



**MAKE SURE YOUR NEXT CONSTRUCTION CONTRACT IS WRITTEN TO REDUCE YOUR RISKS.**



**THE  
HARTFORD**

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# MANAGE YOUR RISK WITH A CAREFULLY DRAFTED CONTRACT.

Contracts are an integral part of doing business, particularly in a complex industry like construction. Unfortunately, they're often under-addressed or even overlooked in the risk management process. But their importance can't be overemphasized - whether you're a contractor, subcontractor or a wrap-up sponsor.

Well-written contracts can:

- Clarify agreements
- Improve project outcomes
- Create good working relationships between the contracting parties

In general, organizations are legally responsible for any action or inaction that directly leads to injury, property or economic damage. However, common state and federal laws usually permit business associates to make contractual arrangements that deal with the financial burden of losses.

THE BASICS ON CONTRACTS	
WHAT IS A CONTRACT?	WHY CONSULT AN ATTORNEY?
A legally enforceable promise between two or more parties. In construction, contracts often require one of the parties to pay or <i>indemnify</i> the other party for a loss they suffer while honoring the contract.	A contract has important legal and insurance consequences that will impact your business. An attorney is best qualified to interpret what those consequences could be, and to advise you accordingly.
WHAT MAKES IT LEGAL?	WHY ARE WRITTEN CONTRACTS BETTER THAN ORAL?
There must be an offer, an acceptance and consideration.	Properly drafted contracts provide a clear understanding to each party. Unwritten agreements, while legally enforceable, can be misinterpreted, particularly after a loss. That's why oral agreements are not recommended.
WHY ENTER INTO A CONTRACT?	
Used properly, a contract is an effective way to manage your risk.	
<p>To <i>indemnify</i> is to <b>protect</b> someone or an organization by promising to pay for the cost of damages, loss or injury.</p> <p>An <i>indemnification agreement</i> is a contract that promises such protection.</p>	



## CONTRACTS CAN BE USED TO TRANSFER RISK - TO YOUR BENEFIT

In this best practices, developed by The Hartford, we'll focus primarily on how contracts can be used from a risk transfer perspective. It reflects our first-hand experience working with construction clients like you. And it includes input from our Risk Engineering, claims and industry professionals, reflecting knowledge obtained from many judicial decisions.

## PREPARE:

### START YOUR RISK MANAGEMENT PLAN LONG BEFORE NEGOTIATING A CONTRACT

Risk management is a systematic process for cost-effectively managing your company's resources and activities to achieve your objectives. It involves organizing, planning, directing and controlling resources to minimize the financial impact of an event upon your business.

So start drafting your contract long before you sit down with your business partners. You should:

**Have a clear vision of your company's risk management objectives.** This will allow you to make decisions that are cost effective, balancing expenditures for risk financing with those for risk control.

**Support the proper allocation of funds** among an organization's risk management activities and its general operations.

**Plan carefully and deliberately.** Deals that are negotiated hastily, or with incomplete information, often work to the detriment of the party least capable of handling them.

**Establish a walk-away position.** Sometimes, when you're unable to negotiate a fair and equitable deal for both parties, it makes sense to walk away. Establish your limits ahead of time.

## PROTECT:

### HELP PROTECT YOUR BUSINESS WITH INSIGHTS FROM THE HARTFORD

We share your desire to control costs and limit your exposures. To help, we've prepared the checklist in this brochure to help you identify potential weak points in your construction contracts.

Here are some helpful suggestions to follow along with the checklist of basic core and supplemental provisions:

- Submit all agreements you draft to your attorney to review and evaluate before signing.
- Submit documents to your attorney that name you as an additional insured on any subcontractor's insurance policies.
- Use specific language in your contracts. Experience tells us that a contractor's interests may be best served when the wording is more specific - and if the sections of the agreement outlined in the insurance provisions express more specific coverage requirements.



# CONTRACT MANAGEMENT CHECKLIST

## CORE PROVISIONS TO INCLUDE

What does your contract require of subcontractors? Be specific. Ask yourself these questions while drafting your contract. Then spell out your requirements, making sure you include the following core provisions.

