

## **Managing Contractors in a General Industry Environment**

**Thomas M. Lotz, CSP, ARM  
Senior Consultant  
Tokio Marine Management, Inc.  
Franklin, TN**

**Patricia M. Ennis, CSP, ARM  
Director of Workplace Safety  
Denver Zoological Foundation  
Denver, CO**

### **Introduction**

For the past 22 years, the authors have worked with contractors and general industry employers to ensure that high standards of safety and control are established and maintained in the workplace. This white paper will present accepted practices which will allow the general industry employer to identify effective steps to establish safety practices from the initial contractor selection phase, through the construction process, and post-construction phase.

By implementing effective practices in the pre-loss stages of a contract, business owners and project management personnel will have a solid plan in place to respond in the event of a loss. These practices include elements of contractor pre-qualification, pre-bid communication and contractual risk management and risk transfer.

Once construction starts in a facility there are measures that must be implemented to maintain security and control. These methods include establishing work area and perimeter expectations, access, storage, material staging, parking, special training, and background checks. Depending on the nature of the facility it is important to establish clear ground rules about noise, housekeeping and contact with clients, guests or employees of the facility where the work is being conducted.

Finally, this paper will conclude with risk management techniques to close out and wrap up a project effectively.

After reading this paper the reader should be able to:

1. Understand loss exposures common to the construction industry, and how those can affect a General Industry operation owner
2. Discuss risk management terms and concepts

3. Describe the key lines of insurance that a company should require proper proof of from their contractor and understand the coverage provided by these products
4. Identify and explain the key elements in a risk management and insurance program that can be combined to manage risk of contractors

## **Risk Management Principles – Identifying and Controlling Risk through Contractor Pre-qualification**

Many firms start the pre-qualification process with a careful evaluation of a contractor's past performance, including looking at loss events. This can be an imperfect science at best. However, data from the past is one of the best tools a company risk manager has in order to identify what the contractor's historic loss exposures have been.

Identifying risk and potential sources of loss is an important first step in the risk management hierarchy. It is critical for an organization to conduct a comprehensive evaluation in order to identify risks so that they can be controlled, eliminated or mitigated.

Once loss exposures have been identified, they can be evaluated and ranked by a variety of methods. There are a variety of methods available for companies to identify a contractor's potential loss exposure. Some of the more common methods are listed below.

1. Review of past losses (claims/loss analysis)
2. Contract review
3. Review of company and industry financial trends
4. Insurance policy review
5. OSHA

Review of past losses can be a very revealing exercise as it provides information on both frequency and severity of the losses in prior years. Insurer loss runs can provide useful data which allows evaluators to identify trends based on frequency and severity of past events. This analysis is most effective for lines of insurance where frequency is a factor such as automobile and worker's compensation. Looking at frequency and severity can be a good predictor of future loss activity and can give the contractor valuable information about where to emphasize loss control activities. The evaluation process may include benchmarking to compare the contractor's past loss experience against that of their peers. Numerous agencies provide benchmarking data, including the Bureau of Labor Statistics and the Federal Highway Safety Board. The contractor can also work closely with the insurance broker risk management department to obtain benchmarking data from the insurance industry.

When evaluating a contractor's safety program as part of the pre-qualification, the reviewing party (frequently the owner) will want to ensure that the safety program addresses the major loss exposures for that trade. Key elements to a safety program should include:

1. Commitment from top management
2. Worker training
3. Personal protective equipment

4. Disciplinary and enforcement measures
5. Hazard identification and control techniques

A contractor's OSHA citation history can be a valuable tool for evaluating contractor safety, although the absence of citations does not necessarily reflect good safety; it may mean the contractor has never had an OSHA inspection. Another popular tool for evaluating contractor safety is the Experience Modification Rate issued by the National Council on Compensation Insurance (NCCI). For more on the EMR see the discussion in this paper under Worker's Compensation Insurance. Lastly, a useful tool for pre-qualification of contractors is a prequalification checklist, or questionnaire. See the sample checklist provided at the end of this paper.

Reviewing current contracts is an important element of the risk management process. Contracts can reveal exposures to loss through hold harmless agreements and indemnification clauses. Some contracts are written in ways which hold one party harmless and pass that risk on to another party who may have nothing to do with the actual loss. Some states, such as Colorado for instance, have passed legislation to restrict the language in these contracts to eliminate one party's ability to pass responsibility for their own sole negligence on to another party by contract.

Part of the evaluation process should include an evaluation of the contractor's current insurance policies and bonding capacity if applicable. This information can be captured on the pre-qualification questionnaire. An additional review is recommended to identify contract language designed to transfer risk.

