



Safety Management and Underwriting Guide to Risk Transfer

The underwriting guidelines for Selective's Contractor's SBU requires us to obtain copies of our insured-contractors' written subcontracts when the insured has \$100,000 or more in subcontractor costs. Our objective is to verify that the subcontractor, who is performing work for a Selective-insured contractor, has enforceable risk transfer mechanisms in place, i.e. that the subcontractor and its insurance carrier can be held responsible for property damage, bodily injury claims and/or personal and advertising injury claims caused in whole or in part by the subcontractor. Our intent is to transfer the indemnity and defense obligation to the subcontractor(s) to the fullest extent permissible under applicable state law.

To accomplish our risk transfer objectives we must undertake an evaluative process which is designed to determine whether a subcontract's risk transfer provisions are "acceptable" (average) or "above average."

In ensuing paragraphs we explain the criteria that we use to make this evaluative determination. The last page is a *risk transfer checklist* that you **must** complete for all new and renewal business when the insured has \$100,000 or more in subcontractor's costs.

Grading Criteria for "Acceptable" Contracts include the following:

1. The Contract is in Writing: this is a mandatory requirement. We must insist that our insured requires all of his subcontractors to enter into a written contract that has been executed before the work begins. The importance of the subcontract being executed before the work begins cannot be overemphasized. Aside from setting forth the parties' respective obligations and rights, it is the trigger in most policies for qualifying it as an "insured contract."

2. Type of Risk Transfer Provision in Place: determine whether the contract contains an indemnification provision and/or a "hold harmless" clause including defense. If so, do they favor our insured?

(a). Indemnification Clauses: Keep in mind that in any given situation, our insured could be either an indemnitor (the party who contractually assumes risk) or an indemnitee (the party transferring the risk). Generally, there are three variants of indemnification clauses. They can be characterized as follows:

Broad Form Agreement - the subcontractor assumes **all** of the risk and liability for specified losses, regardless of fault. This agreement obligates the subcontractor to pay the entire amount of covered damages, even when the contractor's negligence is the sole ("100%") cause of the accident giving rise to the claim. Under this scenario, the contractor, despite being 100% at fault, pays nothing. Note: This type of agreement is disfavored by the courts and often prohibited by state statutes because it completely insulates the contractor from any responsibility for its negligence.

Intermediate Form Agreement - the subcontractor assumes the entire risk of specified losses, as long as the contractor's negligence is **not** the sole ("100%") cause of the accident giving rise to the claim. Under this type of indemnity provision a subcontractor has assumed all risk of loss—even if the contractor is



99% at fault. While most states permit this type of agreement the courts take a jaundiced view because it permits the contractor-indemnitee to act with relative impunity with regard to safety issues. For this reason courts mandate that this type of agreement clearly, unequivocally and unambiguously provide that the indemnitor has agreed to this exposure.

Limited Form Agreement - the subcontractor is obligated to reimburse the contractor **but only** to the extent of the subcontractor's percentage of fault for the loss. For example, where there is a claim for \$200,000 and the subcontractor is 40% at fault, the subcontractor is responsible for paying or reimbursing the contractor \$80,000; representing 40% of the value of the damages.

Please note the following:

General liability and umbrella policies do not always cover the full scope of risk that the subcontractor assumes by way of the indemnification clause. The gap can arise by way of applicable policy exclusions e.g., breach of warranty, breach of contract, work product, etc.

Any obligation of the contractor to indemnify the owner under the prime contract should be “flowed down” into the subcontract and thereby imposed upon the subcontractor to the extent of the subcontractor’s scope of work. In addition, there must be complete consistency between the indemnification provisions in the prime contract and those contained in all of the subcontracts. This will insure that our contractor’s upstream indemnification obligations are not broader than those imposed on the subcontractors. To the extent that the prime contract’s provisions are different from the subcontract(s), the subcontracts must be modified in writing to insure consistency is achieved.

Legal counsel should be consulted to determine the effect of any anti-indemnity statutes or case law which may affect the enforceability of the broad and intermediate indemnification provisions. The insured should also consult with counsel to insure that there is consistency between the indemnification provisions in all of the contracts governing the job.

The indemnification provision should survive the completion of the work or the earlier termination of the subcontract.

(b). Hold Harmless Clause: In most jurisdictions, indemnification and hold harmless clauses are interpreted by the courts as providing the **same** protection to the indemnitee-- most courts do **not** make a distinction between the two.

3. Jobsite Safety responsibilities including cleanup should be specified in the agreement.

It is important that it be clear that the subcontractor accepts responsibility for maintaining a safe worksite and that they will comply with all appropriate safety requirements including cleanup as well as OSHA Regulations. This will effectively allow the insured to transfer jobsite safety responsibility and liability to the subcontractor.



Is there a Waiver of Employer’s Exclusive Remedy Defense for claims for contractual Indemnification?

This provision is extremely important because it explicitly states that the right of indemnification for the insured will not be limited by the subcontractor providing Workers Compensation benefits to an injured employee. This provision is an explicit contractual waiver of the “exclusive remedy” under Workers Compensation by the subcontractor.

5. Is there a requirement that the subcontractor add our insured contractor as an additional insured on the subcontractor's general liability policy for:

“Ongoing operations” (ISO Form CG2010)

“Completed operations” (ISO Form CG2037) and

That the insured contractor is included as an additional insured on a primary and non- contributory basis?

