

Specifications for Special Situations

Summary:

This chapter provides general information about special insurance situations. These include:

Contracts for consultants such as architects, engineers, auditors, and others

Major construction projects

Environmental services contracts

Property management agreements

Professional Services Contracts

Professional Liability insurance protects against losses that occur when a professional fails to practice his or her art to the standards usual and customary to that profession. The types of losses that can occur under such circumstances are often excluded in General Liability policies. Thus, Professional Errors and Omissions Liability insurance is also needed.

When contracting for professional services, your Authority should ensure that the other party to the contract (*Consultant*) carries sufficient professional and general liability insurance to protect against losses that may result from his/her negligent acts or omissions. Personal Injury liability lawsuits arising out of work done for your Authority will name the Consultant, your Authority, and any other connected party as defendants. Even though the Consultant may be the party liable under the law, your Authority, in the event of even the slightest joint liability, could still be required to pay for all or part of a loss if the Consultant carried insufficient insurance or was uninsured. This is an example of what is commonly referred to as the deep pocket exposure often faced by public agencies.

As either General Liability, Professional Liability, or both types of insurance may ultimately pay for the loss, your Authority should require both types of coverage from the Consultant. If the Consultant will use an automobile in any phase of the work performed for your Authority, you should also require evidence of Automobile Liability insurance. In some cases, the Consultant will own no automobiles and therefore may not purchase Automobile Liability coverage. In that event, the Consultant can obtain an endorsement to the General Liability policy which provides coverage for non-owned and hired automobiles. The Consultant should have this coverage anyway, so your Authority's requirement will not pose a hardship.

Unless the Consultant is a sole practitioner, your Authority should require evidence of Workers' Compensation insurance. Even though the contract with the Consultant may make it clear that the Consultant is hired as a contractor and not as an employee, the courts may find a way to provide Workers' Compensation coverage through Authority resources in the event that a Consultant's employee is injured and the Consultant has failed to purchase the necessary insurance.

Special care is needed in drafting indemnification requirements for the contract with the Consultant. Many Professional Liability insurers exclude liability assumed under a contract by their insureds. On the other hand, most General Liability policies in use today automatically provide coverage for Bodily Injury and Property Damage liability assumed under contract. Therefore, the indemnity agreement should be carefully worded so that the Consultant agrees to indemnify your Authority for Bodily Injury or Property Damage arising out of the Consultant's alleged negligent acts or omissions in performance of the work. This assumption of liability is insurable under General Liability policies.

The exhibits found in *Section 6A* provide sample specifications for Consultant insurance requirements. The limits recommended by these sample specifications are \$1 million. As with all contracts, you should pay special attention to the appropriateness of limits included in the specifications. In some cases, smaller consulting firms may be unable to obtain (*or afford*) a limit of \$1 million for Professional Liability, although that amount should be required for General Liability coverage. On large projects, or those with significant potential for loss such as lead or asbestos abatement or disposal, higher limits are appropriate and firms unable to obtain these limits may be precluded from bidding.

You must also exercise judgment on the subject of minimum acceptable insurer requirements. For some professions, limited insurance markets exist for Professional Liability coverage. There may be no insurers meeting your Authority's standard insurer requirements that are willing to write the particular kind of coverage required. Certain specialty insurers or captive insurers formed to write Professional Liability only, may not be rated, or may have received conditional or preliminary ratings. Where a highly rated Professional Liability insurance carrier is available, the rating may be due to A. M. Best's practice of fleet rating, or ascribing to a subsidiary the rating of its parent. Such an insurer may not provide the best coverage. A lower-rated company may provide broader coverage.

In these cases, you should be prepared to relax the standard insurer rating requirements. When doing so, you should attempt to evaluate the financial condition of the insurer, determine how long it has been writing the kind of Professional Errors and Omissions Liability coverage in question and determine whether or not the insurer is admitted in your state. Many carriers writing this coverage are non-admitted. Contact your risk management advisor for assistance in this area.

Because Professional Errors and Omissions Liability insurance is almost always written on a **claims-made** basis, Authorities that hire architects or engineers should be concerned about coverage for latent defects or design errors that may result in future claims after the current coverage has expired. One solution to this problem is to require the design professional to agree to maintain coverage for a specified period after the project has been completed or to purchase an extended reporting endorsement.

Currently HUD requires a five-year extended reporting period. However, this requirement may be very difficult to enforce. If the project is large enough, the architect's or engineer's insurer may provide a project policy in the name of the Authority, with a built-in claims reporting tail. The policy may cover all design professionals on a project. This arrangement affords greater protection for the Authority's interests but a disadvantage of a separate project policy is that an additional premium will be charged. This is only cost effective on large projects (*when architects and engineering fees exceed \$1 million*).

This area of Professional Errors and Omissions insurance does not lend itself to the application of hard-and-fast rules. Flexibility and the exercise of discretion on your part are needed to protect your Authority. Although there are no absolute guarantees to assure that your Authority will not be forced to pay a loss due to errors or omissions of its consultants, the practices described above can help provide a reasonable measure of protection.

Property Insurance

The transfer of responsibility for third party liability claims occurs in most contracts. Responsibility for damage to property owned by one of the parties is also addressed in some contracts, although this is less frequent. There are two primary situations where responsibility for property loss should be clearly spelled out:

1. Buildings in the course of construction
2. Leases involving extensive tenant improvements and betterments

Builder's Risk (*also known as Course of Construction coverage or Installation Floater.*) is the insurance purchased for property under construction. This type of insurance covers property in place but under construction as well as the equipment and materials to be installed. Premiums take into account the changing values as construction nears completion. In most cases, your Authority should arrange for Builder's Risk insurance on construction projects through the Contractor.

