



Owners: Are you sure that you're insured? Simple steps to ensure you have the necessary coverage

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Owners of construction projects often spend thousands of dollars in legal fees to have an attorney draft and negotiate owner-contractor agreements that will protect them against problems that commonly arise at construction projects, such as cost overruns, defective work and the contractor's abandonment of the project. However, one provision of these agreements that is often overlooked during contract negotiations is the insurance requirements provision. Owners should be aware that, although an agreement may clearly and unambiguously require a contractor to procure an insurance policy that names the owner as additional insured, the owner is by no means guaranteed of having the scope of coverage or coverage limits required by the agreement when it's needed. Fortunately, there are several simple steps that an owner can take to ensure that it has the necessary coverage to protect it against any claim or loss that could arise at the project.

1. Make sure that the additional insured coverage under the contractor's policy is in place.

The insurance requirements provisions of many construction contracts simply require the contractor to provide the owner with a certificate of insurance as "proof" that the insurance coverage required by the agreement is in place. Certificates of insurance, however, are not worth the piece of paper that they are written on. New York courts have repeatedly held that, in almost all cases, a certificate of insurance, a document that is almost always issued by the contractor's insurance broker, is not proof of coverage and does not require the insurance company to provide additional insured coverage to the owner. Such a scenario can be avoided by drafting the insurance provisions of the construction agreement require the contractor to provide the owner with a complete copy of the insurance policy, including all endorsements thereto. The owner should then confirm, if necessary through its broker, that the policy provides the additional insured coverage and limits required by the agreement. The owner should not permit the contractor to begin work at the project until the coverage has been confirmed.

2. Make sure that the scope and limits of coverage the contractor is to be provided are sufficient for the project.

In many cases, insurance coverage provisions are simply cut and pasted from prior agreements. Such a practice could result in the owner being under insured if the current project is significantly greater in scope or potential risk than the prior project from which the insurance coverage provisions were copied. For example, a policy that provides a contractor with \$1 million of property damage coverage may be sufficient for a project in an undeveloped area, but such limits would be woefully inadequate if the project is between two multi-million dollar buildings in Manhattan. A lack of sufficient coverage limits could result in an owner being required to pay out of pocket to satisfy the portion of the loss that is above the limits of the contractor's policy. In order to avoid such a situation, an owner should have its broker confirm that the insurance limits set forth in the construction

agreement are sufficient for the project.

Moreover, most general liability policies historically have provided coverage (both defense and indemnity) for losses and claims "arising out of" the named insured contractor's work at a construction project. Recently, some insurers have modified their policies and now are providing coverage only when the loss or claim was "caused by" the named insured contractor. Although this change appears subtle, it could have a significant impact on whether a claim or loss is covered. For example, depending on the specific language of a policy, an insurance company could deny coverage to both the owner and contractor if a claim or loss is "caused by" a subcontractor rather than the contractor. This situation can easily be avoided by requiring the contractor to procure a policy which provides coverage for claims and losses "arising out" its work at the project.

3. Make sure that the owner must provide its own notice to the insurer in the event of any potential claim or loss.

Almost all insurance policies require that every named insured and additional insured provide it with: (i) notice of any potential claim; and (ii) a request for coverage for the claim. New York courts have repeatedly held that an owner's tender of a potential claim to its contractor, but not to the insurance company, is not sufficient to trigger coverage for the owner. Thus, any time a potential claim arises, an owner must ensure that it provides notice of same to the insurance company.

Finally, although your attorney may be skilled in the art of drafting and negotiating construction agreements, he or she may not possess the same knowledge of insurance law. Thus, it is imperative that owners consult with their brokers or insurance coverage attorneys before finalizing the language of the insurance coverage provision of any construction agreement.

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