This provision is extremely important because it provides traction for the contractual indemnification obligation. It is common for a subcontractor-indemnitor to not have the financial wherewithal to honor its indemnification obligations. If the subcontractor procures insurance naming our insured as an additional insured the other carrier will, subject to certain exclusions, be required to provide coverage that funds the subcontractor’s indemnity obligations, including the provision of a defense. When examining a subcontract special attention should be paid to whether our insured is named as an additional insured on a primary and non-contributory basis. When it is present, there is likelihood that our insured’s policy will be considered excess coverage.

Additional Insured coverage must be maintained for a specified length of time. Many states have a 10 year statute of repose for construction claims. SICA will accept contractual provisions that **provide our insured contractor with 3 years of completed operations coverage. We also require the production of certificates of insurance and additional insured endorsements verifying that the premium for this coverage has been paid in advance.**

6. Does our insured require the subcontractor to maintain the following minimum general liability insurance limits:

General Liability

\$1,000,000 each occurrence (Bodily Injury and Property Damage)

\$2,000,000 General Aggregate

\$2,000,000 Products/Completed Operations Aggregate

\$1,000,000 Per Person or Organization (Personal and Advertising Injury)

Automobile

\$1,000,000 combined single limit Per Accident Limit Business or Commercial Automobile Liability Insurance

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Workers' Compensation and Employers' Liability Insurance with limits as follows:

\$100,000 Each Accident

\$100,000 Each Employee for Injury by Disease

\$500,000 Aggregate for Injury by Disease

Umbrella

\$1,000,000 Excess or Umbrella Liability Insurance to overlay the Employers Liability, Automobile Liability, and Commercial Liability Insurance coverages.

7. Does the insured contractor require the subcontractor to produce a current Certificate of Insurance that:

Properly identifies the type of insurance and required limits of liability;

Properly indicates our insured contractor has been named as a certificate holder and indicates the insured has been named as an additional insured on the subcontractor's general liability and/or excess coverage; and

States that SICA's insured contractor (the additional insured) will be given 30 days notice if the subcontractor's policy is cancelled.

"ABOVE AVERAGE" EVALUATIVE CRITERIA

In addition to the preceding requirements, in instances where insureds have subcontracting costs in excess of \$500,000, Safety Management should make the following recommendations, which are geared to putting into place "above average" risk transfer provisions:

Recommend that the subcontractor's insurance coverages be placed with a carrier that has an *A. M. Best* rating of A- or better;

Recommend the subcontractor's policy to include ISO Form CG 25 03 and CG 25 04 Amendments - Aggregate Limits of Insurance (per project) and Aggregate Limits of Insurance (per location). This avoids the situation where the subcontractor's premises/operations general aggregate limit applicable to our insured's construction project could be eroded by claims related to other construction projects that the subcontractor is simultaneously performing;

Recommend a Waiver of Subrogation Clause in the Subcontract –A waiver of subrogation clause provides that the insurance companies that insure the contracting parties will not be able to pursue contribution claims as subrogees of their insureds. The legal principle behind this provision is the oft-quoted phrase: "a subrogee's rights rise no higher than those of its subrogor."



The following are characteristics of “Above Average Contractors” who sub out in excess of \$500,000. These “Best Practices” when implemented justify preferred pricing.

The insured contractor to obtains a copy of the additional insured endorsements (CG 20 10, CG 20 37, etc.) specifically naming the insured contractor as an additional insured on the subcontractor’s policy.

Our insured contractor maintains organized files that include the construction contracts, subcontracts, certificates of insurance and additional insured endorsements.

Our insured contractor has a “suspense system” that tracks receipt of certificates, policy expiration dates and imposes the obligation to obtain an updated certificate of insurance upon the expiration of a policy.

The insured has its legal counsel review and approve its subcontracts every three years.

The insured specifies a listing of all policy endorsements on the certificate of insurance furnished to the contractor in addition to obtaining copies of all manuscript or special endorsements.



Contract Review Checklist				
Named Insured			Reviewed By:	
Policy #			Date:	
	Yes	No	Action Required	Action Taken
Copy of an Executed Contract in File				
Key Components: Acceptable (Average) Contract				
Written contract – signature required				
Parties to contract listed clearly				
Specify project, the work involved & the price				
Job site safety responsibilities including clean-up				
<u>Hold harmless, defense & indemnification</u>				
Contractual Indemnification specifically includes claims by the employees of the Subcontractor				
<u>Additional insured status:</u>				
<u>(1) Covers on-going operations</u>				
<u>(2) Covers completed operations</u>				
(3) Subcontractors insurance is Primary &/or Noncontributing				
<u>Insurance requirements & limits</u>				
<u>GL: \$1,000,000</u>				
Auto:\$1,000,000				
WC: Statutory Limits				
Excess or umbrella liability insurance coverage of at least \$1,000,000				
Contract requires certificate of insurance				
Key Components: Above Average Contract In addition to Acceptable Contract requirements				
Liability insurance required with an AM Best rating of A- or better				
General Liability coverage includes CG 25 03 per project limit				
Waiver of subrogation for:				
General Liability				
Automobile				
Umbrella				
Workers Compensation (If allowed by Law)				
Property (to extent covered by 1st Party Insurance)				
Key Practices of an Above Average Contractor				
Legal counsel has reviewed contract language within last 3 years				
Contractor has suspense system for tracking COI				
Contract obtains copies of additional insured endorsements				
Contractor maintains project files that contain contracts, COI and additional insured endorsements				
The contractor requires a listing of all endorsements on the COI				
The contractor requires that copies of subcontractors insurance policies be available upon request				

Items in **Bold & Underlined** are critical items and potential dealbreakers

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