### Risk Transfer

Risk Transfer is a way to allocate financial responsibility for related construction losses to another party either by contract, or through their insurance policy. Contractors will frequently transfer risks to others, or accept risk from others contractually through hold harmless agreements and indemnification clauses. Using these same techniques can help protect the individual company as well from any issues that arise out of construction work on their property. Purchasing an insurance policy is another way to transfer risk to another party. The contractor pays a premium for coverage and the insurance carrier pays the resulting claims which occur.

### Definitions

1. Hold harmless and indemnification is defined as: one or both parties agree not to hold the other party responsible for any loss, damage, or legal liability. In hold harmless and indemnification agreements, one party assumes the liability of another party.
2. Waiver of subrogation: where one party waives their right to pursue recovery of a loss from another party.
3. Named Insured: where a company is named to the contractor's insurance policy as a stakeholder and allows them to be notified if policy is cancelled, missing payment, as well as allows them to make a claim directly with the insurance carrier.

By waiving rights to recovery, the party is also affecting the insurance carrier's right to recover. For this reason, it is always important to understand the insurance policy provisions before signing away rights under a contract. For the owner, getting a waiver of subrogation is

desirable, as it prevents the contractor's insurance carrier from coming back to the owner to try and recover money paid out for a loss on the contractor's behalf.

Named Additional insured allows the company access the contractors policy to alert them if the policy changes, renews, cancel's, as well as access to the insurance company if a situation arises.

### Insurance Coverage

There are two categories of insurance covering two different types of losses. The first category is called casualty insurance and covers third party losses. Third party losses are those losses where a third party such as an employee of the contractor is involved in addition to the insurance carrier and the contractor in relationship to the project owner. The second category of loss is first party loss such as property and equipment losses. First party loss is between the insurance carrier and the insured party with no third party involved. Below is a brief description of the typical lines of coverage most insurance programs include:

1. Automobile Liability Insurance
2. Commercial General Liability Insurance
3. Umbrella Liability Insurance
4. Worker's Compensation Insurance
5. Builder's Risk Insurance
6. Professional Liability Insurance
7. Pollution Liability Insurance

### Automobile Liability

Automobile liability insurance provides coverage for losses resulting from the contractor's use of owned vehicles. Some policies will provide coverage from the use of non-owned vehicles such as hired, leased, rented, or borrowed and even employee use of personal vehicles for business. The liability limits for automobile coverage vary by state law and coverage limits purchased by the contractor may vary. The typical personal automobile insurance for physical damage is separated into collision and comprehensive coverage. Collision covers damage to the vehicle such as collision with another vehicle. Comprehensive coverage is for damage from things such as hail and vandalism.

### Commercial General Liability (CGL)

Commercial General Liability (CGL) insurance provides protection to from legal liability for commercial risks arising from operations, ownership, contractual obligations, and accidents. CGL insurance will typically protect the insured from the following liability risks:

1. Contractual Liability - Protects the insured or named insured for a loss for which the insured has accepted liability under a written contract
2. Property Damage Liability - Protects the insured or named insured from liability for damage to the property of another

3. Contractors Protective Liability - Provides coverage for claims that can arise from the insured parties supervision of work
4. Completed Operations Liability - Provides coverage for claims arising out of operations that have been completed and turned over to the owner. The typical policy will provide coverage for three years beyond the end of the project. Contractors may need to purchase supplemental insurance to cover a longer period. In some jurisdictions the warranty period can extend seven to ten years past project completion date
5. Premises and Operations - Provides coverage for claims arising out of an insured's premises and business operations
6. X,C,U Coverage - Provides coverage for claims arising out of explosion, collapse and underground property. Explosion coverage insures against property damages that result from blasting or other explosions. Collapse coverage is triggered when property damage is caused by demolition or excavation activities, and underground coverage applies when property damage results in damage to utilities from digging, pile driving or related activities

### Umbrella Liability Insurance

Umbrella Liability Insurance is a policy that sits as an excess layer (like an umbrella, hence the name) over the other types of casualty liability policies such as Commercial General Liability, Auto and sometimes Worker's Compensation liability. The Umbrella policy is triggered when the losses exceed the limits established under the other lines of coverage. The umbrella policy may have a self-insured retention or deductible over and above the deductibles for the underlying coverage.

### Worker's Compensation Insurance

Worker's Compensation Insurance has been in existence since the early 1900's. By 1934, all states had some form of worker's compensation law in place. The laws vary from state to state.

