

Risk Management for Contractors

Protect Your Business from Risks Involving Your Subcontractors - June 1, 2017

Jodie Clark McDougal

General contractors and builders face a unique situation when it comes to risk management. They are legally responsible to owners for the actions and omissions of their subcontractors. Thus, as you work on projects and hire subcontractors to perform work, you want to make sure you are taking the right steps to protect yourself and your business. Iowa's Statute of Repose law impacts how long builders and general contractors are liable for defects. This law was updated in the 2017 legislative session and a summary of the change is available at the end of this packet.

I recommend a multi-layer approach to risk management in regard to your subcontractor relationships:

1. Insurance considerations
2. Risk allocation within your contracts
3. Loss prevention
4. Adequate Insurance

When developing a relationship with a subcontractor and deciding to bring them on board, you should ensure that your subcontractor agreements have robust requirements for insurance coverage and then follow through with enforcement of these contract provisions. Those insurance provisions should involve, among other things, requiring subcontractors to maintain various types of coverages (e.g., CGL, PL, worker's compensation, automobile insurance) at minimum coverage levels and ensuring that the subcontractor policy lists you, the general contractor, as an "additional insured" on the policy through an Additional Insured Endorsement. If your subcontractors sign a contract saying they will have insurance, also require them to provide a Certificate of Insurance, and if they can't, they are off the job. This might take a few extra steps and more paperwork, but in the realm of risk management, it is worth it.

Be sure to speak with your insurance broker about further specifics on the kinds and amounts of insurance coverage are needed for your subcontractors..

Risk Allocation

Your subcontractor agreements should have very specific provisions to move the liability and risk from you to the subcontractor performing the work in regard to that subcontractor's work.

In commercial construction, this is easy, as most projects involve AIA or other project-specific subcontractor agreements. However, that is not always the case in residential construction. In residential construction, we recommend having your attorney prepare a master/standing subcontractor agreement with various risk allocation and other general provisions to be signed once by each of your subcontractors. For each project, best practices dictate that you have an addendum/contract document with price and scope of work details.

Talk with your lawyer about what provisions are appropriate for your master/standing contracts and for your project specific contracts to ensure that the liability is apportioned among parties and is fair and appropriate, including but not limited to appropriate indemnification provisions, insurance requirement provisions, remedy provisions, equipment license provisions, flow down/conduit provisions, and others.

Loss Prevention

Loss prevention in terms of your relationship with your subcontractors can be summarized with a variety of best practices. As a best practice, when selecting subcontractors to work with, it can be tempting to go with the lowest cost bid, however, that can turn out poorly for you. When making your selection, only utilize well-established, well-run, and well-qualified subcontractors considering price only after ensuring quality. Also, do not be afraid to end a relationship with a subcontractor, even if it is a long-term relationship, if the subcontractor's current employees and crew are not promptly and properly performing their work.

During the project, if a dispute arises due to owner complaints, it is important to give notice to the subcontractor as soon as you receive the complaint. As you follow your loss prevention process, you should include the subcontractor and ensure they understand the importance of the process, and contact your attorney regarding possible insurance claims. There are a few possible options that your attorney can advise you on: put the subcontractor's insurer on notice of an owner complaint, file a claim with the insurer (if you are additional insured under the policy), and/or later demand a tender of defense from the subcontractor's insurer based upon contractual indemnification language or your additional insured status.

Subcontractor Safety

Finally, most general contractors do not know that there are times in which they may be liable for safety incidents and injuries sustained by employees of one of its subcontractors. As a general rule under Iowa law, general contractors are not responsible for the safety of subcontractor employees. However, there are some exceptions, including the below-described exceptions:

- **Control Exception:** In some cases, courts have decided that a general contractor is liable for the subcontractor's employees' injuries when the general contractor has sufficient control over the manner and means of work, i.e., substantial control over day-to-day work and over means and methods of the subcontractor. General supervision, coordination and inspection of subcontractors and their work does not constitute sufficient control to trigger this exception.
- **Dangerous Conditions Known to the General Contractor.** In some cases, a court has ruled that a general contractor is liable for subcontractor injuries caused by dangerous conditions that were known to the general contractor, but not known or obvious to the subcontractor.
- **Other Exceptions.** Other exceptions exist under Iowa law, including where liability is allowed by contractor and where construction involves a peculiar, unreasonable risk of harm.

Protect Your Business

Using this multi-pronged approach, you can protect your business by minimizing issues with subcontractors, or if they do occur, handling the situation with a focus on the future of your business

Don't Judge an Insurance Policy by its Cover - September 5, 2017

Jodie Clark McDougal and Larry Heisler

Whether you are a developer, builder, design professional, subcontractor, or supplier, one of the most important aspects of risk management is ensuring both you, and any entities with whom you contract, have good insurance. But, do you really know if you have enough insurance and the types of coverage you need? Ask yourself the following questions and speak to your insurance broker (or find a new one) if you cannot answer them.

