



# Contract to Reduce Risk

*Presenter*

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# Minimizing Potential Risk Exposure

- Contract Provisions
  - Indemnity
  - Additional Insured
  - Independent Contractor
  - Personal Property Loss
  - Arbitration
- Applicable State Law
- HUD Compliance
- Insurance Policy Coverage

# Differentiating Contractual Indemnity and Additional Insured Status

- Two means by which a party to a contract can shift responsibility are through indemnity provisions and additional insured requirements.
- Contractual indemnity is an agreement by one party to indemnify and hold another party harmless.
- Additional insured status gives one party coverage under another party's insurance policy.

# Contractual Indemnity

- Contractual indemnity is an agreement in which one party makes another whole for a loss.
- A party will still be obligated for contractual indemnification even if it does not have insurance.
- Contractual indemnity is typically governed by the laws of the state where the contract is entered, unless otherwise specified.

# Anti-Indemnity Statutes

- Some states have anti-indemnity statutes, which render certain indemnification provisions unenforceable.
- Anti-indemnity statutes limit indemnification provisions in construction contracts that go against public policy.
- These statutes serve to prevent contractors from being obligated to indemnify an indemnitee for the indemnitee's own wrongdoing.
- It is essential that these statutes be considered when drafting contractual indemnity provisions, as well as when evaluating potential liability.

# Louisiana Anti-Indemnity Statute

- Louisiana has an Anti-Indemnity Statute that renders certain indemnity provisions unenforceable. *La. R.S. 9:2780.1*
- This statute applies to construction contracts, including contracts for maintenance.
- The Louisiana Anti-Indemnity Statute also extends to additional insured status, subject to exception.
- If the indemnitor recovers the cost of the required insurance in the contract price, then the additional insured agreement will NOT be unenforceable.

# Additional Insured Status

- Contracting parties can agree that one party to the contract will be an additional insured under another party's liability insurance policy.
- This additional insured status is typically granted through an additional insured endorsement in that policy.
- The additional insured can then look to the other party's liability policy for potential coverage of a claim.

# Certificates of Insurance

- Certificates of insurance are not part of the insurance policy.
- COIs are summaries of insurance coverage, which are issued by an insurer that provide proof of the policy's additional insured endorsement. These should be requested on each policy renewal.
- Before beginning work, HUD guidelines require a contractor to submit a COI naming the Agency as an additional insured.
- HUD guidelines also require contractors be insured for specified limits.

# Independent Contractor Agreement

- These agreements state that the person or entity with whom a party is contracting is an independent contractor, not an employee.
- Potential employer liability for the actions of a contractor's employee is shifted to the independent contractor.
- It is important to consider applicable state law when drafting these agreements.

# Personal Liability of Managers

- In some states, there is potential exposure for Housing Authority managers as custodians of the Authority.
- Louisiana courts have found building managers liable for injuries sustained by third parties on the building premises if:
  - (1) the building owner owed the plaintiff a duty;
  - (2) delegated that duty to the building manager; and
  - (3) the building manager knew of the alleged defective condition and failed to take steps to repair it, or was personally involved in creating the defective condition.
- To the contrary, in Massachusetts employees of public employers such as housing authorities are immune from liability for negligent acts committed within the scope of their office or employment.

# Shifting Risk for Personal Property

## Contractual provisions with residents

- Contractual provisions that address liability for personal property may limit PHA's exposure.

## Renters Insurance

- A provision advising residents to purchase renters insurance could also help reduce exposure.

# Arbitration Clauses

- Arbitration is an alternative to a full litigation of a civil dispute.
- The parties to a dispute can agree in advance to be bound by the decision of the arbitrators.
- In arbitration, the proceedings are informal and the rules of evidence are relaxed.
- Including an arbitration clause in the lease agreement would bind the parties to arbitration.

# Procurement Contracts

- Public housing agencies must establish internal controls to ensure funds are properly expended for services.
- Site staff is responsible for specifications of services.
- The Housing Manager must contact the Regional Manager when the procurement involves major work that may require an engineering expert.
- If a contractor has already been selected for a blanket contract, the Housing Manager should not choose a different contractor unless that contractor cannot supply services in a timely fashion.

# Selecting Contractors

- The contractor must agree that all work performed under the agreement shall be in compliance with applicable federal, state and local mandates.
- It is the contractor's responsibility to have obtain all applicable permits, licenses, and other certifications prior to the commencement of work. The Agency may ask for such documents prior to entering into a contract.
- The Agency is not liable for any work performed by the contractor that was not covered under authorized certifications and proper permits.
- Once a vendor is identified, the Housing Manager is required to check the eligibility of all vendors against the HUD Barred List. [www.epls.gov](http://www.epls.gov).

# Contractor Insolvency

- If a contractor is insolvent, actions against it will be stayed in bankruptcy court, which is a lengthy process.
- Ultimate recovery for you may be reduced through bankruptcy proceeding.
- Ensuring that your contractors have insurance is important to avoid this issue.

# When to Notify HUD of a Claim

- HUD must be ***promptly*** notified upon commencement of litigation.
- If an adverse judgment is to be satisfied from HUD *any* funds, the HUD-Assistance Recipient must send the complaint to Regional Counsel.
- Threatened litigation should be ***promptly*** brought to the attention of the Associate for Litigation.
- A PHA's violation of HUD requirements or other fault will result in the cost of the Agency's defense not being authorized from HUD program funds.
- PHAs' contracts with private attorneys for litigation services expected to exceed \$100,000 require concurrence of Regional Counsel.

# Sanctions for Violating HUD Procedures

- If an entity knowingly does business with an excluded person or organization, the federal agency may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend the entity, or take other remedies as appropriate.

# When to Notify Insurance Carriers

## Notice to Primary Insurers

- Insurance policies generally require *prompt* notice of the potential for a claim.
- Late notice could result in no coverage under the policy.

## Notice to Excess Insurers

- It is necessary to notify the excess carrier when there is a potential to exceed policy limits of primary insurance.
- Primary insurers have the duty to notify the excess insurer of potential excess exposure.

# Know Thy Insurance Policy

- Your insurers may have coverage defenses that render the insurance policy inapplicable to the loss.
- For instance, the following coverage issues could arise:
  - Whether the incident constitutes an “occurrence”
  - Who is insured under the policy
  - Limitations on property damage coverage for faulty work
  - Application of the pollution exclusion or mold exclusion

# Summing Up

- Include Risk-Shifting Contract Provisions
- Understand Applicable State Law
- Comply with HUD Requirements
- Know the Coverage of Insurance Policies

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