The majority of employers are statutorily required to provide worker's compensation insurance. The purpose of worker's compensation insurance is to provide medical and disability benefits to workers who incur an occupational injury or illness. The policy provides employees insurance coverage for medical, indemnity (lost wages), and disability benefits if they are injured on the job.

### Experience Modification Rate

The National Council on Compensation Insurance (NCCI) compiles statistical loss data on individual employers. The experience modification rate (EMR) is an employer-specific multiplier that compares one employer's loss experience to that of other employers in their state, in the same industry.

The rating bureau generates the EMR based on three years of loss experience, excluding the most recent year. For instance, the 2011 EMR will be based on experience from 2007, 2008 and 2009. The 2010 losses will be allowed to develop or mature for a year and will not affect the EMR until 2012. The EMR is revised every year prior to the policy renewal date, dropping the oldest year of experience and adding the more recent year.

An average EMR of 1.0 should reflect the average loss experience of the state classification. Less than 1.0 reflects better than average experience, greater than 1.0, worse than average. Since the EMR is calculated based on loss experience, it is widely used as a benchmark to measure the effectiveness of an employer’s safety program. In actuality, the EMR is an actuarial factor that is designed to help insurance carriers rate companies based on their loss experience and was never intended to be used as a measure of safety.

One way to lower the EMR rate is through the use of deductibles. In some states the loss data reported to NCCI by the carrier is “net” of the deductible. In other words, the loss data reported is reduced by the amount of the deductible, up to an accepted amount. In Colorado for instance, employers can elect to carry up to a \$5,000 per claim deductible. The data submitted to NCCI for companies with a \$5,000 deductible will not reflect the deductible costs, resulting in lower claims dollars being reported into the EMR calculation. This is called net reporting and there are currently 16 net reporting states with NCCI.

Table 1 demonstrates how an EMR can impact a contractor in the bidding process, based on three theoretical paving contractors:

<b>Costs</b>	<b>Paving Contractor A</b>	<b>Paving Contractor B</b>	<b>Paving Contractor C</b>
Manual WC Premium	\$250,000.00	\$250,000.00	\$250,000.00
<i><b>EMR multiplier</b></i>	<i><b>.75</b></i>	<i><b>1.0</b></i>	<i><b>1.25</b></i>
Modified Premium	\$187,500.00	\$250,000.00	\$312,000.00

Table 1 – EMR

Contractor A has an advantage of paying \$124,500 less for worker’s compensation insurance than Contractor C, making them more competitive. Since the EMR is considered to be a reliable benchmark for measuring the effectiveness of an employer’s safety record, many owners will not accept bids from companies who have an EMR over 1.0. The use of deductibles to reduce the EMR is a good example of using risk retention to lower premium.

Although the main contractor may have an EMR of 1.0 or less, an owner should be aware and stipulate that all subcontractors should also meet the minimum requirements of the prime or main contractor. This will help prevent the primary contractor from hiring poor performing subcontractors to perform the work.

## **Contract and Start of Construction**

Once the contractor is selected and the work is scheduled to begin, there are numerous details to be coordinated between the owner and the contractor. These details include defining the contractor code of conduct and performing background checks if necessary. Additional concerns include establishing the work zone and construction perimeter, determining access, storage, material staging, parking, and coordinating special training. This is the phase where clear ground rules about noise, housekeeping and contact with clients, guests or employees of the facility should be established.

Special rules and regulations, risk transfer, scope of work and payment schedule, are some of the details that should be incorporated into the construction contract. Named Additional Insured provisions and waiver of subrogation clauses are also important. The owner should request additional insured coverage be provided on a primary and non-contributing basis if possible, as that protects the owner from having to respond to a loss with their own insurance. Being a Named Additional insured coverage also provides defense for the owner by the contractor's insurer.

One common mistake of owners is that they accept the proof of insurance from the contractor themselves. When requesting proof of insurance and named additional insured coverage, the proof of insurance should come directly from the contractor's insurance broker or the insurance company itself. One should never accept proof of insurance from the contractor themselves.

Once the contractor has been selected, and the contract has been signed, the facility owner is ready to hold preconstruction meetings with the contractor. This is the opportunity to define where the perimeter of work will do, and outline any rules that are specific to the facility in which the contractor will be working.

In a public facility, the rules may relate to interactions with guests, parking and access. In a medical setting, guest privacy, dust and noise can be primary concerns. Setting forth a contractor code of conduct is a good way to communicate these rules. The following example of a contractor code of conduct is courtesy of Denver Zoo, and spells out the rules contractors must follow when working in their facility.

