

Being an “Additional Insured” Provides Invaluable Protection for a Contractor

By: Mitchell B. Reiter, Esq
Goldberg & Connolly

There are several mechanisms by which a contractor or subcontractor can allocate the risks of personal and property damage on a job site to its subcontractors. One of the most well-known and effective risk management tools is to require in the subcontract that the subcontractor procure insurance for these specific risks and include the contractor or higher tier subcontractor as an additional insured under the policy. This affords the contractor the same rights as the policy holder under a commercial general liability policy (CGL).

Being named as an additional insured is exactly what it sounds like – the policy is acquired in the name of the lower tier subcontractor, as the insured party, and includes an endorsement that names the contractor or higher tier subcontractor as an additional insured party for the risks covered by the policy. Both the subcontractor who buys the policy in its name and the contractor/higher tier subcontractor who is named as an additional insured have essentially the same rights and coverage. They are both insureds.

Being an additional insured is an important and highly effective tool to ensure that you do not have to pay the legal fees and damages that typically arise from a job site accident. We are all familiar with the typical scenario. A subcontractor’s employee is hurt on the job. Because he cannot sue his subcontractor employer (the injured worker is covered by workers compensation for the claim he has against his employer), he instead sues the owner, general contractor/construction manager and the higher tier subcontractor for whom his lower tier subcontractor/employer was working. You, the higher tier

subcontractor, now are facing legal fees to defend the action and potential damages for the worker's personal injuries and lost salary.

If your subcontract with the injured worker's employer required that they acquire commercial general liability (CGL) insurance naming you as an additional insured, you will have significant protection from the financial burdens of this situation. Indeed, a recent decision of the highest court of New York State has held that your subcontractor's CGL policy is primary to your policy. This means that your subcontractor's CGL policy, on which you are named as an additional insured, must pay the legal fees and damages first. It does not matter that you have your own policy that covers the types of accidents and damages at issue. Only if your subcontractor's policy either does not cover the particular occurrence at issue or the legal fees or damages has exceeded the dollar amount limit of the policy will your CGL policy have to pay. Since it is quite possible that neither of these events may ever happen, quite often your policy never has to pay anything. Your subcontractor's policy on which you are an additional insured pays first.

In addition, there is no requirement that your subcontractor must have an obligation to indemnify you for the claimed losses of the injured worker before your subcontractor's policy must cover you for the legal fees and potential damages. There is no need to determine the relevant faults of the various parties involved. It is simply enough that your subcontract requires your subcontractor to provide insurance coverage for you as an additional insured.

Even the simple obligation that your subcontractor's policy must pay the legal fees involved in defending the injured worker's personal injury action is highly valuable. The duty of an insurance company to defend a personal injury action is exceedingly broad. The insurance company will be required to provide and pay for an attorney to

defend the action whenever the allegations of a complaint, “suggest a reasonable possibility of coverage.” This duty to defend will be triggered even though the insurance company may ultimately not have to pay any damages for the losses claimed by the injured worker.

G&C Commentary:

Additional insured coverage is quite important and useful in avoiding the types of legal fees and personal injury costs associated with job site accidents. The terms of your subcontract must unquestionably require the type and scope of additional insured coverage necessary to protect you from these costs. The policy containing your additional insured coverage and the documentation evidencing it must also be clear and proper to ensure you have received the coverage required in your subcontract. Be certain to contact an experienced attorney and insurance broker to have them review your subcontract and your subcontractor’s insurance policy and certificate of insurance to make sure your subcontract gives you and your subcontractor’s insurance coverage the “additional insured” status you need.

Mitchell B. Reiter, Esq. is a senior associate with Goldberg & Connolly. Michael J. Rosenthal, an associate with the firm assisted with the preparation of the article. You can email him at mbreiter@goldbergconnolly.com

© Goldberg & Connolly July 2007