### Does your written contract require subcontractors, including any lower tier subcontractors, to:

- Hold harmless, defend and indemnify you and any upstream parties you are required to defend for a liability arising out of their work or negligence?**  
(Tip: Include attorney fees and litigation costs.)  
An indemnification provision (aka a hold harmless provision) typically involves a conscious risk assumption by one party, and a risk transfer by the other party. With an indemnity agreement, the indemnitor agrees to pay the indemnitee if the latter suffers a loss. These clauses are widely used in construction contracts to control distribution of losses and to clearly identify who must pay.
- Endorse you as an additional insured on their general liability policy?**  
The policy should use ISO's 2004 CG 2010 and CG 2037, or equivalent, providing coverage for both ongoing and completed operations.
- Carry the following coverage parts and minimum limits of liability with an admitted A-rated carrier backed by the applicable state guarantee fund?**
  - » General liability: \$1MM
    - Limits to apply per year and per project
    - ISP 2004 edition equivalent or broader
    - No anti-stacking (aka non-cumulation or progressive injury limitations)
    - No exclusions for the scope of work you perform
    - Ask whether the coverage is being offered on an *occurrence* or *claims-made basis* or as part of a *self-insured-retention (SIR)* program. It could make a difference.
  - » Commercial auto: \$1MM
  - » Employer's liability: \$500K (\$1MM is suggested best practice)
  - » Workers' compensation statutory limits
  - » Umbrella: \$5MM
  - » For each coverage part, higher limits may be warranted, depending on the job.

- Confirm required coverages and limits prior to beginning work using a certificate of insurance?**
- Provide additional insured coverage to you on a primary and non-contributory basis on their general liability and auto policies (umbrella is a suggested best practice)?**
  - » A primary insurance clause can ensure that the additional insured policy will be primary to the contractor's own insurance policy. Typically, the party providing the general liability insurance should have its insurer endorse its policy accordingly.
  - » A non-contributory clause ensures that such additional insured policy will contribute and not seek contribution from the contractor's own insurance policy.

- Waive any claims against the general contractor to the extent of any valid and collectible insurance and obtain a waiver of subrogation endorsement on their auto, EL/WC, GL, property and umbrella policies?**

A waiver of subrogation prevents the insurer from attempting to seek damages from a third party who causes loss to the insured. With general liability, property, workers' compensation and employer's liability, the right of subrogation may be waived prior to the occurrence or accident. This could be a significant form of protection.

## OTHER PROVISIONS TO CONSIDER

Have your attorney determine whether the core and additional provisions listed below conform with public policy in the jurisdiction where your work will take place. Find out whether the provision can and/or should be included in your agreements.

### Does your written contract require subcontractors to:

- Provide the additional insured with completed operations coverage for the duration of the statute of repose in the subcontractor's predominant state of operations, or 10 years?**
- Provide additional insured coverage on a primary and non-contributory basis on their umbrella policy?**
  - » This will add an additional layer of protection to the umbrella policy, just as a similar provision enhances the general liability policy.
- Provide you with at least 30 days written notice prior to policy cancellation (60 days is a best practice)?**  
All insurance contracts contain cancellation provisions. While it's often difficult to keep track of other policies, make sure the information provided to you is accurate and current.

## BASICS TO INCLUDE IN YOUR CONTRACT

If you decide to use a contract to indemnify your company, your construction contract should address the following elements before you begin work. (There may be more, depending upon the scope of the project.):

**Who the parties are.** Include names and addresses.

**The work to be completed.** Be specific, particularly if some of the work will be off-site. You'll also need to address change orders, completed operations and defective work claims.

**All the terms and conditions of the agreement.** Agreements that are incomplete, or not executed in a timely manner, can lead to problems. Be sure to include every aspect of the job, even if it seems inconsequential.

**Choice of law.** All parties should specify which state's law applies to their contract. In the event of a claim, this will help a court interpret the agreement. Understand that, even with this agreement, courts will use their good judgment to arrive at an equitable resolution.