#### Rules of Conduct for Contracted Services at Denver Zoo

The Denver Zoo is a unique working environment. As such, listed below are the rules for all outside contractors and their employees working on Denver Zoo grounds. These rules are to be fully adhered to by all contractors, subcontractors and service providers at all times. Any special exceptions to these rules must be discussed with and approved by your primary contact at Denver Zoo prior to the commencement of work. **It is the responsibility of the Contractor's supervisor in charge of the work to thoroughly review, understand, and sign this document as well as to ensure that all supervised employees fully understand and adhere to these rules.** Failure to do so may warrant immediate and potentially permanent removal from Denver Zoo premises.

1. **The safety of all contractors, Denver Zoo staff, volunteers, the public, and the animal collection shall be the top priority all times.** With this in mind, good judgment must be used for any special situations that might fall outside of the written rules.
2. All applicable federal, state, and local safety and working standards must be followed. Examples of these include, but are not limited to: Occupational Safety and Health Act (OSHA), American National Safety Institute (ANSI), National Fire Protection Association (NFPA), Colorado Department of Public Health and Environment, and the various departments of the City and County of Denver. It is your responsibility to understand the applicable standards set by these organizations.
3. Prior to starting new work, check in at Zoo Operations Office at 2900 E 23rd Avenue via gate #7. Ask for the person that contracted your services. All of your employees will be required to sign-in and be given a temporary identification badge. This badge must be worn in a

visible location at all times. At the end of the day, all contractor employees will be required to sign-out and return their badges.

4. Work performed within, in front of, or behind an animal exhibit requires notification of the appropriate Animal Department curator/supervisor. The contractor and the primary zoo contact must ensure that all appropriate divisions are notified before work begins. Notification must be at least 24 hours in advance. Changes in work schedules require notification of appropriate zoo personnel. At all times the contractor must comply with the special requirements identified the zoo contact person, the Animal Department and/or Horticulture Department supervisor(s). **Do not enter any service areas without prior authorization.**
5. **DO NOT ALLOW YOUR EMPLOYEES TO APPROACH ANY ANIMAL. A FIVE-FOOT MINIMUM DISTANCE MUST BE MAINTAINED FROM ANY ANIMAL BARRIER.** Any exceptions to this rule must be approved by your zoo contact and the appropriate Denver Zoo Animal Department curator/supervisor.
6. Various noises, scents, vibrations, etc. originating from construction activities have the potential to be extremely harmful, if not deadly, to some animals. If there is any doubt about whether a particular activity will affect the safety of people or animals, ask your zoo contact prior to commencing work.
7. **Pedestrians always have the right-of-way.** The speed limit within the Zoo perimeter will not exceed 5 MPH, and it is always prudent to drive even slower. **Do not drive off of the path to avoid visitors; stop the vehicle and allow visitors to pass.**
8. During public hours of operation, two escorts must accompany any moving vehicle larger than a pickup truck – one in front of the vehicle and one behind. Outside of normal operating hours, one escort may be used. Should you not have sufficient staff to comply, remain in service area only and notify your primary zoo contact and staff will be provided.
9. Do not drive or park on landscaped areas unless previously authorized.
10. Arrange for continuous public access around your work area. Do not create a dead-end route on main pathways. Special conditions must be agreed to in advance.
11. Always provide a closed-loop barrier around work in progress. Plastic tape between cones is acceptable. More substantial barricades, approved by your zoo contact, must be used around open excavations. All work must be complete prior to removal of the barriers.
12. An English speaking supervisor for the contracted services should be on site during all work. Exceptions must be agreed to in advance (there must always be someone fluent in English on the jobsite). You are required to provide your zoo contact with the supervisor's cell/pager number in case of emergencies.
13. The behavior and demeanor of contractors, subcontractors and service providers must be positive and respectful of the public and other personnel. Any remarks, attire, or behavior that may be deemed as offensive to the public is not tolerated.



14. Smoking is not permitted in any public area or animal enclosure. The zoo contact will advise contractors of approved smoking areas.
15. All injuries or damage to zoo property by an employee of a contractor, subcontractor or service provider must be reported to your primary zoo contact immediately.
16. Your company may be required to provide proof of insurance. Failure to comply may result in immediate termination.
17. In the event of a zoo-wide emergency (i.e. severe weather disturbance, animal accessing an unacceptable location, etc.), contractors will be treated the same as the general public. Zoo staff will be dispatched to your area to provide direction. These rules must be obeyed immediately and without exception.
18. Clean up of all work sites must be thorough, with special attention to removal of harmful debris, i.e. nails, wire, trash, hazardous waste, etc.
19. Contractors are cordially invited to use the concession areas and tour the zoo.
20. Utility locates will be required for any project that entails the need to excavate, penetrate or disturb existing soil.
21. The *Protocol for Working in the Vicinity of Landscaped Areas* must be adhered to when working in or around any planted areas.

