



## **SMALL CONTRACTORS**

Good contractors are hard to find in many communities, especially when the district has a job that is urgent in nature. Small contractors with few or no employees are often asked to do the work and that's when the fun begins. Districts who are members of the Fund know to require certificates of insurance from all of their contractors. Many small contractors don't carry the insurance required, have lower limits of liability than requested and don't carry workers' compensation. But you still need the work done. Here are some considerations that may steer you away from some contractors or open the door to using them despite weaknesses in their insurance program.

### **Lower Insurance Requirements**

Construction or installation jobs are usually confined to one district location at a time. The contractor's insurance may be adequate for a small location with limited property values and few employees present. The contractor may be doing work that is not very hazardous to the building, its contents or its occupants. In that case, a safety or risk manager can examine the risk posed by the project and decide to make an exception to the requirement that \$1,000,000/\$2,000,000 limits of liability are necessary. The Fund recommends only permitting this privilege for contractors you know and who have done excellent work for you in the past. You should also limit this exception to jobs under \$50,000. In rare cases, the contractor you hire may be the only one in your area that does the work you need. You might have to make exceptions to your insurance requirements just to get the contractor to do the work. A contractor's complaint that insurance is too expensive could be an indicator that the contractor doesn't have the financial wherewithal to pay for other things like materials, tools or payroll either. Always keep the purchasing rules for contracted work in mind, especially if you go out to bid or use an RFP. Then the insurance requirements must be the same for all bidders.

### **Workers' Compensation Issues**

Texas Workers' Compensation law is not compulsory for any employer except the district, of course, and any construction contractor doing work for it. Texas Workers' Compensation law, as set forth in the Texas Labor Code, requires coverage as follows:

Sec. 406.096. REQUIRED COVERAGE FOR CERTAIN BUILDING OR CONSTRUCTION CONTRACTORS. (a) A governmental entity that enters into a building or construction contract shall require the contractor to certify in writing that the contractor provides workers' compensation insurance coverage for each employee of the contractor employed on the public project.

Rule 110 of the Division of Workers' Compensation (DWC) of the Texas Department of Insurance re-states this statutory requirement and extends the rule to all sub-contractors on a public entity's construction site. So, you can make no exceptions about workers'

compensation for small contractors on construction projects unless they have no employees.

### **Contractor has no Employees**

Texas Workers' Compensation law permits sole proprietors, partners, and corporate executive officers owning more than 25% of their corporation to exclude themselves from workers' compensation coverage. If they have no employees, they probably don't carry workers' compensation insurance. Section 406.096 does require coverage so contractors who don't have workers' compensation should acquire it for the public entity job. If there is no certificate of insurance noted by the Fund's auditor, the contractor's payroll will be picked up at audit of the district's workers' compensation coverage and the district will be required to pay additional contribution for the coverage.

### **Maintenance Employee**

Texas Workers' Compensation law also addresses employees who perform maintenance work:

- d) The employment of a maintenance employee by an employer who is not engaging in building or construction as the employer's primary business does not constitute engaging in building or construction.

Therefore, the maintenance person doing window washing or lawn mowing is not required to carry workers' compensation. However, the Fund does recommend that they do carry it.

### **Auto Liability Issues**

The main issue with automobile liability is that the contractor has some form of coverage for the vehicles and trailers he or she may bring on site. The exposure comes from operating a vehicle that may cause bodily injury or property damage to others while doing work for you. Limits of liability of \$500,000 or \$300,000 are acceptable. The contractor should also have hired and non-owned liability endorsed to their policy to cover their use of a rented vehicle or an employee's use of their owned vehicle in the contractor's work. It is also permissible to accept the insurance provided by their personal lines carrier as long as limits of liability are adequate and there are no exclusions on the policy for their commercial contracting work.

### **Pay for the contractor's insurance?**

In rare instances when a small contractor is the only one you can find to do the work and they only have limited or no insurance, it might be expedient to pay for their cost of insurance as part of the contracted cost. The main coverage of concern is contractor's general liability that would respond if they injured somebody while doing your work or caused property damage to your property or that of others. Any damage the contractor does to his or her own work would not be covered. More about General Liability in the next section.

### **General Liability**

General Liability insurance is usually the coverage small contractors think is too expensive. Ask them if they've gotten a quote for coverage lately. It might not be as bad as they think. The coverage responds if the contractor hurts someone or does property damage to others during their work. It also covers bodily injury or property damage done

after their work is completed (Completed Operations). An example would be leakage from a plumbing fixture the contractor installed that caused someone to slip and fall. The contractor's general liability would pay for the injury and damage to the floor but not to the plumbing fixture. The contractor's general liability would also pay for property damage to a third party. A common example would be a rock thrown from a landscape contractor's mower that breaks the windshield of a passing motorist.

### **Contractor Qualifications**

Does your contractor have the knowledge and experience to do the work you require? Even small jobs can be very technical and complicated. Ask for a resume or history of experience if there is any doubt. Also recognize that there are huge differences between commercial and residential contracting. When economic conditions worsen, and residential construction slows down contractors will look for work outside their comfort zone. Desperate contractors trying to keep their business afloat will also underbid work to get it. This sometimes creates disastrous consequences for the district when the contractor runs out of cash and can't pay for materials or their employees' wages. That low bid doesn't look so good then.

A solid indicator of a contractor's financial strength is their ability to be bonded. If you require a bid bond and the contractor can deliver one that means the Surety company believes they are financially strong and can complete the work. The Surety company is "bonding" that the contractor can complete the job. If they can't the Surety company has to complete the job. They hate to do this, so they underwrite the contractor's financials and experience very carefully.

### **Key Indicators**

If possible, visit a contractor's active job site. Drive by during the day to see what activity is going on. If possible, drive by again in the late afternoon and check out housekeeping. Has the job site been cleaned up at the end of the day? Good housekeeping usually indicates a safe work site and a conscientious contractor.

### **Contracts**

Just because the job is small doesn't mean you don't need a contract. Use your standard contract or purchase order that includes an indemnification agreement, safety requirements, and insurance specifications. The contract between the district and the contractor should hold the district harmless but you want their insurance company to pay for any claim occurring while they are working for you. Endorsements to their insurance policies that provide a waiver of subrogation in the district's favor will prevent the insurance company from trying to sue the district because you may have been partially at fault. If you have questions about insurance requirements visit the Fund's website at [twcarmf.org](http://twcarmf.org) and go to the Resources page for an FAQ about insurance requirements. Certainly, you can also give us a call based on the staff contact information on the Fund's website.