



Contractual Risk Transfer Toolkit



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Effectively Managing Your Contractual Risk

What is Contractual Risk Transfer (CRT) and why is it important to your business?

Contractual Risk Transfer is the process of transferring risk via a contract or agreement and is a critical component of any risk management program for businesses who subcontract work. CRT plays an important role in allocating risk and requires the use of a written, signed and dated contract. This contract can help to protect your business in the event of a claim and should clearly define roles and responsibilities. Important to note, any contract or contractual language should be drafted or reviewed by competent legal counsel in the jurisdiction where the work is to be performed.

To support the business needs of our customers, we offer a CRT toolkit which provides:

- Contractual Risk Transfer Best Practices
- Actual Claim Scenarios
- Contractual Risk Transfer Checklist
- Sample Contract Templates



| a Berkley Company

Contractual Risk Transfer Best Practices

There are many critical elements which should be included in a risk transfer agreement. The following section lists the best practices for drafting and reviewing contractor/subcontractor agreements. Each of the best practices should be followed when drafting or reviewing a contractual agreement to ensure that the risk is properly transferred to the responsible party.



Contractor/Subcontractor Agreements – Best Practices

Using a written, signed and dated contract is considered important for many business reasons. For property owners or contractors hiring subcontractors, a number of items should be considered and/or incorporated into a written contract to help protect assets in the event of an accident. Additionally, having a written contract that clearly allocates risk, roles and responsibilities saves time and money when a loss occurs.

Although the scope, length and complexity of these agreements may vary depending on the project and the contracted or subcontracted work, a few key items to consider in any contract include the following:

1. A hold-harmless, defense and indemnification provision drafted in accordance with the risk transfer laws of the jurisdiction where the work will be performed. This provision should pass the liability back to the party that will have had the most direct control of the situation, giving rise to the alleged loss (e.g. the subcontractor performing the work). Indemnification language should require the subcontractor to defend and indemnify the contractor and hold the contractor harmless against liability arising out of the work performed by the subcontractor (including expenses, attorney's fees and other costs of defense) to the fullest extent permitted by law. In addition to the foregoing, a waiver of subrogation clause should be included whereby the subcontractor agrees to waive any right against the contractor for loss or damage to the extent covered by applicable insurance.
2. An insurance procurement clause outlining the limits and type of insurance (e.g. workers' compensation and liability insurance) that must be carried by the subcontractor. This provision should state that the contractor, along with any other party for whom the contractor must name as an additional insured on its own policies for the project, must be named as an additional insured on all applicable liability policies of the subcontractor. In addition, the insurance procurement clause should state that the additional insured coverage under the subcontractor's liability policies will be primary and non-contributory to any other applicable insurance the contractor may carry and that the additional insured status afforded will be for both ongoing and completed operations arising out of the work of the subcontractor. Required limits should be determined with the help of the contractor's agent or attorney, but as a rule of thumb, they should at least be equal to the limits of liability coverage under the contractor's own policies.
3. In addition to the above and any other desired provisions, the written contract should clearly explain the term and scope of the work, the payment terms, and to the extent possible, clearly state the respective duties, obligations and responsibilities of each party to the contract. If the work being subcontracted is also the subject of a master contract, then to the fullest extent possible, the subcontractor agreement should incorporate by reference the terms and conditions of the master contract and state that the subcontractor assumes all of the duties and responsibilities of the contractor under the master contract for all of the work under the subcontract. The contract should include a "governing law" provision stating the jurisdiction the parties intend to govern the agreement; a "severability" clause that provides to the extent any word or provision of the contract is found to be unenforceable by a court of competent jurisdiction, the remainder of the contract remains valid and enforceable to the fullest extent permitted by law; and an "entire contract" clause confirming that the contract reflects the entire agreement of the parties and supersedes any prior agreement.

An executed contract and insurance certificates should be in the owner or contractor's possession prior to the subcontractor entering the site or undertaking any work in connection with the project. The owner or contractor should check all insurance certificates for the following: expiration dates; its name (and any others) named as an additional insured in accordance with the requirements outlined in number (2) above (i.e. not simply a certificate holder); coverage limits; types of coverages; and coverage placed with recognizable insurance carriers.

