



PROTECTING YOUR INSURANCE PROTECTION E-UPDATE

FIVE ESSENTIAL INSURANCE PROVISIONS YOU NEED TO REVIEW

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Certain insurance provisions are increasingly being required by both general contractors and construction managers to be included in their subcontracts. The following are five insurance provisions that are now often being found in the insurance specifications of subcontracts on major projects.

ADDITIONAL INSURED COVERAGE

Most construction contracts require that the Named Insured (the party purchasing the policy) add the upstream party(s) to the policy as an Additional Insured ("AI"). This protects the upstream party(s) from having to tender a claim to its own insurer.

Read your policy's AI endorsement carefully and be sure that you understand exactly what coverage it provides and whether it is adequate. There are many different versions of the AI endorsements, each of which is uniquely worded. The more specific the wording of the endorsement is, the narrower the scope of coverage. This provides the insurer with more opportunities to deny coverage to the Additional Insured.

In addition, as discussed below, important case law develop in New York have undermined basic AI protection, by reading "horizontal exhaustion" principles into AI coverage applications.

LIABILITY LIMITS OF \$2M/\$4M

Although liability limits of \$1,000,000 per occurrence and \$2,000,000 aggregate (\$1M/\$2M) have long been the norm, this appears to be changing. The larger contractors and construction managers have begun demanding that the subcontractors whom they retain have Comprehensive General Liability ("CGL") policies with liability limits of \$2M/\$4M. The single biggest reason for the change is New York's adoption, as alluded to above, of the concept of "horizontal exhaustion" of policy layers.

Despite relatively recent landmark judicial decisions involving horizontal exhaustion, the majority of insurance specifications in subcontracts are still drafted with the intention of "vertically" exhausting coverage. The simplest way to avoid this disconnect between what the parties intend and what the courts will do is to mandate that every downstream party provide primary CGL coverage up to \$2M per occurrence and \$4M aggregate. This dollar limit of coverage should generally be sufficient to provide for the majority of claims and, thereby, mitigates concerns about subcontractor's excess coverage not being triggered before the AI's primary coverage, or, conversely, concerns about the AI's primary coverage being triggered before the exhaustion of the subcontractor's excess coverage. In a "horizontal exhaustion" states such as New York, therefore, it is imperative that the subcontractor's primary coverage be more robust to avoid the involvement



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under horizontal exhaustion principles of the AI's primary coverage.

"PRIMARY & NON-CONTRIBUTORY" COVERAGE ENDORSEMENT

Most construction contracts contain a clause which requires the Additional Insured coverage to apply on a "primary and non-contributory" basis. A "primary and non-contributory" coverage endorsement is used to identify the order in which multiple policies of insurance will respond to a covered loss.

For example, let's assume that Dave's Drilling is a subcontractor for Clark Construction. Dave adds Clark to Dave's CGL policy as an Additional Insured, with primary and non-contributory coverage to be provided Clark. An employee of Dave's is injured on the job site and files suit against both Dave's and Clark, who, in turn, tenders the claim back to Dave's insurer. Even though Clark has its own CGL policy, Dave's policy provides coverage to Clark because Dave's policy provided "additional insurance" coverage to Clark on a "primary and non-contributory" basis. This serves to make Clark's policy "excess." The fact that Dave's policy is "non-contributory" means that Dave's carrier will not demand that any other insurer (i.e., Clark's) contribute to the costs of defense or settlement and will cover Clark on a "primary" basis.

COMPLETED OPERATIONS COVERAGE

The traditional CGL policy will provide coverage for claims of bodily injury or property damage which occurs during the policy period only if construction on the project is ongoing at the time of the injury. For this reason, depending upon the terms of the contract involved, it is often necessary to ensure that your CGL policy also specifically provides coverage for Completed Operations.

Many CGL policies exclude coverage for what is known as the "Products-Completed Operations Hazard." This exclusion serves to bar coverage for any claims of bodily injury or property damage arising out of your work, except for work that has not yet been completed or abandoned. By purchasing "Completed Operations" coverage, your policy should provide coverage for claims arising out of your work for another even after the work has been completed. (Note that one of the major disadvantages of Owner Controlled Insurance Programs ("OCIPs") -provided insurance is the absence of "completed OPS" coverage.)

WAIVER OF SUBROGATION ENDORSEMENT

Most construction contracts require the downstream party to provide CGL coverage in which the downstream party's insurer will waive any right to recover damages for bodily



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injury or property damage which are paid by that insurer for injuries arising out of your work performed under a contract with an upstream party. This is a very important part of contracts where the upstream party demands to be added as an Additional Insured under the downstream party's CGL policy. Without this endorsement, the AI endorsement could be completely undermined. The downstream party's insurer could pay a claim which has been made against the upstream party, and then demand that the upstream party (or its carrier) reimburse it in full for the money which it paid in settlement of the claim against the upstream party.

G&C COMMENTARY

In a perfect world, construction managers and general contractors would read every policy of insurance, cover-to-cover, under which they seek to be an Additional Insured. Admittedly, this could be very time consuming. Reviewing at least the above-identified five policy provisions could provide much more essential information than mere reliance on an ACORD-type Certificate of Insurance. Such review would be an important step in better protecting your insurance protection.