

Subcontract Agreements and Accident Investigation

Recognize how they connect to better protect yourself.

Contracts and the language contained in them matters more than ever before. They matter at the time they are reviewed and negotiated and especially in the aftermath of a major accident. The financial exposure generated from a major construction accident has the ability to blow through multiple layers of \$1,000,000 GL primary policies with one claim. Contract-related indemnification and additional insured can cost contractors far more than the revenue generated from even the biggest jobs.

If a serious claim does occur there are a number of contract issues that should be considered while planning for the claim investigation. The following are critical contract-related questions that should be but are seldom asked minutes after a major loss occurs:

1. **Did you name any other party as an Additional Insured on your General Liability policy?**
2. **Was that party also involved in the accident or loss?**
3. **Was the loss the sole fault of that same other party?**
4. **Is fault difficult to determine?**

If you can answer yes to any of these questions, it is critical that your accident investigation team be aware of these contractual issues and that they take steps to conduct parallel investigations on behalf of your company and another Additional Insured party in order to understand what is the “true” liability picture. A common mistake made at the accident investigation level is that the investigators have no idea of the legal relationships of the various parties involved. As a result, they conduct a “one-track” investigation that is “blind” to the dynamics of Indemnification, Additional Insured, and Risk Transfer. The end result is a seriously flawed liability picture focusing on who they think is at fault without any regard for who may be legally responsible to pay for the loss based on contract considerations.

BACKGROUND

Often times, subcontract agreements that you enter contain provisions that can be seriously detrimental to you personally as an owner and to your company in general when major accidents occur on your jobsites.

Most general contractors and upper tier prime contractors/project developers engage high powered law firms to insulate themselves from responsibility.

This is fair....put yourself in their situation.

- Heavy Industrial/Construction projects create High Hazards and involve (Subcontractor) employees that project owners/General Contractors have little or no control over....so they should be insulated.
- But somewhere along the way...fairness has been lost between the project owner/ GC and the Subcontractor in the equation.

The purpose of this article is to deliver risk management informational tools to assist you in satisfying general/prime contractors (contractual) requirements **while** establishing a fair environment for you to operate in.

IT CAN BE DONE - with certain diligence on your part by ‘scratching out’ certain onerous provisions and re-inserting fair contract language suggestions with your subcontract agreements.

And by taking the time and making the effort you can minimize unnecessary claim and litigation exposure to your company.

- Your subcontract language will impact every aspect of your project when an accident occurs.
- Litigation resulting from contract obligations represents the majority cost factor and time requirements when major accidents occur that will **eat your profit**, if subcontract agreements are blindly signed without attempting fair compromise.

UCA Risk Management

By: Kevin J Cunningham

- Modifying certain subcontract language components in advance of jobsite accidents will reduce litigation and save you time...which in turn protects your project profitability, when jobsite accidents occur.

COMMONLY USED SUBCONTRACT (INSURANCE) TERMS & DESCRIPTIONS

While there are numerous technical and legal terms used in heavy industrial/construction contracts, the following are commonly used for insurance purposes:

- **Hold Harmless/Indemnification**
- **Additional Insured**
- **Certificates of Insurance**
- **Waiver of Subrogation**

This article will focus on Indemnification and Additional Insured to assist you in understanding key contract language items to avoid, that create certain 'trapdoors' that can become trip wires for increased litigation against you as the subcontractor:

✧ **Hold Harmless/Indemnification**

These two specific contract items relate to the same issue. The **indemnification** (or Indemnity) agreements purpose is to '**hold harmless**' another party.

Hold Harmless or Indemnity provisions are agreements whereby one party (you – the subcontractor as 'indemnitor') assumes the other party (the owner/GC as Indemnitee's) legal liability to whatever extent is outlined in the agreement. For example, General Contractors usually agree to indemnify and hold harmless project owners for **liability arising out of their work...**

And since the proverbial (@#%@) rolls down hill, the GC then transfers this responsibility down to you, as the Subcontractor.

Note: Herein lies the challenges (and opportunity) to protect your interests, by modifying certain basic contract language obligations in your project bidding/negotiation phases. (Refer to examples below for suggested modifications that have been accepted by large General Contractors)

✧ **Additional Insured**

There are three basic categories of "Insureds" for you to recognize to effectively manage your subcontracting process as specialty subcontractors:

1. **Named Insured**
 2. **Automatic Insured**
 3. **Additional Insured**
1. **Named Insureds** are those individuals or entities to whom the policy is issued. Named insureds typically have more rights and responsibilities than additional insureds and are also subject to more exclusions.
 2. **Automatic Insureds** are individuals or entities who are automatically provided with insured status in the policy by virtue of being members of a group with close ties to the named insured, such as the named insured's directors, officers, employees, and/or subsidiaries.
 3. **Additional Insureds** are individuals or entities who require insured status in conjunction with a business relationship. Additional insured status is usually provided by endorsement or **by a policy provision that is triggered by a requirement for additional insured status in an underlying contractual agreement.**

As you see by the definition it is the "policy provision that is triggered by a requirement for additional insured status in an underlying contractual agreement" that really opens the door for the AI to access the policy of the Named Insured (you).

