase agreements (PPAs), bilateral sale / purchase agreements

Contractual Risk Transfer Guidance

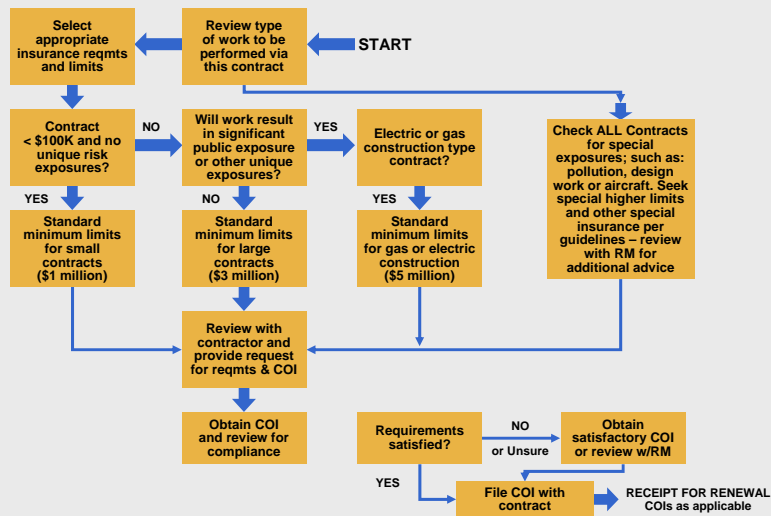
Written guidelines

- Standard language for indemnification, risk of loss, insurance provisions (by type of contract)
- Insurance requirements
 - Coverage and limits (based on type and size of exposure)
 - General liability, auto, workers' compensation, other
 - Additional insured?
 - Proof of insurance requirements
 - Review and handling

Contractual Risk Transfer Guidance Written guidelines

- Exception guidelines
 - Large contracts
 - Small contractors
 - Services vs. construction
 - Unusual exposures or circumstances

Contractual Risk Transfer Guidance Guideline examples



Guideline Examples

Type of Coverage	Amount (Limits)	Constr. Contract	Consult. Contract	Additional Insured	Guidelines
Commercial General Liability	\$1,000,000 \$3,000,000 \$5,000,000 or higher	YES	YES	YES	Higher limits should be requested for larger contracts and for work done where the public is at greater risk. Lower limits can be accepted where exposure to public is minimal or nonexistent. Contract <\$100K uses \$1 million; contract-\$100K uses \$3 million; gas or electric construction or other with greater public exposure uses \$5 million or higher.
Automobile Liability	\$1,000,000 \$3,000,000 \$5,000,000 or higher	YES	YES	YES	Required whenever an auto will be used "doing the work, or during the work." Contractors that use sub-contractors or who may lease vehicles should have hired and non-owned coverage. Coverage applicable to "any auto" is desirable. Prefer combined Single Limit rather than separate sublimits for medical payments and property damage. Contract <100K uses \$1 million; contract > 100K uses \$3 million; gas or electric construction or other with greater public exposure uses \$5 million or higher.
Workers' Compensation	Statutory	YES	YES	NEVER	Coverage is mandatory except for small operations that are not required by the state to be covered by insurance. In this case, contractor shall sign the workers' comp waiver form.
Employer's Liability	\$100,000/ \$1,000,000	YES	YES	NEVER	Higher limits are desirable for physical labor contracts, such as \$500,000. Exception: construction contracts should have at least \$1,000,000.
Longshore and Harbor Workers	Statutory	MAYBE	MAYBE	NEVER	This coverage should be required whenever the contractor will be working over or around navigable waterways (typically power plants).
Harbor Workers Maritime Coverage	Statutory	MAYBE	MAYBE	NEVER	Coverage such as Jones Act should be required when work is actually performed on a vessel such as a barge or boat.

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Guideline Examples

Type of Coverage	Amount (Limits)	Constr. Contract	Consult. Contract	Additional Insured	Guidelines
Professional Liability (Errors & Omissions)	\$1,000,000 to Reasonable	MAYBE	MAYBE	NEVER	This coverage should be required whenever advice is to be received which we will rely on, and may be subject to legal action if the advice proves faulty. Architects & Engineers are the prime example needing this coverage, and Management Training Consultants, where it is not needed. Very expensive, don't ask for more than really needed, if at all.
Environmental Impairment (Pollution Liability)	\$3,000,000 to Reasonable	MAYBE	MAYBE	YES (when allowed by insurer)	This coverage should be required for all contractors handling, transporting, or disposing of hazardous materials. Asbestos abatement contractors should also have this coverage. This provides coverage in instances such as when a truck carrying waste motor oil drives into a ditch and releases the load (our waste oil) into a creek.
Transit		BACK-OUT	NO		We have transit coverage that can cover items for our projects that we agree to insure by contract. Paying additional money to contractor only adds to cost.
Aircraft Liability	\$5,000,000	MAYBE	MAYBE	YES	May need more, but this is good for aerial photography and line inspection.
Misc./Unique					Contact Insurance Risk Management.