Example of a Defense, Indemnity and Hold Harmless Provision

To the fullest extent permitted by law, Subcontractor, on behalf of itself, its employees, agents, successors and assigns, hereby releases and agrees to defend, indemnify and hold harmless Contractor, its officers, directors, employees, agents, affiliates, successors and assigns from and against any and all losses, damages, claims, suits, costs and/or expenses, including reasonable attorneys' fees, resulting from the actions or inactions of Subcontractor, its managers, officers, employees, subcontractors or agents and arising out of Subcontractor's work or services performed under this Agreement.

Example of an Insurance Procurement Provision

Subcontractor agrees to maintain workers' compensation coverage for the benefit of its officers and employees during the term of this Agreement to the fullest extent required by law. Subcontractor further agrees to purchase and maintain at all times during the term of this Agreement, insurance of the types and minimum amounts specified in Exhibit A, attached hereto and incorporated herein by reference. Subcontractor further agrees to have Contractor named as an additional insured on all of its liability insurance policies on a primary and non-contributory basis for both General Liability and Umbrella policies. Furthermore, Completed Operations coverage should be maintained by the Subcontractor.

Example Insurance Schedule

Type of Coverage	Limit of Liability
Workers' Compensation	Statutory
Employer's Liability	\$500,000/\$500,000/\$500,000
Comprehensive General Liability	\$1,000,000/\$2,000,000
Including:	
Premises Operations	
Completed Operations	
Products Liability	
Blanket Contractual Liability	
Broad Form Property Damage	
Comprehensive Auto Liability	\$1,000,000
Including:	
Owned	
Non-Owned	
Hired	
Umbrella	\$5,000,000
Errors & Omissions (Professional Liability)	\$1,000,000

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Actual Claim Scenarios

What may happen if the appropriate contractual risk transfer is not in place?

A contract with missing elements may have a negative impact when deciding who will be held responsible in the event of a claim. It is important to consult with legal counsel to ensure the contract will respond as intended. With the correct contractual risk transfer elements, the out-of-pocket expenses paid because of the claim may be eliminated or reduced. The three scenarios explained on the following page are based on actual events.



Actual Claim Scenarios

Insufficient Subcontractor Limits of Liability Insurance

A contractor is hired to remodel a store in a busy commercial area. The contractor's painting subcontractor leaves a bucket of oily rags in the alley next to the store overnight, and they ignite, completely destroying the neighboring building. The cost to replace the building and its contents is over \$2.8 million.

The contractor's contract with the painting subcontractor contains an Additional Insured provision, but it only requires the subcontractor to carry liability limits of \$500,000. The subcontractor has no assets beyond the policy's \$500,000 limit, and the contractor is sued for the additional \$2.3 million in damages. The contractor's own liability insurance carrier must defend against the lawsuit and pay any covered amounts up to the limits of liability coverage, leaving the contractor exposed to any amounts in excess of its own insurance. Had the contractor required the subcontractor to maintain higher limits of liability insurance, this excess exposure may have been reduced or eliminated.

No Contract to Transfer Risk Responsibility

A business owner has a retail store with a large parking lot. The owner hires a snow removal contractor to maintain the lot during the winter months. The business owner has known the contractor for years, so the plowing agreement is a handshake arrangement, with no documentation of any risk-transfer measures or standards for the snow removal contractor's performance. A few days after a heavy snowstorm in January, a customer coming into the store slips and falls, seriously injuring his back. The customer requires two spinal surgeries.

The business owner tenders the claim to the snow removal contractor, asserting that the contractor was supposed to check the lot periodically for icy conditions and other hazards; the contractor maintained that he was only obligated to plow snow once after each storm subsides, which they did in this instance.

The injured customer sues the business owner (as owner of the property) for \$180,000 in medical expenses, \$100,000 in lost wages, and compensation for pain and suffering. Evidence shows that the lot was not properly maintained for customers at the time of the accident, but with no written contract, the contractor's actual responsibilities become a word-versus-word dispute with the business owner. Since there is no written contract detailing the scope of responsibilities of the contractor and no contractual risk transfer language addressing items such as indemnification, the business owner is unable to successfully shift responsibility to the snow removal contractor. The jury in the case renders a decision against the business owner and awards the injured customer \$400,000.