Items to consider include:

- **PERILS:** Coverage should include all risk insurance. Earthquake coverage is optional based on the needs and location of the project. For example: earthquake coverage must be included if funding for the project or financing arrangements (*i.e., bonds*) require it.
- **DEDUCTIBLES:** Deductibles should be reasonable in relation to the non-insurance assets of the parties and the size of the project. If the other party to a contract has a large deductible, but does not have sufficient assets to pay that deductible when a claim occurs, the Authority may have to pay it. Don't let that happen to your Authority.
- **PROPERTY COVERED:** At minimum, the insurance should cover the full insurable value of the project or completed improvements. It may, at your Authority's option, also include consequential loss insurance if your Authority could be harmed financially because of delay due to an insured loss. Coverage is available for both Loss of Revenue (*rents or earnings*) and for Additional Interest (*costs or expenses*).
- **LOSS PAYMENTS:** Depending on the circumstances of the contract, your Authority most often should require that any loss payments be made to your Authority (*i.e., loss payee*). Sometimes the funding source may want to be the loss payee.
- **VALUATION BASIS:** Coverage can be written based on the completed value of the project or by reporting changes in value on a scheduled basis. Usually, the former method is preferred as it is less complex and there is less of a chance of errors resulting in inadequate insurance.

Since Builder's Risk is written specifically for a project, you should receive and retain a copy of the loss payee endorsement for each project covered by Builder's Risk insurance.

Tenant's Improvements and Betterments

Property insurance should be required where your Authority has a continuing interest in improvements or betterments installed by a non-residential tenant in one of your properties. Many leases require that such improvements revert to the property owner at the completion of the lease. Often the value of these improvements is factored into the lease cost. In such cases, you should require the tenant to provide sufficient insurance to cover the full replacement value of the improvements, and to name your Authority as loss payee on the policy. You should also require a copy of the policy for your review.

Contracts with Private Parties for Use of Public Property

Occasionally, your Authority will enter into contracts with private individuals. A common example may be rental of a facility for private usage, such as a park, meeting hall, or historic building for holding a wedding or other private gathering. Another example is rental of a booth at a community fair. As private individuals (*and some small non-profit organizations*) do not normally purchase commercial liability insurance, other forms of financial guarantee may be needed. If a fair or carnival will be held at your property by or in association with resident organizations, you should consider the use of a Special Events insurance policy.

Most homeowner insurers will provide additional insured coverage to another party if requested. An individual who purchases a homeowners policy or tenant's package policy should be able to ask his/her insurance agent to provide the additional insured endorsement when they are using your property..

Another problem you face in this situation is the issue of limits. Most private individuals do not carry large amounts of liability insurance. Unless the homeowner purchases Personal Umbrella liability coverage, limits on the homeowners or tenants policies are likely to be in the vicinity of \$300,000 to \$500,000. However, the risks involved in a private party event may be just as severe as those in a commercial contract. Crowd exposures and food poisoning are examples.

There may be instances in which you cannot obtain any insurance coverage for the use of your facilities. In those cases you could implement necessary safety controls that limit the probability of a claim occurring and permit the event to go on without having the insurance. A decision must be made regarding whether or not the function creates a benefit sufficient to outweigh the expense to the

Authority of a claim for which it will be responsible. You should discuss those situations with your risk management advisor.

Environmental Services Contractors and Consultants

Environmental issues are becoming an increasing concern and are often the responsibility of local governmental agencies; both as the owners of contaminated property and as the entities responsible for the permit process. Municipalities are increasingly recognizing their exposure as generators and transporters of hazardous materials and pollutants. Municipalities are involved in issuing encroachment permits for access to their property involving both groundwater and soil contamination testing and potential cleanup of waste generators within their communities.

Many housing authorities are facing issues concerning lead based paint and asbestos.

There are very few insurance companies underwriting these unusual risks, and they are reluctant to modify their standard policy terms. Disposal of pollutants by your Contractors, such as lead and asbestos poses a significant and long-term problem. According to the current superfund legislation and regulations, the generator of a hazardous material (*you*) is jointly and severally liable for improper clean-up or disposal of those materials. For this reason you must carefully select contractors, haulers and disposal sites and have the Authority named as additional insured at every opportunity. The Authority can be held financially responsible for mishandling by a hauler that you hire or for a pollutant's escape from a landfill.

Exhibit 16 (*Section 6A*) contains insurance requirements appropriate for environmental contractors and/or consultants. If you cannot verify the A. M. Best's rating of the Contractor's insurer, or if the coverage is written by a risk retention group or captive insurance company, you should check with your risk management advisor for further information about the market.

NOTE: Automobile, Pollution, Asbestos Pollution, and/or Professional Errors and Omissions Liability insurance carriers may not name the Authority as additional insured. If the Authority cannot be named as additional insured, you should request a letter from the insurance company confirming its position regarding coverage extensions to the Authority.

Property Management Agreements

Housing authorities sometimes find it advantageous to hire property management professionals to manage some of their properties. The industry standard is to require the owner (*housing authority*) to indemnify the property management firm for any negligent acts or omissions of the property manager's employees. This industry standard should and can be amended by requiring the property managers to assume responsibility for losses caused by their employees. HARRP cannot extend its coverage to property managers.

**HARRP has a model Property Management Agreement
that can be found at www.harrp.com under Forms.**