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Contractual Risk Transfer Guidance Guideline examples

- Types of insurance coverage
 - Commercial general liability
 - Automobile liability
 - Workers' compensation
 - Employer's liability
 - Longshore & harbor workers
 - Professional liability
 - Environmental impairment
 - Transit
 - Miscellaneous / unique

Contractual Risk Transfer Guidance Guideline examples

- Contract insurance provisions FAQs
 - What limits should be requested for insurance coverage?
 - Why do we ask for higher limits on some contracts and when should we do so?
 - Why ask to be named as an additional insured?
 - When should we ask for professional liability coverage?
 - What about other coverages?
 - What if the contract contains provisions limiting the contractor's liability?

Contractual Risk Transfer Guidance Guideline examples

- Contract insurance provisions FAQs
 - What if the contractor is small (one or two employees) and does not carry workers' comp?
 - What if small contractors don't carry other requested coverage?
 - How should we file the certificates?
 - When should we ask for new certificates?
 - How do I interpret the data reported on the certificate of insurance (COI)?
 - What if I have other questions?

Contractual Risk Transfer Guidance Education and Training

Agenda

- Introduction – Supply Chain – 30 Minutes
- Basic Contract Principles – Legal-Contracts – 1-1/2 Hours
- Ins Risk Mgmt Issues/Provisions – Ins Risk Mgt – 1 Hour
- Claims – Legal-Claims – 45 Minutes
- **Lunch** – 30 Minutes
- Environmental – Legal-Environmental – 45 Minutes
- Litigation – Legal-Litigation – 45 Minutes
- Liens – Legal-Contracts – 15 Minutes
- Summary – Supply Chain – 1 Hour
- Q&A – All – 45 Minutes



Contractual Risk Transfer Process

- Key success factors
 - Support from stakeholders
 - Establishment of clear guidelines
 - Manage by “exception”
 - Training and education
 - Act as advisor and expert resource

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Contractual Risk Transfer Tools, Tips and Takeaways

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Demonstrating the Value of Contractual Risk Transfer – Background

- Difficult to obtain favorable risk transfer provisions
 - Greater awareness of the risks being transferred (e.g., Sarbanes Oxley)
 - Tight labor markets (until recently)
 - Insurers' resistance in granting full additional insured status and waivers of subrogation
 - Larger risk retentions
 - Increased use of alternative risk transfer mechanisms

Demonstrating the Value of Contractual Risk Transfer – Background

- Plenty of anecdotal evidence, but less empirical evidence supporting the value of our contractual risk and insurance recommendations
- Supply chain personnel may question the value of insurance requirements
- How much effort should they expend in contract negotiations and policing proofs of insurance?

Value of Contractual Risk Transfer

Study scope

- Provisions examined
 - Insurance limits
 - Additional insured status
 - Waiver of subrogation
 - Indemnity language
- Claims examined
 - General liability, business interruption, and property damage
 - Open or closed within the past ten years
 - Over \$50,000

Value of Contractual Risk Transfer

Findings

- Number of claims
 - 32 general liability claims
 - ≈ 2 claims per year from 1993 to 2007
 - Steadily increasing in the current environment
 - 0 business interruption claims
 - 0 property damage claims

Value of Contractual Risk Transfer Findings

- Litigation costs
 - Includes defense and settlement costs
 - ≈ \$2 million per year
 - ≈ \$28.8 million total
- Largest claims
 - \$5.75 million – gasket injury
 - \$5 million – aviation fatalities
 - \$3.8 million – electrocution fatality

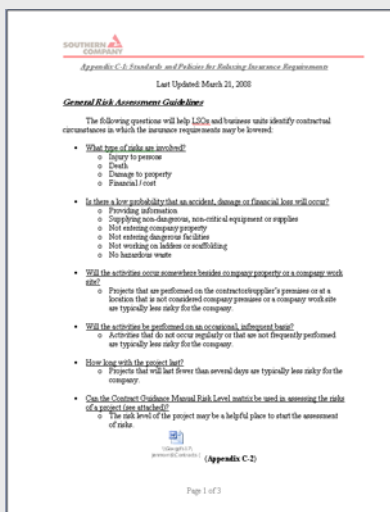
Value of Contractual Risk Transfer Findings

