Loss Control for Contractual Liability

It is my view (which has been myopic at times) that Loss Control Professionals are either incredible safety people or property masters that can keep an old barn from catching on fire and burning down. When it comes to liability getting beyond premise liability, the knowledge is not as good as it could be. This article will look at the liability of contractors as it pertains to subcontractors.

Coming from the brokerage community as a producer, my old mentor once told me. "Subs will kill you every time." Sounds counterintuitive, after all the sub is hired because the insured does not have the skill to perform that part of the project. However, it is our insured that is hired by the owner or GC. It is our insured that will get the blame for problems resulting from their sub. So how do we control that risk?

Loss control methods of controlling the risk include.

- Selection – How are the subs chosen for the work.
    - Best practices include qualification process, referrals, financials, resume, EMR's, hiring practices, etc.
- Supervision – Supervision is a double edged sword.
    - Some courts state that the amount of supervision over a sub is directly related to the liability, so if your insured supervises your sub, then your insured will have more liability.
        - OSHA calls your insured a "controlling employer" and your insured IS responsible for their safety.
    - Most insurance companies want to see a degree of supervision to ensure that subs are following safety protocols.

Post Loss

The successful execution of post loss risk management depends on the successful "pre-loss strategy of contractual risk transfer," where most loss control professionals don't have the knowledge.

Contractual Risk Transfer – There are many aspects of risk transfer in the contract and most are not insurable. So we will look at only two aspects. The indemnification agreement language and the insurance requirements. Both of these are the most critical parts of the general liability of a contractor (contractors sign contracts as a matter of course) but it is the least emphasized in the loss control report.

Depending where they are on the food chain, contracts with subs (called downstream contracts) and for contracts that our insureds sign to be able to perform work and be in existence (called upstream contracts) are essential. Upstream contracts allow our insureds to stay in business and negotiating the

best terms and conditions is always desirable and not always practical. If your insured is an electrician and competing with 50 other electricians, they are not really caring what the underwriter wants stricken from the contract….. they just want the damn job, as a result, this will not be discussed in this article.

Downstream Contracts – The indemnity language (aka hold harmless for the purposes of this discussion) and additional insured language is crucial here. To be fair, the indemnity language should be reviewed by lawyers and the insurance language should be reviewed by a licensed broker yes as a LC consultant it is not a luxury you have in order to give the underwriter what they want.

Indemnity Agreement

Disclosure. I am not a lawyer. I cannot tell you what is proper indemnity agreement language but there are some key items to look for as a LC consultant that can suggest a recommendation should be made to have the indemnity language reviewed by an attorney.

"To the fullest extent allowed by law"

This phrase or similar phrase is important.

To keep it simple, there are 3 types of indemnity agreements that are recognized, broad form, intermediate, and limited. Without getting technical, a broad form indemnity is the most desirable if your insured sits at the top of the food chain, however it may be against the law in their jurisdiction. In many jurisdictions if the indemnity goes beyond the allowance of the law, THE ENTIRE INDEMNITY AGREEMENT IS STRICKEN FROM THE CONTRACT. In many jurisdictions, adding in this phrase will provide that the indemnity agreement is valid up to the allowance of the jurisdiction.

"Bodily Injury, property damage, death"

At minimum these three causes of loss should be in the indemnity provision. These are the insurable claims under the CGL policy.

"including legal fees and expenses"

There is a section of the GL policy that requires the contract to state that legal fees and expenses be a required item in the indemnity agreement in order for the carrier to pay for those items.

Additional Insured

Most surveys ask the simple question. "Does the insured require that subcontractors name them as an additional insured?"

1st rule of thumb. If the requirement is not in the contract (you should be getting a copy of one), then the answer is a BIG FAT RESOUNDING NO!!!!!

Part 2 will discuss the different additional insured agreements and how the language in the contract is critically important to align with the proper contractual risk transfer.