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IS YOUR INSURANCE PROGRAM SYNCHED WITH YOUR CONTRACT SPECS?

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The typical construction agreement requires specific types and amounts of insurance coverage. Your subcontract will designate the types of insurance required (i.e., general liability, workers' compensation, auto, umbrella/excess, etc.) and the minimum coverage required. However, nearly every construction subcontract will also include a risk sharing or, more accurately, a "risk shifting" provision requiring all of the parties downstream from the owner to assume the duties to defend and indemnify the upstream parties (Owner, GC or CM). This is done in two ways. First, the downstream parties must add all the upstream parties as "additional insureds" under the downstream parties' policies. Second, the downstream subcontractors must also contractually bind themselves to protect the upstream parties through contractual indemnification clauses. Such indemnification provides important protection for the upstream parties in the event that insurance coverage of any subcontractor is denied for any reason. In such case, the downstream parties are still contractually bound to defend and indemnify the upstream entities on their own, without the benefit of the denied insurance coverage.

Assuring that your insurance program "synchs" with these contract requirements is critical. If a claim is made under a policy of insurance in New York, it is the language of the policy that controls coverage, not the language of your prime or subcontract, which only indicates what coverage was contemplated and contractually required. This has led to some very disappointed "upstream" parties and some very contractually "exposed" downstream (subcontractor) parties.

Upstream parties must not simply accept an ACORD form which only attempts to confirm the type and amounts of coverage provided. Conversely, downstream parties such as subcontractors and suppliers must carefully assure that all required insurance is in place to

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provide the financial backing for the costly defense and indemnification they are contractually required to provide.

Aside from the type and amount of required insurance, two of the most frequently encountered insurance coverage problem areas are the specific language of the "Additional Insured" and "Other Insurance" clauses. You and your broker or risk manager need to make certain that these endorsements conform with your contract's requirements.

"Additional Insured" Clauses

For example, an "Additional Insured" endorsement may indicate that coverage is provided to any party (i.e.,broad form endorsement) for whom you are contractually required to provide such coverage. In that instance, you need to assure that you have a written contract with the party that you intend to add as an additional insured under your policy, and that the contract has been executed before your work on the project is started.

In contrast, another type of "Additional Insured" endorsement may indicate that coverage is only provided to specifically-named additional insureds. In that case, you must make certain that the endorsement specifically names each and every party that the contract requires you to include under your policy. This is fraught with the possibility of a serious omission being made.

"Other Insurance" Clause

When a project involves multiple parties, each of whom is providing their own liability insurance, each policy's "Other Insurance" clause is also often implicated. These clauses must be carefully designed to ensure that the policies "exhaust" (i.e., provide and use up coverage) as the parties intended.

For example, if one insurance policy contains an "Other Insurance" clause which states "This policy is primary…," and another policy provides that "This policy is excess…,'" there is generally no problem. However, if both policies contain the same "Other Insurance" clause, New York courts have concluded that the terms are mutually exclusive and, therefore, ineffective. For example, if two excess or umbrella liability policies contain identical "Other Insurance" clauses, each of which says "This policy is excess…," then neither policy is excess. Under New York law the clauses are ignored and each policy will suffer first exposure and will pay in the first instance on a pro-rata basis.

Risk of Owner "Holdback"

In the event of a coverage denial, you may also face the added problem of the owner or general contractor implementing a "holdback" and stopping all future payments under the contract until they receive appropriate assurances that in lieu of the insurance coverage you have failed to provide, other satisfactory arrangements were being made for their (costly) legal defense, as well as possible indemnification for the damages ultimately awarded and paid to the injured plaintiff.

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Complying with contract insurance requirements will require more than simply providing an "ACORD" form indicating the specified type and amounts of insurance are in place. If you fail to properly include "additional insureds" on your policies, or fail to assure that "other insurance" will be required to respond properly, you may face a situation where you have failed to provide the insurance coverage required under your contract.

When a claim by an injured party is received under such circumstances, you could be faced with the problem of having to "go out of pocket" at your own expense if your carrier disclaims coverage. This will require you to personally pay for the defense of both the upstream parties who are not receiving the anticipated "additional insured status," as well as yourself. The legal fees in defending the underlying construction accident case can be very significant.

G&C COMMENTARY

The effort you and your insurance professional spend properly implementing a contract-compliant, project-specific insurance program is time certainly well spent. It is not enough to simply buy the cheapest CGL, excess and workers' compensation policies, or to simply keep renewing what you already have in place. You need to understand the insurance specifications of your contracts and assure that the content of your various insurance policies are consistent with your contractual obligations (beyond mere type and amount of insurance). Paying more careful attention to this seemingly routine, but extremely important issue can go a long way toward avoiding a disaster (and isn't that the very purpose of insurance), as well as "protecting your insurance protection."

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