- Contractual provisions
 - Strong indemnity - 90.63%
 - Additional insured status - 93.75%
 - Paid settlement costs - 65.63%
 - Defense by the contractor
 - Due to the indemnity provision - 75.00%
 - Due to additional insured status - 15.63%

Value of Contractual Risk Transfer Recommendations

- Focus our resources where they are needed most – high risk, high payoff contracts with the use of
 - Standards and policies for relaxing insurance requirements
 - The contract risk matrix
 - The vendor / contractor risk assessment tool
 - Ration efforts around Certificates of Insurance (COI)
 - Document contractual risk transfer claims in RiskMaster

Standards and Policies for Relaxing Insurance Requirements



The Contract Risk Matrix

Scenario:	Risk Rating By Coverage (1=lowest, 5=highest)			Rationale	Notes	Does Not Include
	General	Auto	Workers Comp			
Light junctional (small-scale, not industrial)	1	1	2	Minor exposure to injuring others, limited auto use, higher risk of injuring self. Insurance adds more than 10% to cost, may be sole source provider	Encourage vendor to secure health insurance	Insulated-type cleaning, such as coal conveyor belt cleaning or window cleaning, high elevations
Interior painting, wallcovering, flooring (very low / no elevation)	1	1	2	Minor exposure to injuring others, limited auto use, higher risk of injuring self. Insurance adds more than 10% to cost, may be sole source provider		Projects involving scaffolding, climbing ladders over 6 feet or major lifting
Ductile installation, office reconfiguration	1	1	2	Minor exposure to injuring others, limited auto use, higher risk of injuring self. Insurance adds more than 10% to cost, may be sole source provider	Encourage vendor to secure health insurance	Projects involving scaffolding, climbing ladders over 6 feet or major lifting
Light electrical, such as interior lighting (very low / no elevation)	2	1	2	Minor exposure to injuring others, limited auto use, higher risk of injuring self. Insurance adds more than 10% to cost, may be sole source provider		Projects involving scaffolding, climbing ladders over 6 feet or major lifting
Locksmith (Bonded)	1	1	1	Bonding provides a safeguard, limited exposure for GL/AL/PL/WC		



The Vendor/Contractor Risk Assessment Tool

Project: _____ Primary Contact: _____ Date: _____
 Description: _____ Extension: _____
 E-mail: _____

I. General Liability

1. Will the contractor be working on or around company premises, or doing operational work on our behalf?

Premises/Operations in a broad sense may include right-of-ways, facilities, operational activities in the field, etc.

2. Is the nature of the work such that it could pose risk of injury to persons or damage to property?

- Consider:
- Work Activities
 - Proximity to highly valued company property or employees
 - Equipment utilized in performing the work
 - Duration of work activities

3. How likely is it that an accident could happen?

Consider realistic loss scenarios.

4. Select the magnitude of expected losses:

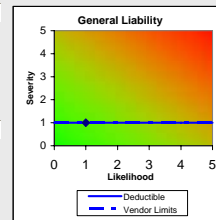
Consider the worst case that could realistically occur. Optional: What sorts of losses could occur in the course of this contract?

- Dollar Impact
- Negative Publicity
- Regulatory Concerns

5. Select the appropriate deductible for your company:

Company	Liability

6. What limits is the vendor offering?



The Vendor/Contractor Risk Assessment Tool

III. Workers' Compensation

1. Select the number of contractor employees:
Employers with less than three employees are not legally required to carry WC insurance; however we may be liable as the 'deep pocket'

2. Will the contractor be:
 a. Working on or around company premises?
 b. Working on company behalf around third-party persons or property?
For example, customer property, public roads/highways, etc.
 c. Providing consulting services?
Consulting services only, out of vendor's premises, presents limited WC exposure.

3. Is the nature of the work such that it could pose risk of injury to persons or damage to property?
Consider:
 - Work Activities
 - Proximity to highly valued company property or employees
 - Equipment utilized in performing the work
 - Duration of work activities

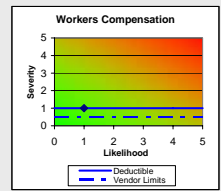
4. How likely is it that an accident could happen?
Consider realistic loss scenarios.

