

Protecting Assets by Utilizing Risk Transfer Solutions

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As corporations begin to move former industrial sites into redevelopment, customized risk transfer programs are an integral part of the risk transfer solution by further supporting the corporate balance sheet decision. Property owners should be aware of the benefits and various programs that are available for all parties involved in the transaction. The elements of each program will need to be based on the site conditions, the parties risk tolerance levels, the transaction structure and the regulatory implications.

The Basic Approach:

A combination program where the property is approached as a multi-part risk transfer and risk mitigation solution could include:

- Capping the cost of the work both contractually and/or through a cost cap insurance solution;
- Insuring and bonding the on-site activities of the contractors/subcontractors;
- Insuring and bonding the transportation of off-site waste and material;
- Crafting strong contractual indemnification language between the remediation contractor and the property owner;
- Having the remediation contractor indemnify through contract indemnification language;
- Guaranteeing against subsequent reopener of the site by regulatory agencies;
- Recommending a real estate transfer coverage program, which offers further protection and insurance solution that can be transferred with the property as it is conveyed to subsequent purchasers for a period of up to 20 years;
- Obtaining indemnifications and/or certificates of destruction from the waste incineration and/or treatment and disposal facility.

Contractors Pollution Liability (“CPL”) —CPL is designed to address environmental liabilities associated with the job-site operations of contractors. CPL provides coverage for third-party claims for bodily injury and/or property damage, as well as remediation costs stemming from pollution incidents resulting from the contractor’s covered operations.

Many companies offer combined GL/CPL Programs, which are designed to ensure continuity of coverage for environmental contractors and consultants for losses arising from operations that may fall under general liability operations or contractors professional liability operations.

The Surety Solution — The remediation contractor can require the bonding of all its subcontractors and suppliers on a project requiring 100 percent performance and payment bonds. The current market for environmental surety providers is limited. However, many of the non-environmental providers will issue a bond as an accommodation based on the size and relationship of the remediation contractor. Moreover, the remediation contractor should ensure the execution of “Dual Obligees” on all subcontractors’ and suppliers’ surety bonds, naming the property owner.

Subcontractor/Supplier Insurance Solution — The remediation contractor can ensure that the property owner be named as “Additional Named Insured” on all subcontractor and supplier insurance programs.

Remediation/Stop Loss Program — These programs will typically cover known contamination at the site. The RSL is designed to cover overruns in the anticipated cost of project work. This program is typically structured with a self-insured retention (SIR) that represents the expected clean-up costs, plus a buffer, to clean a site.

Among the benefits of this program is its periodic reporting requirement. Under this provision, the remediation contractor would provide a periodic report to an insurance carrier on the clean-up activities conducted at the site along with the interim and total clean-up costs incurred, which are submitted for application toward the SIR. Such periodic reporting gives the remediation contractor the opportunity to receive feedback from its insurer's environmental remediation specialists.

There are potential limitations with this program in that it usually covers only known remedial activities required to implement the scope of work at the site or as defined in the remediation action work plan. Coverage typically does not cover losses arising from unknown or undiscovered contamination at the site, contractor delays and faulty workmanship.

Addressing the unknown or undiscovered contamination at a site would typically require the inclusion of either a real estate environmental liability policy or an agreement by the parties to extend the RSL coverage to unknown contamination.

Environmental Wrap-Up — In light of the multiple subcontractors typically found on a brownfield project, the property owner may consider requiring an environmental wrap-up program, which would require coverage for the remediator as the general contractor of the project and all the subcontractors engaged. This coverage could also include coverage for all parties on a project, restoration costs, site capping activities and offsite exposures at non-owned locations.

Pollution Legal Liability — Pollution Legal Liability (PLL) is the most common type of risk transfer solution purchased after a remediation on a brownfield property. A PLL is structured to pay on a site owner’s behalf all sums that they are legally obligated to pay as a result of emission, discharge, release or escape of any contaminants, irritants or pollutants into or on land, the

atmosphere or any water course or body of water, provided this results in "environmental damage." Additionally, PLL pays a reimbursement of an owner's expense for reasonable and necessary clean-up costs incurred in the discharge of a legal obligation validly imposed through governmental action, provided such expense is incurred because of "environmental damage." What makes the PLL attractive is its transferability to future property owners and the fact that the coverage is available for five-,10- or 20-year terms.

A comprehensive risk transfer approach should include coverage to a property owner for any cost overruns on remediation expense, defense and indemnity on a first- and third-party basis, for conditions both on and off site, for claims arising from either new conditions or pre-existing unknown conditions. A risk transfer solution can also be provided on a "re-opener" basis to address any claims arising from environmental constituents previously cleaned up during the project.

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