



Insurance and Alternatives

by Jeffrey G. Gilmore and Karen E. Harrison

Insurance coverage can protect builders from financial ruin when they are faced with large claims. Construction projects can generate many types of claims, ranging from personal injury and property damage to delay damages. Contractors should carry several types of insurance to cover these various types of liability. Insurance for construction projects, however, is increasingly expensive and difficult to obtain.

Types of Insurance Policies

A construction project should be covered by *comprehensive general liability* insurance. The coverage will vary from insurer to insurer. This article covers just a few of the

uninsured loss can be included in the bid.

Alternatives to Insurance To Cover Liability

"Indemnification" and "statutes of repose" offer alternatives to insurance coverage. But don't rely on either of them to replace a comprehensive insurance policy. However, if you are not covered for a particular kind of claim because of an exclusion in your policy, these alternatives may help.

Indemnification is a contractual arrangement between two parties. For example, an owner may agree to indemnify (reimburse) the contractor for any claim brought against the contractor that arises from the

because it contained such clear and unequivocal language. Indemnification gives contractors an opportunity to require the party that is in the best position to prevent damage to assume the risk of loss. In theory, that person can get the cheapest insurance premium.

If a claim is brought, the contractor should examine the applicable statute of repose. Statutes of repose, which have been passed in some states, limit contractors' exposure to a certain number of years after the completion of a project. Beyond that time they cannot be sued. Although statutes of repose have been challenged on constitutional grounds, some courts have found them legal. Without these laws, contractors are discouraged from experimenting with new materials. ■

Jeffrey G. Gilmore and Karen E. Harrison are lawyers with the firm of Wickwire, Gavin & Gibbs of Vienna, Va., specializing in construction and public-contract law. Questions may be sent to the authors c/o The Legal Column, New England Builder, P.O. Box 5059, Burlington, VT 05402.

Indemnification agreements have been used to protect general contractors from losses caused by subcontractors. But don't rely on indemnification or statutes of repose to replace an insurance policy.

components that should be included in a comprehensive general liability policy.

Operations or premises liability insurance covers personal injuries or property damage caused by the contractor. *Independent contractor's protective liability* covers claims by a subcontractor's employees, and *protective liability* covers the owner against losses caused by the general contractor.

Contractors must also carry *workers' compensation*. The terms of workers' compensation are set by state law and, thus, vary from state to state. Other policies that the contractor should consider include *automobile liability*, *excess liability*, and *builder's risk* insurance (if the owner does not contractually assume the risk of loss to the project before its completion).

An insurance professional can help you select the appropriate coverage, but a lawyer should review the policy to make sure the coverage is adequate, and to evaluate the possible impact of policy exclusions.

Unavailability of Insurance

It's hard to obtain adequate and reasonably priced liability insurance in the current marketplace, especially for projects that are hazardous to both property and people. The cost of liability insurance has increased for all types of companies so contractors should carefully assess their insurance needs. This assessment is sometimes called "risk management."

The goal of risk management is to reduce the total cost of insurance premiums, uninsured losses, and administrative expenses. You should determine these costs before you submit a bid for a project, so that the cost of insurance and the potential

presence of hazardous waste on the site. Or the owner may agree to assume the risk if a loss due to fire or severe weather results. These agreements should be drafted by experienced lawyers, since state law limits the enforcement of certain private indemnification agreements.

Recent decisions show the willingness of courts to enforce properly drafted indemnification agreements. In one case, a contractor promised to compensate Hertz for the consequences of any tort suit brought against it. (*McMunn v. Hertz Equipment & Rental Corporation*, 791 F.2d 88 [7th Cir. 1986]). The court enforced the agreement when one of McMunn's employees was injured while operating a loader that was leased from Hertz. The court found that Hertz did not know that the loader was intended for construction use and, thus, was not in the best position to minimize damages from its use.

Indemnification agreements have also been used to protect general contractors from losses caused by subcontractors. An Iowa court enforced an agreement that required the excavating sub to indemnify the general contractor

from any and all loss or damage... occasioned wholly or in part by any negligence or omission of the subcontractor... regardless of whether or not it is caused in part by a party indemnified hereunder. (*Payne Plumbing & Heating Co., Inc., v. Bob McKiness Excavating & Grading, Inc.*, 382 N.W.2d 156, 160 [Iowa 1986]).

The Iowa Supreme Court, however, specifically stated that the agreement was enforceable only