5. Select the magnitude of expected losses:
Consider the worst case that could realistically occur:
 - Dollar Impact
 - Negative Publicity
 - Regulatory Concerns

6. Select the appropriate deductible for your company:

Company	Liability

7. What limits is the vendor offering?



The Vendor/Contractor Risk Assessment Tool

The following questions apply to General Liability, Excess Liability, and Auto Liability:

3. Would the contractor have to buy additional coverage exclusively for this project, and pass the costs (uneconomically) to the company?
If so, what percentage would it add to contract price?

4. Is there a compelling business reason to use this supplier?
Is it a single-source supplier, or do they have a substantial advantage in costs, ability to meet schedule or capabilities.

5. Is there another supplier option?
Another supplier that could meet your requirements (ie costs, schedule, capability)

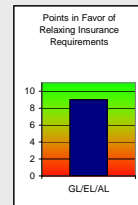
6. In relationship to the company's risk profile, is this work the company would or could self-perform?
...and would ordinarily self-insure (assume the risk), consistent with our normal risk profile. If the contractor provides any insurance at all, and it's something we'd ordinarily do ourselves, they're improving our risk profile by providing any insurance.

7. Looking to the risk profile, are the likelihood and impact of a loss less than or equal to 2?
Even if the likelihood of losses is remote, potential severe impact suggests caution in relaxing limits requirements.

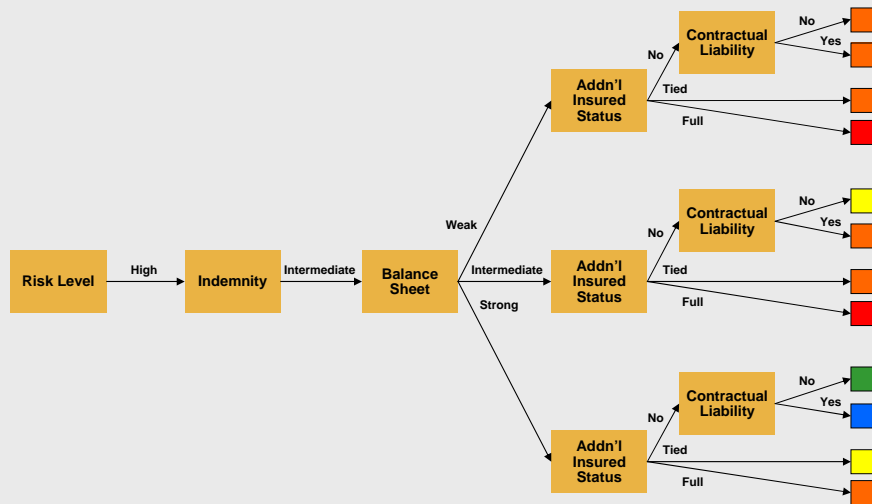
8. Are there other non-insurance methods available to mitigate the risk?

Scoring:

1
4
0
2
1
1
1
1
Total: 9 Points in favor of relaxing requirements



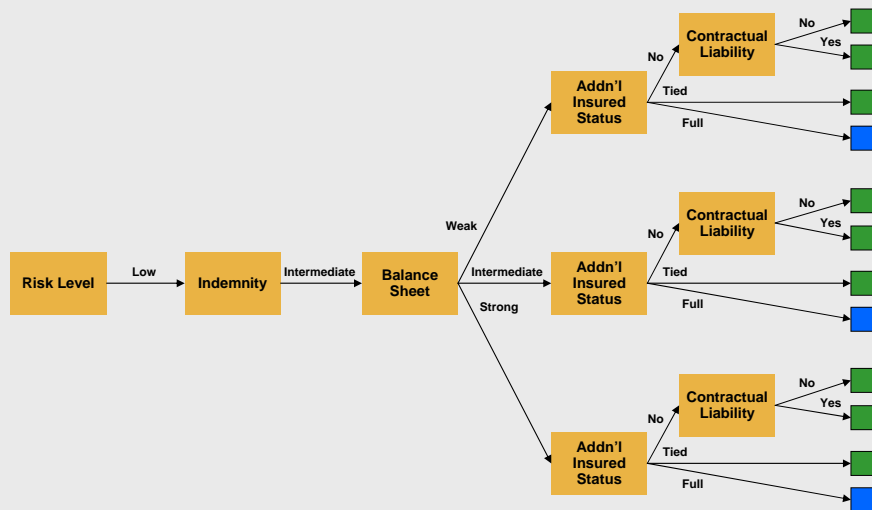
Certificates of Insurance Value Tool



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Certificates of Insurance Value Tool



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Additional Insured Ain't What It Used to Be!

