

## **Control your Subcontracted Exposures** *A Brief Guide for VLCT PACIF Members*

It is common practice for Vermont municipalities to contract out work for various operations such as construction projects, lawn maintenance, recreational activity providers, water/wastewater treatment plant operations, and vendors who provide a service to the municipality. This practice can be very beneficial to municipalities as it allows them to efficiently accomplish work that is seasonal or that requires specific skills not ordinarily found in the municipal workforce. Sometimes, a subcontractor can just get the job done for less time and money!

When a municipality does contract work out, it is important to make sure that any associated liability exposure is transferred to the subcontractor. It is perfectly appropriate to transfer the responsibility for liability and workers' compensation (WC) insurance coverage to the party responsible for generating the exposure. If this is not done, the responsibility for injuries caused by, or to, the subcontractor or their employees could fall back on the municipality and VLCT PACIF as your coverage provider.

We want to help VLCT PACIF members avoid this situation because any resulting claims paid by PACIF on your behalf could have an impact on your future contribution charges. Also, if the potential exists for PACIF to have to provide WC benefits to an injured subcontractor, we will have to include the contract cost as payroll on your WC audit and add a corresponding contribution charge for the exposure (if you cannot provide us with documented evidence of coverage carried by the subcontractor or a signed WC affidavit).

### **How to Transfer Contractual Risk**

It is important to take the time to carefully consider and document this contractual risk transfer. A municipality should make sure that the contractor carries both liability insurance and WC coverage (unless it is exempt from WC by state statute). If the subcontracted work involves a vehicle or requires a professional designation, you will want to obtain evidence of automobile and/or professional liability coverage as well. If the contract involves a food service vendor and alcohol is served, you will want evidence of liquor liability and general liability coverage. If the contractor is exempt from carrying WC coverage, you will want him or her to sign a non-employee work agreement to guard against the possibility that the contractor becomes your "employee" by default for WC coverage. This is not a guarantee that the contractor won't be ruled an employee, but it will help in your defense of an appeal.

In addition to checking for the above, specific coverages, here are a few more general best risk management/transfer practices to follow when hiring a contractor:

- Always utilize written contracts.
- The contracts should contain indemnification and hold-harmless provisions in favor of the municipality. Subrogation should not be waived.
- The municipality should require that it be named as an "Additional Insured" on all contractors' liability policies.
- All contractors (including construction manager, general contractor, prime contractor and subcontractors and vendors) should document that they carry adequate insurance

coverage. (A rule of thumb is that their limits of liability should be at least as high as yours.)

- Certificates of Insurance should be obtained and reviewed from each contractor prior to him or her beginning any work.
- Regarding true independent sole-proprietor contractors who are exempt from carrying WC coverage on themselves (they do need WC coverage for any employees), be sure to obtain a signed non-employee work agreement.
- Consult your attorney for assistance in drafting and reviewing contract language.

### **The Employee/Independent Contractor Determination**

The State of Vermont defines “employer” broadly. It includes work performed through independent contractors and subcontractors. The law presumes an employment relationship with any worker hired or contracted by you. Contracting out does not automatically relieve you of insurance requirements. However, the legal presumption of an employment relationship may be rebutted by proof that the subcontractor is truly an “independent” contractor.

Vermont WC law considers whether an individual is an independent contractor on a case-by-case basis. There are three key questions to consider when determining an individual’s status:

- 1) Who controls the work being performed?
- 2) Is the work being performed normally carried out by an employee of the municipality?
- 3) Are the worker’s work activities integral to the municipality’s regular operations?

If you control a subcontractor’s work, or if the subcontractor’s work is work that is normally performed by or part of your operations, then your subcontractor is considered an employee, and WC coverage is required. For this reason it is very important to use written contracts, and obtain a certificate of insurance that shows WC coverage is in place (or, as mentioned above, obtain a signed non-employee work agreement from a sole proprietor or partner owner of an unincorporated business).

When reviewing certificates of insurance, please check the following:

- That the appropriate lines of coverage and amount of insurance required has been purchased.
- That the expiration date of the policy(ies) has not passed, and will not expire during the contract term.
- That the municipality is listed as an “Additional Insured.”

Please call the VLCT Group Services Underwriting Division if you have any questions regarding the principles of risk transfer or would like a copy of the non-employee work agreement referenced above.

*Ken Canning, Deputy Director, VLCT Group Services*

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