

"CONTRACTORS, CONTRACTS AND CERTIFICATES"  
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How many contracts did your association execute for work on your premises in the last twelve months? Two, Five, Ten? How many of these contracts did you have reviewed by your association attorney? One, Two, Three, all of them? If your answer was all of them go to the head of the class. If your answer was not all of them begin now to formalize your new association procedure for review of all contracts, executed with your contractors, for work on your premises.

Many associations hire contractors to provide certain tasks which is simply a basic Risk Management technique to transfer the risk, or chance of loss, to a contractor. Obviously, the alternative is to hire your own employees to perform the particular task needed which does expose the association to a significant level of risk. Each, and every, contract executed by the Board of Directors should be reviewed by the association's attorney prior to execution. From an insurance perspective each, and every, contract should contain certain insurance requirements and indemnification agreements in favor of the association.

Yes, this will cost the association money but is, in my opinion, money well spent to protect the financial condition of the association. Action must be taken to protect the association before you execute the contract- not after execution of the contract.



Want a real life example of what not to do? An association hired a tennis court repair contractor who could meet their scheduling requirements, worked cheap but had no insurance program in place. Employee of the contractor electrocuted by overhead powerline and sustained severe injury to legs and foot. Association had no real contract executed with the contractor but did execute a "Liability Release" presented by the contractor which stated, in part, that contractor releases the association from any liability for negligence while performing services requested. Association was sued by employee of the contractor and insurance company for association now defending this claim under commercial general liability coverage on behalf of the association. Obviously, the problem with the claim was that there is no funding mechanism in place to protect the association. Yes, this contractor did leave the association "holding the bag" and the association should have sought the advice of legal counsel and, perhaps, their insurance agent before going forward with such action. Could this problem for the association been avoided or eliminated? Absolutely. Let's review three basic rules available to protect the association from an insurance perspective.

#### Rule No. 1

Be certain that all your contracts include an Insurance Clause outlining your association's specific insurance requirements for the contractor. Generally, these limits should be equal to or greater than your own limits of liability. The determination of exactly the proper limits of liability needed to protect the association clearly must be made by the Board of Directors.



The types of coverage which should be required, at a minimum, are commercial general liability (CGL), automobile liability including owned, hired and non owned automobiles and workers compensation. All coverages should be provided on an occurrence basis, written with insurance companies acceptable to the association, written with limits of liability acceptable to the association, require thirty day notice of cancellation/reduction in coverage to association, require association to be named as an additional insured (except workers compensation), require a waiver of subrogation in favor of the association and require original certificates of insurance evidencing such coverages be provided to the association in a time certain manner.

Specifically for CGL coverage the association should elect to require contractual liability in support of the contract including indemnity provisions of contract, personal injury with employee and contractual exclusions removed, products and completed operations, premises/operations, broad form property damage, and independent contractors coverage. The association may also elect to require an endorsement stating coverage is primary and noncontributory with other insurance available to the association, explosion, collapse and underground depending on the specific circumstances of the contract. There may be other coverages your association would require such as a commercial umbrella, builders risk, installation floater, accident policy or performance bond depending on the specific contract.



All subcontractors, if any, used by the contractor should also adhere to the same requirements as the contractor. However, your basic insurance requirements for each, and every, contract should not waiver, or change, from contract to contract.

Frequently, the question today is "should the association use contractors that do not have workers compensation coverage and are not a subscriber to the Texas Workers Compensation Act"? The easy answer to that question is there is no substitute for workers compensation coverage only alternatives. Some large contractors could be self-insured and some, large or small, contractors have simply elected not to purchase workers compensation coverage and have purchased an alternative coverage of some kind. Clearly I would never recommend the use of a contractor that does not have some type of coverage in place to voluntarily respond to injuries to their employees. We saw an example of that already- did we not?

In my opinion, your contract must address this issue and the association should require, at a minimum, evidence of the contractor's alternate insurance plan and it should substantially meet the provisions of a workers compensation policy and not solely be an accident or health insurance policy. Obviously, this issue can be very difficult to "police" for the association as we know exactly the coverage contained under a workers compensation policy but coverage under alternative policies tend to vary greatly. The absence of workers compensation coverage simply invites commercial general liability claims to the association.

#### Rule No. 2

Be certain all contracts contain proper indemnification



agreements written in favor of the association. Contracts are, as continuously noted, the special purview of attorneys and this important contract ingredient must be drafted by your association's attorney. This portion of the contract is of primary importance because it is a key component to trigger the funding mechanism in place to protect the association. Contractual liability under the CGL provided by the contractor is also of vital importance as it is used to transfer the exposure to liability, for the association, back to the contractor.

If one could pick three important words to put in this indemnification agreement it would be defend, indemnify and hold harmless. As in our real life example used previously, and assuming we had a valid indemnification agreement, it was still worthless because there were no insurance coverages in place to fund the agreement. There are not many contractors (or insurance agents for that matter) in this world that I would want to rely on financially to defend my association out of their hip pocket. How about you?

### Rule No. 3

Finally, obtaining certificates of insurance to verify the contractual commitment is of primary importance for each, and every, contract. Please remember that certificates of insurance do not alter, or modify, an insurance policy and are for informational purposes only. Your association may want to involve your insurance agent, or attorney, in verifying certain coverages outlined in each executed contract.

Certificates of insurance should include a brief description of the operations to be performed and should be dated and signed



by the issuing agent. They should include the authorized agents name and address, a full description of coverage including policy numbers, policy periods, limits, the name and address of the certificate holder, insurance company name for each coverage, and the name and address of the insured. Although this sounds obvious these items tend to become repetitious and are therefore prone to human error. Obviously one would also want to obtain certificates of insurance on an annual basis and someone must be assigned to routinely follow up on expiring certificates of insurance. Generally, the disclaimer wording on certificates of insurance should not be accepted. The certificate of insurance contains wording such as "endeavor to" provide notice of cancellation or nonrenewal and this wording should generally be removed, if possible.

In summary, we all execute contracts in our for-profit and non-profit lives rather routinely. However, we must take steps to protect ourselves before we execute the actual contract. Contractors will adhere to the specifications set by your association, if they want to work for your association, as the Board of Directors "holds all the cards". Contracts typically outline each party's specific responsibilities and well they should. However, with the advice of your attorney, and insurance agent, certain steps can be taken to offer greater protection to your association. A hand shake is great but it does not take the place of a contract drafted by your attorney and executed by the Board of Directors.

