



## **FIVE ESSENTIAL INSURANCE PROVISIONS YOU NEED TO REVIEW**

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Insurance specifications are routinely utilized by both general contractors and construction managers in their standard subcontracts. Among those are the following five key insurance-related provisions which require careful review.

### **Additional Insured Coverage**

Most construction contracts (prime and subcontract) seek to transfer risk and require that the Named Insured (the party purchasing the policy) add upstream parties to the policy as additional insured(s) (“AI”). This protects the upstream parties from having to tender any claim to their own primary carrier.

Whether you are a contractor or subcontractor, it is important to carefully review the actual AI endorsement in any policy submitted for approval by a subcontractor. Contrary to popular misconception, they are not all the same or “standard.” Be certain that you understand exactly what coverage it provides and whether it is adequate for your particular circumstances. The more specific the wording of the endorsement is, the narrower the scope of its coverage. Such specific wording provides the insurer with more opportunities to later deny coverage to an Additional Insured.

For example, the AI endorsement may be as basic as the following:

WHO IS AN INSURED is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of “your work” for that insured by or for you.

A more complex AI endorsement may provide:

WHO IS AN INSURED is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for “bodily injury” or “property damage” caused, in whole or in part, by “your work” at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the “products completed operations hazard.”

This second AI endorsement is much narrower in scope and more restrictive than the first quoted endorsement above. Be wary of such an endorsement, because it gives the insurer more room to maneuver if it later decides to deny an Additional Insured's claim for coverage under a subcontractor's primary policy. The less conditions, exceptions, or qualifications the better.

In addition, as discussed below, important recent case law developments in New York have undermined traditional AI protection by reading "horizontal exhaustion" principles into AI coverage analysis. This means that all primary coverage (including that of the upstream AI) will be tapped (and exhausted) before any excess policy is impacted. This greatly impacts the AI's protection, since its primary carrier would be called upon to defend and indemnify it much earlier in the event of a claim. It also, therefore, leads to a greater concern as to the amount of "buffer" or protection the Named Insured's primary Coverage provides the AI.

### **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 in the industry, this appears to be changing. Due to the "horizontal exhaustion" rule now being firmly established in New York, larger contractors and construction managers have begun demanding that subcontractors with whom they contract obtain primary Commercial General Liability ("CGL") policies with primary liability limits of \$2M/\$4M, which is twice the historic norm.

Despite the recent case law invoking "horizontal exhaustion," the majority of insurance specifications in subcontracts are still drafted with the intention of "vertically" exhausting coverage. The simplest way to avoid the harsh effects of this disconnect between what the parties contractually intended and what the courts will do in interpreting CGL policies in the event of a claim, 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 it should lessen the upstream parties' 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" state such as New York, therefore, it is imperative that the subcontractor's primary coverage be more robust to avoid or lessen the involvement under horizontal exhaustion principles of the AI's primary coverage.

### **A.I. Coverage is "Primary and Non-Contributory"**

Most construction contracts contain a provision which requires that Additional Insured coverage 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. This usually requires a special endorsement to your policy. This may be included in the AI endorsement itself, or in a separate "primary and non-contributory coverage" endorsement. Look closely at your policy's Declarations Page to make certain it contains a specific endorsement using some variation of the phrase "primary and non-contributory."

The endorsement itself may state as follows (or some variation thereof):

If the Named Insured has agreed in a written contract to provide the additional insured(s) coverage on a primary basis, the coverage provided to such additional insured(s) hereunder will be primary to, and will not seek contribution from, said additional insured's policy(ies) of insurance.

For example, let's assume that Sub Drilling is a subcontractor for GC Construction. Sub adds GC to Sub's CGL policy as an Additional Insured, with primary and non-contributory coverage to be provided GC. An employee of Sub is injured on the job site and files suit against GC (but not Sub, which, as the employer, is covered by Worker's Compensation), who, in turn, tenders the claim back to Sub's primary insurer. Even though GC has its own CGL policy, Sub's policy provides coverage to GC,

because Sub's policy provided "additional insurance" coverage to GC on a "primary and non-contributory" basis. This serves to make GC's policy "secondary" (i.e., the Sub's primary policy must be exhausted before the AI's primary policy). The fact that Sub's policy is "non-contributory" means that Sub's carrier will not demand that any other insurer (i.e., GC's) contribute to the costs of defense or settlement and will cover GC (to the extent of the Sub's primary coverage) on a "primary" basis.

Confirm that your policy contains this type of endorsement.

### **"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 even after the work has been completed. (Note that one of the major disadvantages of Owner Controlled Insurance Programs ("OCIPs") is the typical absence of "Completed Ops" coverage.)

### **Waiver of Subrogation Endorsement**

Most construction contracts require downstream parties to provide CGL coverage in which the downstream party's insurer will waive any right to recover damages (seek "subrogation") for bodily 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 very important in circumstances such as those discussed above, where the upstream party demands to be added as an Additional Insured under the downstream party's CGL policy. Without this waiver, 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), which is found to be at fault, reimburse it in full for the money 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 subcontractor's policy of insurance, cover-to-cover, under which they seek to be named an Additional Insured. Similarly, every subcontractor would take the time to assure it is fully protected by assuring that the insurance requirements of its subcontract's insurance specifications and the policy it purchases are in synch. Admittedly, this could be very time consuming. Reviewing, at the very least, the above-identified five policy provisions would clearly provide more essential information than mere reliance on an ACORD-type Certificate of Insurance. In future articles, we will also be discussing a list of policy declarations and exclusions to add to your "must review" checklist.

Such a review would be an essential step in better "protecting your insurance protection."

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