Safety, Insured

BALANCING INSURANCE AND INDEMNIFICATION AGREEMENTS CAN MITIGATE RISK IN UTILITY PROJECTS. By Kevin Hudson & Matthew Spivey

The wireless revolution is in full force, and to meet growing demand for cellular phones and data devices, wireless companies are scrambling for new cellular tower sites. Power companies are also scrambling to keep up. The surge of new construction related to power lines and cell towers does not, however, come without its fair share of risks. After all, the leading causes of death in construction are falls and electrocution. The Department of Labor's Bureau of Labor Statistics for 2006 found that those working on cell towers and other communication structures have "the most dangerous job in America," citing 115.2 deaths per 100,000 workers.

As recently as April 13, a construction worker fell nearly 150 feet during construction of cell tower. Prudent owners and contractors must allocate the risk ahead of time, before the project begins. Dealing with such risks through a steady balance of both insurance and indemnification agreements is a good place to start.

Insurance vs. Indemnification

When allocating risk, the difference between indemnity and insurance is subtle but important. Insurance agreements provide for payment to the insured by the insurance company when a certain insured event occurs. Indemnity agreements require the indemnitor to pay the indemnitee if that indemnitee has to pay a third party.

For example, if a person is injured due to the negligence of a contractor, and that person sues the owner of the property and wins, the owner may have to pay that person money. However, the owner may be able to get that money back from the contractor if he or she has an indemnity agreement with the contractor wherein the contractor agreed to pay the owner for losses the owner suffered pursuant to the contractor's negligence.

Indemnity agreements should be drafted carefully because many courts will hold them to be void or unenforceable if they are not drafted correctly. For instance, if a party seeking indemnification wishes to be indemnified for his own negligence, some states will hold this is unenforceable, while others will require very clear language in the indemnity agreement. Most courts enforce indemnity agreements that provide indemnity for the sole negligence of the party seeking indemnification.

Carefully drafted indemnity agreements can still provide a means of protection for contractors or owners seeking to limit their liability. In fact, indemnity agreements can be quite helpful to cover situations that may be "excluded" from coverage under an insurance policy. For example, an insurance policy (i.e., it may exclude certain environmental contamination from its coverage it may refuse to reimburse a contractor for loss due to pollution of the worksite). In that situation, a carefully drafted indemnity agreement would be very helpful and could avoid such an exclusion.

On the flip side, insurance policies can provide protection in situations where indemnity provisions are found to be insufficient or void. In the case of *Ryder vs. BellSouth*, an insurance agreement provided protection where an indemnity agreement was found to be invalid. That case involved a Ryder employee who was seriously injured while working on a project for BellSouth, the property owner. The Ryder employee filed a lawsuit against BellSouth, alleging that he was injured as a result of BellSouth's sole negligence.

BellSouth ended up with some protection, however, through an insurance agreement that it had with Ryder. The same contract between BellSouth and Ryder that contained the indemnity agreement also required Ryder to add BellSouth to Ryder's insurance policy as an additional insured. Thus, Ryder's insurance company had to pay Ryder's employee for the injuries suffered due to BellSouth's negligence. BellSouth was held responsible for the amount owed to Ryder's employee that went above and beyond Ryder's $1 million policy limit.

The above scenario illustrates the importance of carrying enough liability insurance to cover all potential losses. In today's climate, a cellular tower or power line contractor should obtain at least $5 million in liability insurance for a small project and $10 million for a large project. Before deciding that a project is too small to justify $5 million in insurance, remember, it is not the size of the tower that matters, it is the size of the accident.

High-Voltage Safety Acts

Many states have enacted high-voltage safety regulations to protect owners and operators of utilities and well as workers and contractors who perform work around utilities. These regulations add another wrinkle to the ability of a cellular tower or power line contractor or subcontractor to limit his or her liability. These regulations require any person who intends to perform work near utilities to notify the owner or operator of the utilities so that the owner or operator can take proper safety precautions before the work begins. If the contractor fails to provide notice, often these statutes will hold the contractor solely responsible for any injuries that occur pursuant to the contractor's work or for any damage to the utilities. The contractor will be required to indemnify the owner or operator for all claims resulting from the contractor's work, including claims for personal injury, wrongful death, property damage and service interruptions. The contractor may also be required to pay for the owner or operator for its costs to defend those claims.

Additionally, if a contractor's employee is electrocuted, and the contractor pays the employee worker's compensation, that is not the end of the contractor's potential liability. If the contractor's employee sues the owner or operator of the utilities (which he or she probably will), then the owner or operator of the utilities can come back after the contractor if he or she failed to give the utilities notice of the performed work.

The contractor may try to argue that he or she does not owe the owners or operator of the utilities for the money the owner or operator had to pay to the injured worker because the contractor's liability is limited by worker's compensation. This argument will fail. Worker's compensation acts typically do not prevent owner or operators of utilities from seeking indemnity from contractors whose worker's were injured and received worker's compensation but later sued the owner or operator of the utilities. This is because the indemnity is provided for by statute and specifically allows an owner or operator of utilities who has not been given notice of work to go after a contractor for the amount the owner or operator of the utilities had to pay to the contractor's injured employee.

In Georgia, for example, the High-Voltage Safety Act (HVSA) provides for this type of indemnity despite worker's compensation payments paid to injured employees. That scenario played out in *Flint Electric vs. Ed Smith Construction*. In that case, an employee of Ed Smith Construction was injured on the job when a crane came into contact with a high-voltage line owned by Flint Electric. The employee received worker's compensation but also sued Flint Electric. Flint Electric then sought indemnification from Ed Smith Construction. Ed Smith Construction argued that the exclusivity provisions of the Worker's Compensation Act precluded Flint from seeking indemnification, but the court held that the exclusivity provisions of the Worker's Comp Act did not prevent Flint from seeking indemnification because the indemnity action was based on the HVSA.

When a contractor or subcontractor seeks to undertake work on or around utilities, or seeks to perform work constructing a cellular tower, the risk in performing such work is high. Owners, contractors and subcontractors must be aware of risk and plan for it in advance. Such planning mechanisms include detailed and comprehensive insurance and indemnification agreements. ■

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