

# Reviewing Insurance Provisions for Construction Contracts

Often when reviewing a construction contract, I will suggest a number of revisions to the language of the contract to help assure that the insurance provisions require the parties to do what is necessary to avoid the possibility of a gap in coverage. As you can imagine, the insurance industry changes so fast that it can seem nearly impossible to keep up with it. While I strive to keep on top of new issues in insurance, I always recommend that my clients have the insurance provisions in a construction contract reviewed by their insurance agents and brokers to make sure the language and limits comply with the current industry practices, leave no gaps in coverage and generally do what the parties expect they will in case the need arises. There are numerous technical and legal points that should be addressed in your construction contract, however, I've chosen to discuss a few of the more practical things to consider when reviewing insurance provisions of construction contracts:

- **Consider Who Should Carry Casualty/Builder's Risk Insurance.** Standardized construction contracts often provide that the owner will carry builder's risk. Often, that arrangement makes the most sense, since the owner owns the land and, once installed (and paid for), owns the improvements. Further, adding builder's risk to an owner's insurance coverage may be the most cost-effective. However, in the case of new construction, it may make sense to consider whether the contractor should carry builder's risk. The contractor will be in control of the site and in the best position of avoiding situations where insurance coverage becomes necessary. Depending on the contractor, the cost of contractor-carried builder's risk may be less than what a particular owner can obtain. Finally, consider who should bear the risk of the deductible in the case of a covered event and the acceptable amount of the deductible. Owners should also consider expressly allocating to the contractor the obligation of carrying casualty insurance on the contractor's own personal property, equipment and tools.
- **Consider the Limits of General Liability Insurance.** In my view, the amount of General Liability coverage carried by a contractor should be based, to some extent, upon the relative size of the project. Frequently, contractors will carry a set amount of general liability coverage, but then supplement it with umbrella coverage with higher limits. While this practice is certainly normal and

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acceptable, you will need to take care to ensure that the umbrella coverage carried by the contractor is primary and written to mirror the general liability insurance carried by the contractor. This issue can be of special importance when considering limits of general liability coverage for subcontractors, as well. In some states, without specific language or endorsements for umbrella coverage, insurers may be able to avoid the "vertical" exhaustion of the policies (i.e., first exhausting a subcontractor's general liability limits and then the same subcontractor's umbrella coverage limits) in favor of forcing "horizontal" exhaustion of the policies (i.e., first exhausting a subcontractor's general liability limits and then the general contractor's general liability limits before going back to the subcontractor's umbrella coverage). Of course, this is of particular concern to contractors or subcontractors who hire their own subcontractors to complete work.

- **Consider Other Coverage Issues.** Certainly workers compensation and employers liability as well as automobile liability, have minimum standard coverage requirements and should be included in every construction contract, however, there may be other coverage that would be applicable to a particular project. Consider discussing other coverage options for unusual projects, like those that might require blasting, with your insurance agent/broker.
- **Consider Cost of Premiums.** Contractors generally cover the cost of their insurance premiums for their general liability and umbrella coverage. The premiums incurred by the contractor are usually charged back to the owner under the cost of the general conditions for the project. However, if an owner requires coverage in excess of that normally carried by the contractor, the contractor will seek reimbursement of the premium cost for such additional required coverage. This could have a substantial impact on the overall project costs.
- **Consider Insurance Limits for Subcontractors.** Typically, the pass-through provisions of a subcontract require subcontractors to carry the same insurance coverage limits as the contractor. In many cases, this is not feasible for smaller subcontractors. Consider reviewing the bidding documents to determine which subcontractors will have substantial enough (or compelling enough) contracts such that the higher contractor limits should apply and relaxing those standards for smaller subcontractors.
- **Obtain Evidence of Insurance.** While this may seem to "go without saying," too frequently it "goes without doing." Before commencing construction, owners must be sure to obtain certificates of insurance (or copies of actual policies) evidencing the insurance required by the construction contract, naming the owner as an additional insured where appropriate and stating that



the insurer will not cancel coverage without giving the owner adequate (usually 30 days) notice. Having quality insurance provisions in your construction contract will not help if the coverage isn't properly in place. In fact, construction contracts should contain provisions that clearly indicate liability if a party does not carry the insurance they are required to carry under the construction contract and clarify that limitations of liability under the contract only apply when the required coverage is in place.

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