



APR - ALTERNATIVE MARKETS

DEDICATED TO PUBLIC ENTITY

LESSONS FROM LOSSES: WHAT'S IN A CONTRACT?

“The only mistake in life is the lesson not learned.” —Albert Einstein

DESCRIPTION

A drawbridge operator was in a three-story tower attached to the side of a 50-foot bridge when the tower broke off the bridge and toppled to the ground. The drawbridge operator was trapped in the collapsed tower for hours. She survived but suffered serious orthopedic injuries, including a fractured pelvis, tibia, femur, and ribs and lacerations with permanent disfigurement.

The Department of Transportation (DOT) was sued along with three contractors: the engineer, the design firm, and the builder. The allegations against the DOT were for failure to inspect and negligent hiring of contracting firms. The plaintiff contended the DOT was negligent in hiring the firms, the bridge was designed and built with flaws, the design lacked proper reinforcement, the contractor failed to install the reinforcement required by the blueprints, and the engineering firm failed to identify the problems and recommend proper remediation measures.

THE RESULT

The case settled for \$3 million after four years of litigation. All three contractors paid the settlement; the DOT paid nothing.

THE PROBLEM

Construction defect cases are costly to defend, especially when multiple entities and forensic inspections are necessary to identify one or more causes of an incident. The contracts with the firms adequately addressed indemnity and defense provisions on behalf of the DOT; therefore, defense and related costs to the entity were limited to those incurred before tendering the claim to the other parties.

Each codefendant's defense pointed fingers at the others as the cause of the incident.

- The engineering firm argued that everything looked fine in exterior inspections and that all deficiencies were within the actual bridge. Because the defects were concealed, reasonable inspections could not have identified that the builder did not follow the design or that the design was faulty.
- The builder argued that they followed the blueprints.
- The design company argued that the builder did not follow the design.

LESSONS LEARNED

Jury verdicts, cost of defense, and injury settlements quickly diminish self-insured retentions and policy limits, which puts public entities at financial risk. Savvy public entities pay attention to contractor policy limits, additional insured status, and indemnification language to protect finances adequately in case a claim arises from contractor operations, products, and work.



A one-size-fits-all approach to contractual limits does not sufficiently insulate public entities from exposure; therefore, engaging risk managers is recommended to take a more methodical approach.

- Analyze the services to be completed and the likelihood and severity of injury that may arise from operations. Small events at the park carry less risk than a high-hazard project, such as building a bridge over a busy highway. Small events may warrant a \$1 million policy limit, whereas bridge construction, dam operations, arborists, or other high-hazard services may warrant minimum limits of \$5 million or more.
- Validate that the public entity is an “additional insured” on the contractor’s policy and that the contractor’s policy is primary. A certificate of insurance is inadequate protection.
- Ensure the contract adequately addresses the scope of services.
- Report catastrophic claims to excess carriers promptly.
- When a claim occurs, review all contracts related to a project and place appropriate parties on notice of the claim. The ability to shift expense costs and amount of costs recoverable are often linked to the date of notice, so early notice is highly recommended. Follow up routinely for a response to the tender of defense and indemnity.
- When feasible, coordinate a defense strategy with codefendants.

Note: Although the statements above are based on an actual loss, some facts may have been altered for illustration and education purposes. This information should not be relied upon for legal advice; please contact an attorney for your specific needs.



Allied Public Risk is dedicated to insuring public entities. Please contact anyone on our Alternative Markets Team regarding your public entity accounts.

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