

**WHAT'S HOT IN
CONSTRUCTION RISK MANAGEMENT SEMINAR**

CONTRACTUAL RISK TRANSFER

Presented by

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Mr. O'Neill is one of four panelists for Monday's "What's Hot in Construction Risk Management?" seminar and is a copresenter for Miniseminar K, "Hard Market Risk Finance Alternatives." He has been involved in the construction insurance industry for more than 25 years. He is president of ACIG Insurance Agency, Inc., a construction-industry-owned insurance organization in Dallas. Mr. O'Neill is a frequent speaker for construction industry trade associations; he has spoken 10 times at the Construction Risk Conference and was a previous Words of Wisdom Award winner. His expertise lies in the areas of captive management, risk management, retention analysis, contractual risk transfer, development of specialized coverage, and risk funding programs. Mr. O'Neill has written many articles for construction industry publications, including AGC, CFMA, and *Engineering News Record*.

CONTRACTUAL RISK TRANSFER

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I. Contractual Risk Transfer

- A. Definition
- B. How and Where

II. Theory vs. Reality

- A. Manage the Risk
- B. Bargaining Position
- C. Daisy Chain

III. What's the Focus

- A. Indemnity Provisions
- B. Contract Insurance Requirements

IV. Indemnity Provisions, The Good, The Bad and the Ugly

- A. Limited Form
- B. Intermediate Form
- C. Broad Form

V. Additional Insured Status Used to Circumvent the Anti-Indemnity Statutes

- A. Courts
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VI. Additional Insured Endorsements

- A. CG 20 10 (85 Edition) "Your Work"
- B. CG 20 10 (93 Edition) "Ongoing Operations"
- C. CG 20 10 (01 Edition) "Completed Operations Exclusion"

VII. Alternative Additional Insured Endorsements

- A. CG 20 26 (84 Edition)
- B. CG 20 37 (01 Edition)

VIII. Other Insurance Provisions

- A. 1996 and Earlier ISO Policy Forms
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IX. Examples of Non-Standard Additional Insured Endorsements

X. Subcontractor's Perspective

- A. Risk Flows Down Through the Contracts/Agreements
- B. Efforts to Push Back on the Risk May be Futile
- C. Price the Risk into the Subcontract Price

XI. Summary

Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

CONTRACTUAL RISK TRANSFER

Contractual Risk Transfer

- **Definition – Contractual Risk Transfer is the risk management technique of allocating risk among the contracting parties.**
- **How and Where – In provisions of a lease, purchase order, contract or subcontract.**
- **Key Risk Management Provisions**
 - **Hold Harmless/Indemnity Provision**
 - **Insurance Requirements**

Contractual Risk Transfer

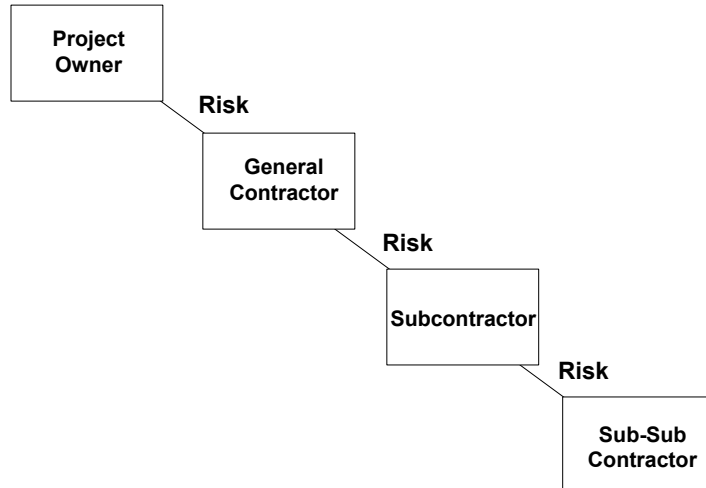
Theory – Risk should be allocated to party that is in the best position to manage it.

Contractual Risk Transfer

Reality – Party with the strongest bargaining position will transfer risk to the other parties.

A.K.A. The 800 Pound Gorilla

Contract Risk Transfer Daisy Chain



Contractual Risk Transfer

A small sub-subcontractor with limited financial net worth and generally low limits can find itself taking on the financial risk for a Fortune 500 Company.

Contractual Risk Transfer Key Provisions

- **Hold Harmless/Indemnity Provisions**
- **Insurance Requirements**

Contractual Risk Transfer Hold Harmless/Indemnity Provisions

The Good, the Bad and the Ugly

- **Limited Form**
- **Intermediate Form**
- **Broad Form**

**Contractual Risk Transfer
The Good**

- **Limited Form – Agreement obligates the indemnitor only to the extent of its own fault.**

**Contractual Risk Transfer
The Bad**

- **Intermediate Form – The indemnitor assumes all liabilities of the indemnitee, except where the injury or damage is caused by the indemnitee's sole negligence.**

**Contractual Risk Transfer
The Ugly**

- **Broad Form – The indemnitor assumes an unqualified obligation to hold the indemnitee harmless for all liabilities even if the injury or damage is due to the sole negligence of the indemnitee.**

Contractual Risk Transfer Anti-Indemnity Statutes

- **A majority of the states have enacted legislation prohibiting the use of broad form indemnity provisions due to public policy concerns.**
- **IRMI's Contractual Risk Transfer Manual contains a listing of the anti-indemnity statutes.**

Contractual Risk Transfer Additional Insured Endorsements

- **Used to circumvent the anti-indemnity statutes.**
- **Some courts have supported this position.**
- **Bosio vs. Branigan Organization, Inc. (Illinois)**
- **Chevron U.S.A. vs. Bragg Crane and Rigging Co. (California)**
- **Long Island Lighting Co. vs. American Employers Insurance Co. (New York)**

**Contractual Risk Transfer
CG 20 10 Endorsements**

- **CG 20 10 ('85 Edition) “Your Work”**
- **CG 20 10 ('93 Edition) “Ongoing Operations”**
- **CG 20 10 ('01 Edition) “Completed Ops Exclusion”**

**Contractual Risk Transfer
Alternate Additional Insured
Endorsement**

- **CG 20 26 (84 Edition) “Operations”**
- **CG 20 37 ('01 Edition)
Additional Insured – Owners, Lessees or
Contractors – Completed Operations**

**Contractual Risk Transfer
Other Insurance – Dueling Provisions**

- **1996 and earlier ISO policy forms**
 - **Co-Primary Position**
 - **Method of Sharing**

Contractual Risk Transfer Other Insurance - Solutions

- 1997 – Mandatory ISO Endorsements to change the other insurance provisions.
- 1998 ISO Policy Form – Contains the coordinating other insurance provision.

4. Other Insurance

b. Excess Insurance

This insurance is excess over

* * * *

- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

Contractual Risk Transfer Example of Non-Standard ISO Endorsements

Who is an insured (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of “your work” for that insured by or for you.

Primary Insurance Clause

It is further agreed that such insurance is afforded by this policy for the benefit of the Additional Insured shown shall be primary insurance, and any other insurance maintained by the Additional Insured shall be excess and non-contributory, but only as respects any claim, loss or liability arising out of the operations of the Named Insured, and only if such claim, loss or liability is determined to be solely the negligence or responsibility of the Named Insured. This coverage is limited to “your work” completed within the policy period.

Contractual Risk Transfer Contractor Perspective

- **Risk flows down through the contracts or agreements.**
- **Negotiate risk transfer in the contracts or agreements.**
- **Price the risk into the contract using historical losses.**

Contractual Risk Transfer

Summary - The Golden Rule applies.

He who has the gold makes the rules.