#### Other Work by Outside Contractors

- Any vehicles or equipment, that leaves the pavement, must have mats under the wheels to protect the turf. Avoid driving over sprinkler heads and valve boxes.
- Two escorts (one in front and one behind) should be utilized to guide large vehicles through the zoo to protect overhead tree limbs and wires and ensure the safety of the public.
- Every effort should be made to avoid tracking mud/debris on visitor pathways and service drives through the zoo.
- The job site should be left clean when work is complete.

(Denver Zoo, 2011)

## Conclusion

This paper has covered some of the best practices to be used when selecting a contractor and signing a contract. The facility owner should keep several key issues in mind when bringing a contractor into their facility.

1. Take the time to select the right contractor. Consider the unique needs of your business in addition to price, in some cases special expertise is more important.

2. Review and ensure contract documents are in order and that important elements have not been struck by the contractor before signing.
3. Clearly communicate expectations for codes of conduct, safety, access, and construction activities.

While it is important for the facility owner to provide adequate oversight of the contractor, it is equally important that they do not assume the entire management role, unless that is the arrangement agreed upon in the contract. If a contractor is not following federal or state safety regulations, the facility owner should remind them that the contract requires them to do so, and inform them that they need to get into compliance. It is not the owner's responsibility to provide the equipment, or tell the contractor how to comply.

Resources are available to the facility owner from insurance brokers and agents, carriers and trade associations. Figure 1 is a tool that can assist owners with the selection and contracting process.

## Sample Material

**Figure 1**

<b>Construction Contract Checklist</b>
Does the contract contain the strongest <b>indemnification</b> ; allowable by the laws of the state where the work will take place? (Simple, Intermediate, Broad)
_____ Requirement for all subcontractors to name the general contractor as an additional insured on auto, G/L and property policies
_____ Reassignment statement or clause prohibiting all subcontractors from re-subbing or reassigning any of the work to others without the general contractor's written permission
_____ Insurance requirements specifically spelled out in the contract. This would include types of insurance, limits, rating requirements of carriers, types of policies, and any endorsements required. (For temporary agencies or leased employees alternate employee endorsement.)
_____ Safety requirements for the job specifically spelled out in the contract. This includes a general statement about compliance with rules and regulations such as OSHA;
_____ List any standard requirements that exceed OSHA regulations, such as:
100 percent fall protection if applicable,
Hot Work Permit
Mandatory PPE usage
Disciplinary policies
Special instructions on lay down area or access to plant
Lending of tools and/or equipment
Any other specific safety requirements.

\_\_\_\_\_ Sample certificate of insurance showing what the COI should look like when submitted.

\_\_\_\_\_ Legal counsel review of final contract

**ABC Construction**

**CONTRACTOR HEALTH AND SAFETY QUESTIONNAIRE**

Contractor Name:		
Project:	Location:	Date:
Purchase Order/Contract Number:		Work Order Number:

1a) List your firm's Workers' Compensation Experience Modification Rates (or equivalent statistics for the last three years):

Year 1 _____	Year 2 _____	Year 3 _____
--------------	--------------	--------------

1b) If your EMR is exactly 1.0 for any policy year, is it because your firm is (or was ) too new or too small to have an EMR calculated?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

1c) Is your firm self-insured for Workers' Compensation Claims?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

2) We require backup for the above information. Any of the following methods would be acceptable:

- a. Furnish a letter from your insurance agent, insurance carrier, or state fund (on their letterhead ) verifying the EMR data listed above; or
- b. Furnish copies of the last three years Experience Rating Calculation Sheets which your insurance carrier should forward to you annually; or
- c. Furnish a copy of the page from each of your last three years annual statement pages showing the modification rate and coverage period.
  - If you are in a "state fund," furnish a copy of the state's last three years annual statement pages showing the modification rate and the coverage period.

3) Using the information from your OSHA 300 form, provide injury and/or illness data for the last three years of your firm.

	Year 1 _____	Year 2 _____	Year 3 _____
Number of fatalities:			
Number of cases with lost workdays and/or restricted work activities:			
Numbers of cases without lost workdays and/or restricted work activities:			
Employees hours worked (do not include non-worktime, even though paid)			

4) (CHECK ONE)

Does your firm have a written safety program?	_____ Yes	_____ No
---	-----------	----------

5) Do you have one or more full time, part time, or consulting: (CHECK ONE)

Safety Professionals; Safety Trainers	_____ Yes	_____ No
Industrial Hygienists	_____ Yes	_____ No