**All agreements.** Don't simply refer to other agreements or documents in your contract – include them. Generally, courts look unfavorably on agreements that attempt to expand a party's liability by referring to another document.

## INSURANCE AGREEMENT CONSIDERATIONS

If the firm you're doing business with is using an insurance company, there are important issues to consider whether you're a general, prime or subcontractor – or even a wrap-up sponsor. Your perspective may be different but the issue is not.

**Resist all requests to add named insured coverage onto your policy.** Named insured coverage could trigger coverage for events neither intended nor contemplated. There are more effective ways to handle these requests.

**It may be desirable to consider a separate policy** for owner's and contractor's protective (OCP), railroad protective or joint venture coverage. Your Hartford underwriter can provide you with additional information.

**Certificates of insurance (COI).** These are intended to be evidence of insurance, not an insurance contract. The document should include relevant information, such as the named insured, policy number, policy terms, limit and coverage by line of business. Watch for nonstandard forms and wording.

## States have a say in the matter

Some states prohibit broad form indemnification, and many of the same states limit intermediate language. Because these forms tend to favor defendants in cases, they are sometimes considered unfair to one of the parties – or inconsistent with good public policy.

However, these agreements are allowed in some states if expressed in clear, unequivocal terms. That's why it's important to understand state statutes when negotiating your contract.

Otherwise, you may have no protection in the event of a loss.

Be aware, too, that multi-state operations face even more complications. For example, states have different statutes of limitations and duty to provide a safe place to work laws. What is enforceable in one state may be unenforceable in another.

continued

## ABOUT INDEMNIFICATION CLAUSES

There are three types of indemnification or hold-harmless clauses used in construction contracts:

	INDEMNITOR'S LIABILITY	INDEMNITEE'S LIABILITY
<b>BROAD FORM</b>	100%	None, even if negligent
<b>INTERMEDIATE FORM</b>	All, except where indemnitee is solely at fault	Could be up to 100%
<b>LIMITED FORM</b>	Only for own acts of negligence	Only for own acts of negligence

### Courts have a say in the matter, too

If there's ever a dispute over an indemnity contract, courts will attempt to enforce the contract, assuming it was negotiated by the parties involved in good faith. Courts will:

- Analyze the plain language to determine the true intent of the parties.
- Assess the agreement as a whole, considering provisions like indemnity clauses to assess the meaning of the contract terms.
- Consider relevant prior or current evidence as a way to understand the intent of the agreement. They usually will not, however, consider this information to contradict or modify the terms of a written agreement.
- Enforce the indemnity clause against the drafter of the agreement when ambiguity creates two or more interpretations.

## PREVAIL:

### WITH CAREFUL PLANNING, YOU CAN CREATE A CONTRACT THAT HELPS MANAGE RISK

A well-written contract can be a boon to project performance, reducing costs and establishing a strong working relationship among all the parties involved. Your attorney, independent Hartford agent and The Hartford can help you develop a program that responds to your specific insurance and risk management needs.

The checklist of provisions in this brochure highlights some of the issues that may be very important to consider before you sit down to negotiate. Be aware, though, that it pertains only to insurance and indemnification - there may be other issues to consider.

### BEGIN YOUR BEST PRACTICES WITH A CALL TO A KNOWLEDGE LEADER.

Contact your Risk Engineering consultant from The Hartford today or visit us at [TheHartford.com/riskengineering](http://TheHartford.com/riskengineering)

This document outlines in general terms the coverages that may be afforded under a policy from The Hartford. All policies must be examined carefully to determine suitability for your needs and to identify any exclusions, limitations or any other terms and conditions that may specifically affect coverage. In the event of a conflict, the terms and conditions of the policy prevail. All coverages described in this document may be offered by one or more of the property and casualty insurance company subsidiaries of The Hartford Financial Services Group, Inc. Coverage may not be available in all states or to all businesses. Possession of these materials by a licensed insurance producer does not mean that such producer is an authorized agent of The Hartford. To ascertain such information, please contact your state Department of Insurance or The Hartford at 1-888-203-3823. All information and representations herein are as of May 2019.

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