



Mary Hanson

About the Business Advisor

The Business Advisor is written and published by Mary Hanson, a business attorney in Torrance, California.

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She provides legal services related to owning, operating, buying, selling, and structuring businesses. Her clients are business owners in many different industries. She handles corporations, LLCs, new businesses, new ventures, and a broad range of contracts and business decision-making.

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INSURANCE AND LIABILITY ISSUES

by Mary Hanson

Most well-done contracts today include a number of provisions dealing with the risks and liabilities associated with the goods or services to be provided. Every type of contract, from pre-printed purchase orders to consulting agreements tend to address potential liability. For example, contracts might include provisions covering:

- the risk of loss of goods in transit (in a contract for sale of goods);
- the risk of damage to property by a contractor's personnel (in a contract for services);
- specific insurance required to be maintained by one of the parties; and
- indemnification by one party of the other, holding the other party harmless from specific liabilities (typically from third party claims arising from the first party's actions).

New, small, and growing businesses may not have the insurance they should have, and may not meet the insurance requirements stated in their contracts. It is important for a business to review its insurance policies, not only to assure that it has the insurance required by its contracts, but also to make sure it has insurance that addresses the risks associated with current business activities.

A service contract will often require a consultant or contractor to maintain the following types of insurance:

- Commercial general liability;
- Auto liability;
- Professional liability;
- Workers' compensation.

The contract may specify limits for certain coverage (e.g., commercial general liability insurance at a limit of at least \$1 million dollars). It may require that the insurance carrier be rated at a certain level (e.g., an A or better rating by A.M. Best Company).

Frequently, performance of a contract requires the work of subcontractors or independent contractors. What insurance should be required of them?

I sought the advice of Mark Zahoryin of Brown and Brown Insurance Brokers in Orange regarding insurance issues that arise in business. He provided information and advice to assist me in writing this article. Here are a few suggestions regarding insurance:

Contract Issues

1. If you have a contract that requires certain insurance, you should send a copy of the insurance requirements to your insurance broker. Your broker should be able to advise you:

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- Whether your existing insurance already meets the requirements of the contract;
- Where you can get the required insurance, and what the premiums will be (if you don't already have the required coverage); and
- Whether or not the insurance is available to you (there may be no insurance carrier that is willing to provide the insurance to you).

You won't want to enter into a contract that requires insurance coverage that you cannot get (or cannot afford). You would be in default on the contract as soon as the contract was entered into (if you don't have the required coverage).

2. If you have subcontractors who will provide services under a contract your insurance broker should be able to help you determine:

- What insurance you should require of your subcontractors to meet the contract requirements and to meet your own risk management needs;
- Whether you should be named as an “additional insured” and covered under your subcontractor's policy;
- Whether your subcontractors can be covered under your policy and whether that will increase your insurance premium;
- What proof of insurance you should get from your subcontractors; and
- How to monitor your subcontractors' insurance coverage.

The contract will typically make no mention of your subcontractors, but under the law you may be liable for many risks associated with your subcontractors' activities.

3. Indemnification provisions in contracts are not only hard to understand, but they often impose liability beyond insurance coverage. They are usually so broad that you cannot obtain insurance for many of the liabilities you are agreeing to cover. If you agree to hold the other party harmless from any expenses and liabilities arising from your business's acts and failure to act, you are agreeing to cover the other party not only for accidents and mistakes - for which you may or may not have insurance - but also for intentional acts, for which no insurance is available.

Get a business attorney to work with you on contract indemnification provisions to limit your obligations and exposure to risk. In addition, work with your insurance broker to be sure the liabilities you are agreeing to are covered by insurance.

Goods and Services Provided By Your Company

What about insurance to cover your business regardless of contractual requirements? You should be working with an insurance broker who understands your business so that he or she can help you identify and assess the risks and liabilities involved in your industry.

An insurance broker should be able to help you determine what

INSURANCE AND LIABILITY ISSUES

insurance you need by identifying the types of risks involved in your product or services. The risks are different for each type of product or service. If you are expanding into new areas, manufacturing or handling different products, taking on larger projects, or changing the nature of the work your firm does, you should make sure your insurance coverage matches the risks associated with your business activities.

A broker with ties to your industry already knows the typical risks associated with your type of business, as well as the insurance carriers who provide the types of insurance you need. Your trade associations and organizations are prime places to look for insurance brokers already involved in your industry.

In addition to types of insurance, and needed coverage, an insurance broker can assist with getting appropriate endorsements on policies. For example, a business which has employees traveling to customers' sites, may seek a "waiver of subrogation" endorsement on its workers' compensation policy, preventing the insurance carrier from suing a customer of the business if an employee has a workers' comp claim based on something that happened at that customer's site.

Services Provided To You

What if you have contractors doing work for you in your business or at your home? What insurance coverage should you require of them?

An insurance broker should be able to help you determine what insurance you should require by identifying the types of risks involved in the contractor's work. The risks are different for each type of work you might have done. You want insurance that covers the whole possible financial loss if things go wrong. The risks are different for a builder, an architect, a carpet layer, an executive coach, an accountant, a financial consultant, etc.

An insurance broker can develop a detailed checklist for determining possible losses arising from different types of work. The checklist requires investigation of the nature of the work to be done, potential liability, the presence of contractor's personnel on the premises, evidence of workers' compensation insurance by the contractor, and other risk-related and insurance-related questions.

Even if you are covered for certain risks (for example, bodily injury or property damage to a third party – like a neighbor – as a result of some action by a roofing contractor), you shouldn't want YOUR insurance to be the primary protection. If claims are made on your policy, your insurance premium will increase and the claim will be on your insurance claim history. You want the contractor's insurance to be "primary" and not "contributory." You want their insurance to cover a loss even if you also have liability for the loss.

The Certificate of Insurance provided by the contractor should state that you are an additional

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Publisher's Note

Liability and insurance issues are an important part of business planning. The risks have to be identified and estimated. There is no magic level of insurance or type of insurance. And there are many "moving parts" to this issue in most businesses - people, vehicles, products, subcontractors, various services, and large and small projects.

Some newer business don't have the insurance they should have, until the issue comes up in a contract. Better late than never!

Of course, a small or new business may not be in a position to obtain certain coverage or certain endorsements. When you DO have greater negotiating ability, make sure you have the advice you need to make the most of your insurance.

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Attorney/Publisher

insured, and that the contractor's insurance is primary. The actual coverage can be checked by making sure the appropriate endorsements are part of the contractor's insurance policy. Your insurance broker can help in making sure the appropriate insurance is there.

Conclusion

An insurance broker is important in identifying and addressing the risks associated with business activities and contractual obligations. Having an insurance broker that knows your

industry is part of your business "risk management program."

The premium payment for the policy is the same whether you purchase the policy through an insurance broker who can assist you or you purchase the policy through an insurance broker who provides little guidance, information, or assistance. The assistance in determining the types of insurance, the endorsements, and the limits you need, as well as issues involved in subcontracts has value that is not added to your premium!

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