



## Landfill Lessons in Contracting

Landfills often engage outside contractors for activities ranging from one-day installation and repair to long-term projects involving cell construction, maintenance and closure. The skilled and unskilled trades involved in landfill projects typically represent many disciplines and the projects performed vary significantly in the degree of risk. Construction specialists may act on behalf of the landfill owner as a project “boss” accept-



ing responsibility for the daily management and supervision of other specialists selected by either the owner or contractor. What follows is an actual scenario which illustrates some of those risks and the importance of consistently maintaining rigorous risk transfer methods when engaging subcontractors at landfill sites.

An experienced hazardous waste landfill company with dedicated corporate Risk Management personnel contracted with a specialty environmental contractor to construct a new treatment building. The fixed price contract had hold harmless/indemnification clauses as well as Certificates of Contractors General Liability Insurance with appropriate limits and the Additional Insured designation of the owner. This particular contractor was well known to the owner, having taken on numerous projects in the past.

During the course of construction, a separate underground tank excavation project was identified. The excavation project was expected to be completed within five days; but was sufficiently different in scope so as to require a change order to the existing construction contract. Instead, the tank excavation project was executed through a Purchase Order on a turn-key basis requiring the same contractor to be responsible for direct oversight and supervision with the owner electing to hire the necessary unskilled labor from a local temporary agency.

During the project, a temporary employee alleged that the contractor dumped Portland cement on him while he was in the excavation pit. Though he finished the shift, he did not return to work the next day and filed a workers’ compensation claim, alleging multiple back injuries of a severe nature. The injured employee then sued both the owner and contractor for negligence. Since the owner did not have employees at the site, the more responsible party would seem to have been the contractor, who reportedly failed to clear the pit before dumping the cement.

During the coverage investigation process, XL Insurance claims staff initially sought to identify the contractor as the responsible party under the Construction Contract agreement, but discovered that the tank excavation project in question was governed by the separate purchase order as referenced above. This purchase order had neither indemnification/hold harmless provisions nor certificates of insurance with additional insured provisions and necessary endorsements. Since the owner hired the temporary employee from an agency, the XL Insurance claims staff sought

similar indemnification provisions and certificates from the temporary service company. No such provisions existed. The existing contract between the landfill owner and the temporary service company lacked an indemnification clause. In addition, the certificate of insurance provided did not list the owner as an additional insured. Had it contained such, it would have served as a second line of defense, despite the significant shortcomings of the Purchase Order.

**Additional Factors Identified:** Before XL Insurance claims staff discovered the “naked” purchase order, they sought coverage from the contractor under the Construction Agreement. The contractor’s General Liability carrier issued a denial letter, before realizing that the project in question was not under the Construction Agreement. Their basis for denial identified two policy exclusions – which include a Temporary Employee and Landfill Exclusion. This suggests that, even when appropriate risk transfer provisions are included in a contract, coverage may still be denied based upon policy exclusions.

It may be necessary to obtain and review the insurance policies of subcontractors so as to make decisions on how to negotiate and manage project risks. For example, to negate Landfill exclusion, it is necessary not only to include the corporate name as an Additional Insured, but also the specific landfill name and physical address. Temporary employee exclusion on a contractor’s policy should compel the owner to negotiate, not directly hire temporary employees, or ensure that the contract with the temporary agency contains indemnification provisions as well as certificates with Additional Insured designation and attached endorsements.

This multi-location landfill operation has a centralized corporate risk management staff and

procedures in place regarding project development as it relates to risk transfer methods and insurance verification. In this particular instance, local landfill managers authorized a short duration project to be managed by a known, reliable, and trusted construction specialist. In expediting the project without contractual provisions from the contractor and temporary agency, they assumed a disproportionate share of the risk.

#### **LESSONS LEARNED:**

- Purchase Orders for subcontracted work should have Indemnification Clauses and Additional Insured requirements from all parties involved in the project. Projects should not commence until all provisions are properly documented and signed by all parties.
- Agreements with temporary or labor leasing agencies should include Indemnification/Hold Harmless Clauses and Certificates of Insurance with Additional Insured designation and necessary endorsements, if hired directly, or through contractors.
- A Certificate of Insurance is for information purposes only. As a stand alone document, it serves only to verify coverage in effect. Without specific language naming a party as an Additional Insured with an attached Contractual and Additional Insured endorsement, it may not protect owners and contractors from acts of negligence on the part of subcontractors.
- Parties who develop subcontracted projects should request, receive, and review subcontractor’s General Liability policy to identify exclusions which could negate indemnification agreements and Additional Insured designation.

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