What's in a contract?

By Tiffany Ambrose

In 2016, a WCIA member awarded a waterline replacement contract to an excavation / underground services company they had routinely worked with. The contractor was hired to deactivate the existing water main; install approximately 7,300 linear feet of 16-inch ductile iron water main; and replace existing services, hydrants, and crossings.

Part of the project was to "tie-in" the new waterline, in other words, connect the existing east/west feeder waterlines with the newly installed north/south main waterline. In its simplest form, a tie-in involves cutting the existing line to make space for a T-shaped valve that will direct water in four directions. Generally, after making the initial cut in a line in order to place the new mainline, a cap is installed over both sides of the cut off feeder pipe, which prevents contaminants from entering the water stream and allows the water system to be re-pressurized, so surrounding customers have water pressure during the project. These caps are generally stabilized by wood blocks to ensure that pressure in the line does not cause a forward thrust/water hammer and "blow off" the pipe caps. When it is time to intertie the feeder pipes with the new water main, the City will turn off the water pressure in the feeder lines, and the contractor will remove the caps and install the "tie-in" valves.

There is inherent danger in performing a tie-in as there can be both water pressure and air pressure built up behind line caps. Often times, older valves can allow water / air through as they no longer fully close. Usually a fire hydrant or other water access point is used to let out built up pressure but here one was not available. In these instances it is customary safety practice for the contractor to make a cut or drill a hole into the bottom of the feeder pipe just behind the pipe cap to check and release any remaining pressure and water in the feeder pipe.

Here, water department employees shut off the water pressure flowing through the feeder pipe towards the tie-in intersection using the existing valves. Staff then told the contractor's supervisor that the water valves had been shut off, but due to the lack of a pressure release point, there was no way for the City to ensure there was no retained water or air pressure at this tie-in and that the old valves may be letting pressure through. A factual dispute developed here as the contractor's supervisor reports he was not told this by the City, and thus, didn't inform those in the excavation pit. As this information was not relayed to those in the excavation, the plaintiff proceeded to remove the thrust blocks on the pipe and began cleaning the tie in for a new attachment. After about five minutes, the retained pressure caused the feeder pipe to thrust forward with the capped end hitting plaintiff's hand. This came with the sound of an explosion and water / air vapor enveloping the excavation pit. The crush injury to his hand was severe. The damage to his hand caused permanent disfigurement with lifelong pain. He lost one of his digits and had to undergo numerous surgeries.

The challenge with this case comes down to the contract the City signed with the contractor and the allegations made by the plaintiff. The plaintiff alleged that the City's failure to relieve pressure was the cause of the damages and initially did not allege the contractor had any failings. When WCIA tendered the claim to the contractor's insurer, they denied the tender arguing there were no allegations of the contractor's failure and that they owed no defense obligation to our member for our member's own negligent acts.

Generally, employees cannot sue their employer for negligent acts. Doing so is prohibited by Title 51 RCW (workers compensation). When WCIA spoke to the plaintiff's attorney here, they told us they did not sue his employer for this reason. WCIA's recommended contract language includes a waiver of Title 51 immunity, unfortunately, this language did not make it into the final contract. Without this contract language, the plaintiff was unable to sue his employer and had to focus all of his efforts for general damage recovery on the City. The City still had a right to contribution from the contractor, but without that language, the City would have had to take a verdict and then pursue the contractor in a separate action to recover the portion of the award paid to the claimant that came from the contractor's negligence. Proceeding in this manner would make for a long and expensive litigation process.

With the authorization of the City, WCIA filed a third-party claim against the contractor in the City's name to force the contractor and their insurer into the litigation. As the facts of this case developed it became quite clear the contractor bore the majority of the fault. After litigating the case for nearly four years, the case was settled at a mediation with the contractor's insurance carrier paying 4:1 what WCIA contributed to the settlement. If the contract had included WCIA's recommended insurance language, the litigation likely would have been substantially less costly and would have resolved much sooner.

WCIA offers risk guidance to members and has recommended contractual language that members should rely heavily on. Being involved in litigation this long is taxing to member staff in responding to discovery and being deposed. Having avoidable claims drives costs for the membership and affects future rates for members. This example demonstrates a great reason to engage with your entity's assigned risk management representative in contract review and illustrates the importance of having strong indemnification language, appropriate insurance requirements, and ensuring you receive updated certificates of insurance.