- Increased resistance to naming us as additional insured (AI) and to granting waiver of subrogation (WOS)
- Steady efforts by counterparties and their insurers to erode coverage afforded to AIs
- Efforts to link AI to a weakened indemnification clause, leaving you with only contractual liability cover
- Indemnification provisions and AI status can operate independently
- You may be able to get AI coverage broader than the indemnity

Additional Insured Endorsement Options

- 2004 ISO changes promulgated a menu of options which, if not effectively selected, may leave coverage shortfalls
 - e.g., AI but no contractual liability
- Option 1: CG 20 10 11 85 or equivalent
 - Provides the broadest additional insured coverage, including completed operations

Additional Insured Endorsement Options

- Option 2: CG 20 10 10 01 with CG 20 37 10 01 or equivalent combination
 - Provides coverage similar to CG 20 10 11 85 by adding completed operations coverage; still contains “arising out of” language which provides broader coverage for the AI
- Option 3: CG 20 10 07 04 with CG 20 37 07 04 or equivalent combination
 - CG 20 37 provides coverage for completed operations, however, the AI will not have coverage for liability resulting from their sole negligence

What to Expect from Strong Counterparties

- They seek low limits of liability (LOLs), especially for first party property damage
 - Will define owner’s property as not “third party”
- Link AI status to a weakened indemnity provision
- Say that they “don’t want to be your insurer”
- Argue that your demands are unfair and unreasonable
- Demand waivers of subrogation from you, especially for owners property, but not waive their subrogation rights
 - May offer WOS to the extent of contractors negligence, which is worthless

Dealing with Strong Counterparties

If we have any deal leverage, counter with:

- Pushing for higher LOLs
- Offer WOS on a reciprocal basis and cite the mutual advantages
 - We try to preserve our right to recover self insured losses, to the extent practicable
- “Likewise, we don’t want to be your insurer,” citing risk of contractor negligently damaging our property

Dealing with Strong Counterparties

If we have any deal leverage, counter with

- It’s not unreasonable for the contractor to assume the risk, including our contributory negligence; just as we often do when we provide wrap up coverage to contractors
 - Contractor has the option to insure or self-insure and price the risk in the proposal; subject to competitive dynamics
 - Point the contractor to their own requirements of suppliers and contractors
http://www.gepower.com/about/suppliers/en/downloads/std_terms_purchase_revq.pdf

Dealing with Strong Counterparties

If we have any deal leverage, counter with

- Price adjust contractors bid against competitors, to reflect the additional risk we assume, if they don't meet our insurance and indemnification requirements
- As a last resort, suggest financially solid counterparties throw out the insurance language and lean on the indemnity provisions, without LOLs; each party then bears full responsibility for its own negligence

When the Shoe Is on the Other Foot and We Are Providing Indemnity and Insurance to Others

- Strive for LOLs
- Provide counterparty AI status "to the extent of our indemnity obligations"
- Protect our excess insurers: contractually, provide AI status only to a set limit and show only that limit on COI
- Self-insurance letters should be consistent with the above and include: "consistent with the terms and conditions of our excess policies"

Additional Thoughts on Professional Liability

- Distinguish between “pure” E&O (i.e. design efficacy) risk and third party BI or PD liability arising from a design failure
- At a minimum, we want cover for BI & PD:
 - May be provided under CGL or E&O forms
 - Consider adding to CGL: ..., “and shall include cover for third party BI / PD arising from the provision of (or failure to provide) professional services”
- Recognize limitations of “pure” E&O efficacy cover: claims made, prior acts, no AI, no contractual liability, small limits, expensive
 - May not be worth it, if counterparty has to buy cover and pass thru the costs
 - Best insurance are the three Cs: character, capacity and capital
- Consider separate professional liability and general indemnity clauses

In Closing, Some Things to Consider:

- Manage expectations – encourage others not to over-rely on insurance
- Strive to be a problem solver, obstacle remover and not an obstructionist
- Look for a non-insurance risk mitigation opportunities
- Ensure that stakeholders fully understand the risk factors and can make an informed business decision
- Don't let the counterparty insurance issues force a bad business decision

In Closing, Some Things to Consider

- The party with greater control of the risk, in the better position operationally and financially to handle it, generally should bear the risk
- Be passionate, but pragmatic, in the negotiations: sometimes you have deal leverage and sometimes you don't
- A risk free transaction is realistically unattainable; rather, strive to optimize the company's risk profile
 - How does the contractor's risk profile compare to the company's risk profile, if it self performed the work?

Questions