UCA Risk Management

By: Kevin J Cunningham

Additional insured requirements have become one of the most critical areas for you to recognize due to the significant impact to you as a subcontractor and for the general contractor who requires this provision from your company.

There are various reasons that general contractors/project owners require Additional Insured status from you as a subcontractor:

- To bypass the indemnification/hold harmless provision that may be disallowed in different states under certain state Anti – indemnification statutes
- The project owner/General Contractor is trying to insulate their own insurance policy (Key Reason).
- The Additional Insured provision provides direct rights to your policy on behalf of the project owner/GC for coverage limits and legal defense for lawsuits.

As contract risk management has evolved over the past several years, the additional insured provision has gone from relative obscurity to becoming arguably the most impactful contract provision for subcontractors today.

RECOGNIZE INDEMNIFICATION & ADDITIONAL INSURED DYNAMICS IN CLAIM INVESTIGATION

If you can properly screen and suggest modified contract agreement language on indemnification and insurance requirements to prevent being contractual obligated to insure General Contractors (and other upstream/high-tier Contractors) from their own “sole negligence,” then you have a fighting chance to limit paying for serious claims that were not your fault.

The key to making sure that does not happen is to conduct a detailed claim investigation. If you review and negotiate your contracts properly, then you have laid the groundwork for being able to conduct a multi-level claim investigation that can address your own liability, as well as possible sole negligence on the part of the Additional Insured and in some cases other subcontractors.

The various investigation tools contained in future “Pipeline Risk Management” articles will be specifically designed to assist in critical early & time-sensitive investigation techniques, which increase the odds of being able to establish “sole negligence” on the part of the potential Additional Insured. It is not enough to allege that other parties were entirely responsible...you need to obtain prompt evidence to be in a position to prove your case. Future articles and Bunker Hill/UCA “Risk Management Workshops” will deliver additional strategic tools to protect Underground Contractors’ interests favor contract risk management and post accident quality control .

Modified Subcontract Agreement “Indemnification” Example	
Language to Avoid	Accepted Changes
Subcontractor shall indemnify, defend and hold harmless Contractor, Owner, any other person or entity required to be indemnified by Contractor under the Prime Contract, and the officers, directors, employees, agents, insurers, successors and assigns of each, from and against any and all actual or alleged claims, fines, penalties, causes of actions, suits, demands, damages, liabilities, losses, costs and expenses, including, but not limited to attorneys fees (the “Claim”), arising out of, relating to, or in any way connected with the Agreement or Work, whether or not the claim is caused by the Contractor.	Subcontractor shall indemnify, defend and hold harmless Contractor, Owner, any other person or entity required to be indemnified by Contractor under the Prime Contract, and the officers, directors, employees, agents, insurers, successors and assigns of each, from and against any and all actual or alleged claims, fines, penalties, causes of actions, suits, demands, damages, liabilities, losses, costs and expenses, including, but not limited to attorneys fees (the “Claim”), arising out of, relating to, or in any way caused by subcontractor’s negligence connected with the Agreement or Work, whether or not the claim is caused by the Contractor.

UCA Risk Management

By: Kevin J Cunningham

Modified Subcontract Agreement <i>("Additional Insured" Example)</i>	
Language to Avoid	Accepted Changes
Coverage for the Contractor, its officers, directors and employees and the Prime Contractor/Developer/Owner as additional insureds shall be provided by an endorsement providing coverage at least as broad as Insurance Services Office, Additional Insured Endorsement Form CG 2010 (11/85) or similar form as approved in writing by Contractor. The duty to provide such additional insured coverage is independent of the defense and indemnity obligations set forth in Section 15, Indemnification.	Coverage for the Contractor, its officers, directors and employees and the Prime Contractor/Developer/Owner as additional insureds shall be provided by an endorsement providing coverage at least as broad as Insurance Services Office, Additional Insured Endorsement Form CG 2010 (11/85) CG 2010 (10/01) or similar form as approved in writing by Contractor. The duty to provide such additional insured coverage is independent of dependent on the defense and indemnity obligations set forth in Section 15, Indemnification.

Kevin J. Cunningham
President
Bunker Hill Underwriters
Engineered Risk Division

UCA Exclusively endorses Bunker Hill Underwriters to administer the UCA Insurance & Risk Management Program through your Agent/Broker.