Missing Additional Insured and Indemnification Clauses

A general contractor is hired to construct a new hotel. An employee of the general contractor's masonry subcontractor is on scaffolding working on an elevator tower when he falls 20 feet to the ground, becoming paralyzed. The scaffolding had been erected by the masonry subcontractor and lacked sufficient railings, but since the injured worker cannot sue his own employer (due to the workers' compensation laws), he files a lawsuit against the general contractor. In that lawsuit, the injured worker alleges that the general contractor had a duty to ensure safe conditions over the entire jobsite.

The general contractor's contract with the masonry subcontractor does not contain any risk-transfer language, such as indemnification and insurance requirements. If there had been an Additional Insured requirement in the contract, the general contractor could have claimed coverage under the subcontractor's general liability policy, and if there had been an indemnity clause, the general contractor could have tendered the defense of the claim to the subcontractor. Since neither of these provisions exist in the contract, the claim remains under the general contractor's policy, with the risk of an excess verdict weighing on the general contractor due to the seriousness of the injuries.

Contractual Risk Transfer Checklist

There are many elements included in a contractual risk transfer program and a checklist can be a helpful tool when reviewing a contract to verify the necessary elements have been included in a contract. Please note, it is crucial to pay attention to any state specific required language and statues of repose. Insurance limits should also be verified to ensure the contractor/subcontractor has sufficient insurance to cover potential losses.



Contractual Risk Transfer Checklist

Contract Elements

Term and scope of work
Duties, responsibilities, obligations of each party
Payments
"Governing law" provision, "severability clause", "entire contract provision"
Master contract provisions where applicable
Insurance and indemnification requirements

Reviewed an executed contract

- Signed by both parties
- Date executed
- No cross-outs or alterations
- Used with all subcontractors
- No operational exclusions or action over exclusions apply to general liability

Indemnification

- "To the fullest extent permitted by law"
- Duties
 - Indemnify
 - Hold Harmless
 - Defend
- Type of clause (State reference below)
 - Broad ("arising out of")
 - Intermediate ("caused in whole or in part by")
 - Limited ("to the extent caused by")

Minimum Carrier Rating

- A- (excellent) rating by A.M. Best and be qualified to do business in the state where the project is located

Insurance Requirements*

- Auto
 - Limits \$1,000,000
 - Primary Non-Contributory
 - Additional Insured
 - Notice of Cancellation – 30 Days
- General Liability
 - Limits \$1,000,000/\$2,000,000
 - Additional Insured
 - Ongoing Operations
 - Completed Operations
 - Years State Specific
 - Primary Non-Contributory
 - Waiver of Subrogation
 - Notice of Cancellation – 30 Days
- Workers' Compensation
 - Limits \$500k/\$500k/\$500k
 - Waiver of Subrogation
- Umbrella
 - Limits \$5,000,000
 - Primary Non-Contributory
 - Notice of Cancellation – 30 Days

**Higher limits acceptable, must not be less than insured's and/or contract requirements*

Example of a Defense, Indemnity and Hold Harmless Provision

To the fullest extent permitted by law, Subcontractor, on behalf of itself, its employees, agents, successors and assigns, hereby releases and agrees to defend, indemnify and hold harmless Contractor, its officers, directors, employees, agents, affiliates, successors and assigns from and against any and all losses, damages, claims, suits, costs and/or expenses, including reasonable attorneys' fees, resulting from the actions or inactions of Subcontractor, its managers, officers, employees, subcontractors or agents and arising out of Subcontractor's work or services performed under this Agreement.

State Specific Needs*		
State	Indemnification Language Permitted	Statute of Repose
CT	Limited – "to the extent caused by"	7 years
MA	Intermediate – "caused in whole or in part by"	6 years
ME	Broad – "arising out of"	10 years
NH	Limited – "to the extent caused by"	8 years
NY	Limited – "to the extent caused by"	none
VT	Broad – "arising out of"	none
RI	Limited – "to the extent caused by"	10 years

**State laws are subject to change over time*

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Sample Subcontractor Agreement Templates

Sample contractual risk transfer templates can be downloaded by clicking on the document titles below. These templates are samples to assist in development. All final contracts should be reviewed by legal counsel to ensure they are written with your best interests in mind.



[Sample Owner-Contractor Agreement](#) 



[Sample Contractor-Subcontractor Agreement](#) 





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