

Weatherization Assistance Program (WAP—POI)

Private Subcontractor Risk Management Report

Private Subcontractor Risk Management for Community Action Agencies and Private Contractor Contract Clauses to Maximize Insurance Protection

Lead paint poisoning claim expenses will go up the organizational chain of command just like a “slip, trip and fall” or “property” damage claim would go up the chain of command to a Community Action Agency (CAA), CDC, or nonprofit organization if the claim is not covered by the private subcontractor’s general liability insurance policy. Pollution claims are excluded from all general liability policies because general liability policies have “absolute” pollution exclusion. A pollutant, as defined by the exclusion, excludes coverage for any claim involving lead, asbestos, mold, PCB, petroleum products, or radon, to name the more common pollutants; all of these pollutants can be found in older homes.

What if a \$1,000,000 lead paint poisoning or pollutant claim rolls up from the private subcontractor to a CAA? How does a Community Action Agency minimize or manage this private subcontractor risk? The survival of Community Action Agency might depend on how well this private subcontractor pollution risk is managed.

Ideally, private subcontractors that perform contracting services in older homes should have their own pollution policies. With regard to lead and the DOE WAP Program, CAAs require private contractors to incorporate LSWP on all projects in pre 1978 homes, and the use of LSWP, if done properly, will reduce the overall exposure from lead poisoning claims. However, if a poisoning is alleged against the private contractor, LSWP will only provide the contractor’s defense with something to counter against the plaintiff’s accusations in court, but these defense and court expenses will quickly exceed most private subcontractor’s financial capabilities, and then the claim will roll up to a CAA if the private contractor does not have a pollution policy to deal with their own claims involving lead, asbestos, mold, and “pollutants.” The new EPA RRP law has brought attention and awareness to lead safe work practices (LSWP).



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There does not appear to be a great deal of private contractors using chemical spot test kits in the DOE WAP program. If private subcontractors are “testing” to determine if LSWP should be incorporated into a pre-1978 project then this would present a substantial risk to CAA’s for this reason; the contractor has tested which is excluded from all general liability policies, and in some cases the contractor has not incorporated LSWP which reduces defense options and increases defense expenses and damage amounts. A contractor who uses the chemical spot test kits should have a pollution policy that includes coverage for testing; this coverage is provided in the pollution policy with an incidental professional liability endorsement.

In addition to the incidental professional liability coverage endorsement if applicable, there are three endorsements that a CAA should request from private subcontractor’s pollution insurance policy to maximize protection: Additional Insured, Primary Non-Contributing and a Waiver of Subrogation (where permitted by law). Most of the pollution (and general liability) policies in the marketplace automatically give Additional Insured, Primary Non-Contributing and sometimes Waiver of Subrogation endorsements if the above endorsements are requested in the contract between the CAA and the private subcontractor. Without the contract reference, the coverage would not apply unless the CAA requested these endorsements individually for all projects, which adds an administrative burden and increases the potential for administrative errors.

When a claim rolls up from the private subcontractor, these endorsements (if in place) will protect the CAA to the greatest possible degree by eliminating potential defense claim costs and deductibles. These endorsements should not cost anything at issuance. If the CAA can obtain the waiver of subrogation for no additional cost because it is automatically included in policy with contract reference or if the private contractor underwriter will issue it without additional cost, then it would be wise for the CAA to solicit this endorsement. Insert the Following Into the Insurance Section of your Contract with Private Subcontractors to Maximize Insurance Protection for the CAA. These clauses if inserted into private contractor contract will back up any CAA private contractor insurance administrative effort. Our audit revealed CAA’s are not getting Additional Insured Endorsement from 100% of private subcontractors, and primary non contributory and waiver of subrogation endorsements are not even being requested, in many instances.



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The insurance policies specified above shall be endorsed to provide the following:

1. Name CAA and property owner, their directors, officers, employees and agents as additional insured with respect to the services performed hereunder, and
2. Shall be primary with respect to any insurance carried by CAA, and
3. Shall include a waiver of subrogation, where permitted by law, for CAA if policy automatically provides this endorsement with contract reference. If insurance company charges for this endorsement, please solicit instructions from CAA.

Because of the potential for high private contractor turnover, a CAA would be wise to require their private subcontractors to have an “occurrence” pollution policy. If “claims-made” policies are allowed by the CAA, the insurance certificates from private subcontractors should reflect policy retroactive dates, and retroactive dates should be monitored by the CAA. With claims-made policies, if the retroactive date changes or the policy lapses because the contractor becomes insolvent or cuts costs, the CAA will lose the protection afforded by the private subcontractor’s claims-made pollution policy for the completed work. This would be tragic because it could be prevented. Claims-made policies require management by the CAA.

If the CAA does not have a pollution policy, but it requires the private subcontractors to have their own pollution coverage, then it is imperative that the CAA manages the private subcontractor’s pollution insurance well because the claim will still roll up to the CAA if the private contractor’s “pollution” coverage is inadequate, no coverage exists, or the limits are too low. The CAA should provide stated requirements to the private contractors as to what must be covered, the limits, and if claims-made policies are allowed, the CAA will also need to manage retroactive dates as mentioned above. The CAA would be wise to have the covered pollutants listed on the certificate, such as lead, mold, asbestos, or radon, so that everybody is on the same page. If the CAA already requires a pollution policy from private contractors, then it is wise to get protection from all the common pollutants in addition to lead.



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Coverage for all the pollutants does not necessarily increase the insurance costs for the contractor. It is even more essential for the CAA to request the above-mentioned endorsements from all their private contractors: Additional Insured, Primary Non-Contributing, and Waiver of Subrogation. If the private contractors are allowed to have claims-made pollution coverage, as mentioned above, the retroactive dates will require monitoring to make sure the coverage for the CAA is maintained going forward. Again, it might be easier to require that the contractors have an occurrence form pollution policy, so that retroactive dates are not an issue. With occurrence policies, CAA will retain their coverage protection regardless of retroactive dates, contractor solvency, or a contractor that does not renew their insurance. Limits should be high enough to protect the assets of the CAA.

What if the CAA has POI coverage, but the subcontractors do not. This creates several potential problems. As mentioned above, a poisoning claim against a private subcontractor without coverage will put the contractor out of business, and now the claims rolls up to CAA. If the CAA has POI coverage that includes their subcontractors, then the policy will certainly provide defense. The same policy will most likely provide coverage for damages if the contractor was not negligent. For example, the private subcontractor was supposed to use LSWP, but they did not, and the claim can be traced to that subcontractor's negligence. If the contractor did not do what the CAA required, and that is the origination of the claim, then it is the subcontractor's fault and not the fault of the CAA. In this example, the CAA's POI coverage might not respond to medical damage claim costs. Now there are these medical damage costs floating around without any policy to pay for them. At this point, this claim would most likely find its way to the CAA's general liability policy for "breach of contract." The plaintiff would attempt to make a case that the CAA did not live up to their contractual obligations. The DOE WAP program offers the Additional Named Insured Endorsement to extend coverage down the private subcontractors and eliminate this potential problem with contractor's negligence and medical damages.



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