One contract: four

Bill Smith discusses how having the right contract language gives your company four layers of protection.

The goal with contract language is to tee up your defenses in the event your company becomes immersed in a claim.

If you've been in business for any length of time, you've likely heard about – or learned – one of the most important lessons there is to learn in the crane and rigging industry: If you have a claim, contract language can be the deciding factor in initiating complete risk transfer and suffering a policy limits loss.

By ensuring the legally preferred contractual language is embedded within each of your company's contracts, in accordance with each state's laws – whether it's a daily work ticket or a long-term rental agreement – you can effectively optimize your risk transfer potential, help mitigate your losses, and do your part to fight against rising insurance costs.

Clause clarification

However, while those are all really critical benefits to knowing and understanding what needs to be in your contracts, perhaps the biggest benefit is the fact that you're essentially teeing up four defenses in the event you find yourself immersed in a claim.

If your daily work ticket or contract has an Indemnification Clause, an Additional Insured Clause utilizing preferred language, a tie-in to the B-30 standards and a Care, Custody, and Control Clause (also known as the Borrowed Servant clause), then you're putting yourself in the best possible position to defend yourself.

Here's how each of these break down.

INDEMNIFICATION CLAUSE. At its most basic level, indemnity is the promise to pay for the cost of possible damage, loss or injury and determines the level of liability crane insurance policyholders are assuming or passing on to their customers.

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Indemnification is driven by the particular state you're operating in and is typically broad-based, intermediate, or limited. Below is an example of each form of indemnity:

1 **Broad based:** The contractor is at fault – regardless of who is actually at fault – and indemnifies the crane company for the crane company's sole negligence, the contractor's sole negligence, and any joint negligence of the two. The entire risk is transferred to the contractor. This is the most onerous of indemnity clauses and the one most targeted by anti-indemnity legislation.

2 **Intermediate:** The contractor assumes responsibility for its own sole negligence or partial negligence. If the crane company is solely at fault, there is no indemnity. There are two types of intermediate indemnity:

- **Full Indemnity ("broad based"):** If the contractor is partially at fault, he pays all the damages. This allows a crane company who was 99 percent at fault to receive indemnity from the contractor who was only one percent at fault.
- **Partial Indemnity:** Indemnity is on a sliding scale based on the extent of the contractor's negligence. This sets a cap on the amount of indemnity that can be had. If the crane company is 51 percent at fault it is indemnified only for 49% of the total damages.

3 **Limited:** The contractor assumes only the responsibility for its own negligence – if it is solely at fault. There is no protection if the crane company is even partially at fault. All states allow limited indemnity provisions.

ADDITIONAL INSURED CLAUSE WITH PREFERRED CONTRACT LANGUAGE. Additional Insured clauses are often the most favorable risk transfer tools you can have in your contract for two reasons: (1) When you can't get protection through an indemnity clause, you may find protection through an Additional Insured clause; (2) Becoming an additional insured on your customer's insurance policy, by way of a written contract, affords you the same liability protection your customer would have under its insurance policy for covered claims, including defense obligations by the customer's insure. By becoming an additional insured on your customer's insurance policy, you have two insurers to call on for defense and indemnity coverage.

REQUIREMENTS FOR STANDARDS OF CARE/TIE IN TO ANSI B 30.5 ROLES AND RESPONSIBILITIES. Incorporating the ASME B30.5 standard into your contract assists your insurer's defense team in

lines of defense

making liability arguments as to both the standard of care and responsibilities the contracting parties agreed to follow by. In the event of a loss where a dispute arises as to who was responsible for a specific task during crane operations, ASME B30.5 becomes the standard that guides litigators to delineating roles and responsibilities. Should one of the contracting parties fail to perform according to the standard of care outlined in the B30.5, litigators can refer back to the agreed-upon terms within the contract.

CARE, CUSTODY AND CONTROL CLAUSE. During crane operations, it's common for the crane operator to be working under the direction and supervision of another party, such as the customer's lift director and/or signal personnel. Who had the right to control the crane operators' activities becomes a critical liability argument. So to ward off liability as to who is responsible for directing the crane operator's activities on a given job, crane service providers can benefit from inserting a "Care, Custody and Control Clause," also known as "Right to Control" clause, into their daily work ticket or contract. In doing so, crane companies are contractually transferring the risk back to the customer and/or the customers who is supervising and/or directing the crane operator's activities at time of incident. ■

> "You can effectively optimize your risk transfer potential, help mitigate your losses, and do your part to fight against rising insurance costs."

QUOTE IN FULL

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