Beyond the typical CGL, E&O/PL, & Auto policies, are there other policies you need to protect your company?

Companies often forget to consider some of the other beneficial insurance policies that exist, so if you have not done so already, ask your broker about Employment Practices Liability Insurance, Business Interruption Insurance, Key Person Life Insurance, Data Breach/Cyber Insurance, Directors and Officers Insurance, and Pollution Liability and Environmental Insurance.

Do you have a "Choice of Counsel" endorsement?

Ask your broker about a Choice of Counsel Endorsement. This is one of the easiest ways to keep control over any potential litigation. With this endorsement, you are able to choose your lawyer, instead of using the lawyer(s) named by your insurance company. In litigation, where your business and personal reputation are at stake, it can be immensely helpful to have a lawyer who knows your business. The lawyer who writes and reviews your contracts, helps with your employment issues and general business matters, knows the ins and outs of your business, and is familiar with you and your approach to business, is often the best lawyer to represent you in the event of litigation. A Choice of Counsel endorsement allows you to use such lawyer as your chosen counsel in litigation covered under your insurance policy, instead of the insurance company's choice, who may not be familiar with you or your business.

Choice of Counsel is not automatic, so you need to ask specifically if you can get this endorsement. Sometimes your insurer will allow you to get the endorsement, sometimes it requires an additional fee, and occasionally they will not allow it, but it does not hurt to ask.

Are you truly aware of all of the exclusions in your Commercial General Liability Insurance (CGL) policy?

Among other things, you and your broker should do the following:

- Ensure your CGL policy **includes** coverage for Ongoing Operations and Products/Completed Operations;
- Ensure your CGL policy does **not** have a "subcontractor exclusion";
- If your CGL policy has an exclusion for contractual liability, consider the costs for such coverage; and
- Ensure your broker explains, and you understand, all other exclusions in your CGL policy.

In addition, other policy exclusions that may appear in your CGL policy include exclusions for "high risk" trades, pollution damage, mold damage, cost of defense, and exclusions relating to whether your policy is a claims-made or claims-occurrence policy.

Do your subcontractors or other entities with whom you contract truly have sufficient insurance?

Developers and general contractors often forget that they should be annually collecting Certificates of Insurance and Additional Insured Endorsements to ensure their subcontractors have the same types and levels of coverage as they have; have named the builder/developer/general contractor as an "Additional Insured" on their policies; have coverage that is "primary and on a noncontributory basis"; and have coverage for Ongoing Operations and Products/Completed Operations as part of their CGL policies. It is of no use to say you require insurance of your subcontractors if you do not enforce the rule and collect Certificate of Insurance and Additional Insured Endorsements each year.

As you consider all the risks that your business faces, reviewing your insurance annually and asking the appropriate questions of your insurance broker is an important step in your risk management process. Consult with your insurance broker and your attorney to ensure you have the right coverage appropriate for your business.

Statute of Repose Bill Signed Into Law - April 18, 2017

Jodie Clark McDougal

What Does the New Statute of Repose Law Mean for Me?

On April 13, 2017, the Governor signed [SF413](#) into law, which is a law reducing the Statute of Repose applicable to construction claims. This is great news for the Iowa construction industry.

This law will reduce Iowa's current 15-year Statute of Repose for all claims arising out of a defective or unsafe condition of an improvement to real property to 8 years for commercial construction and 10 years for residential construction. Please note that the law has the following exceptions:

1. claims regarding nuclear power plants, interstate pipelines, and fraud/intentional misconduct claims will maintain a 15-year repose period, and
2. if the unsafe or defective condition was discovered within one year of the expiration of the new statute of repose period, then the repose period would be extended for one additional year.

When Does the New Statute of Repose Law Take Effect?

The new statute of repose law will take effect on July 1, 2017. The law does not have any retroactive effect. In addition, the law contains an express provision regarding applicability:

Sec. 2. APPLICABILITY. This Act does not apply to an improvement to real property in existence prior to the effective date of this Act or to an improvement to real property, whether construction has begun or not, that is the subject of a binding agreement as of the effective date of this Act.

This means that, if the construction project has not begun as of July 1, 2017 **and** if your company's construction or design agreement has not yet been executed as of July 1, 2017, then the new, shorter statute of repose will apply to your company.

Conversely, the old 15-year statute of repose applies if **either** the "improvement to real property" is already "in existence" as of July 1, 2017, **or** your company has already signed "a binding agreement" regarding the construction project as of July 1, 2017 regardless of whether construction on the project has begun.