



Ensuring that a construction contractor is properly insured - by John Comiskey

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Insurance coverage is often the bane of a construction contractor's existence. Many contractors often give short shrift to the process of obtaining and ensuring that they have the proper insurance coverage necessary to protect them during their construction operations. However, such a cavalier attitude by contractors can have a deleterious effect on their business. Failure to have proper insurance oftentimes results in claims against contractors that are met with disclaimers of insurance coverage by their insurers.

Given the high overhead many construction contractors have, it is not unusual for contractors to try to skim on insurance. In fact, many contractors mistakenly believe that if they have a Commercial General Liability (CGL) insurance policy and workers' compensation policy, they will be covered if a claim is submitted to their insurer. Thus, some contractors will merely obtain the cheapest insurance they can without regard to what is and, more importantly, what is not, covered under such policy. The expression "you get what you pay for" often aptly describes a CGL policy with a premium that seems too good to be true. Put another way, in the construction industry, particularly in New York, where the Labor Law is extremely employee-friendly and provides fertile ground for personal injury lawsuits, good insurance coverage is not cheap and, oftentimes, cheap insurance coverage is not good. In fact, attorneys who practice construction law and/or insurance coverage are aware of certain insurance companies that essentially provide insurance policies that are known in the industry to be essentially worthless.

Though there are various types of insurance coverage that a contractor is often required to procure for a given project, this article focuses solely upon CGL insurance. Typically, many CGL insurance policies use the Insurance Services Office, Inc. (ISO) forms. Construction contracts may require that the ISO CG 00 01, which is the standard Commercial General Liability Coverage form, to be a certain edition. Furthermore, construction contracts are also likely to require that certain additional insured endorsements be utilized. There are several different ISO additional insured endorsements and different editions, each of which provides additional insured coverage on a different basis. Failure to have the ISO CG 00 01 form or an additional insured endorsement that provides coverage at least as broad as the form specified in the construction contract can potentially expose a contractor to a contractual claim for failure to procure proper insurance coverage.

There are many different additional insured endorsements, both ISO endorsements, which are

standardized endorsements, and manuscript endorsements, which are forms specifically generated by an insurer that contain variations from the standard ISO endorsements. Since manuscript endorsements are issued by a specific insurer, such manuscript endorsements would need to be examined to ascertain what impact they have upon insurance coverage, particularly considering construction contracts that call for use of a specific ISO endorsement “or its equivalent”. However, the ISO additional insured endorsements either require that entities that are to be additional insured(s) on a Commercial General Liability policy to be specifically named or provide coverage on a “blanket” basis, which basically means that an entity is deemed an additional insured if the named insured (i.e., the contractor) is required by contract to name an entity as an additional insured. Moreover, it should be noted that commercial construction contracts will also generally require contractors to provide additional insured coverage not only for ongoing operations, but also for completed operations. There are various ISO additional insured endorsements that range from broad to limited. Not surprisingly, many insurers choose to offer the more limited forms for additional insured endorsements for both ongoing and completed operations, to limit their potential exposure should a claim be made that implicates either an insurer’s own named insured or the additional insured endorsements under the named insured’s CGL policy. Many sophisticated owners are well-versed in the various ISO additional insured endorsements that exist and often the contracts written by owners require that contractors procure insurance that contains the broad versions of the ISO additional insured endorsements.

Instances in which insurers properly disclaim often involve either exclusions contained in the policy or failure to qualify as an additional insured. Some insurers, particularly those that have too-good-to-be-true premiums, often contain exclusions that make insurance coverage illusory. For instance, some insurers issue CGL policies that contain a “Five Boroughs Exclusion,” which precludes insurance coverage for any claim involving work performed within the five boroughs of the City of New York. While this would not be an issue for a contractor that only performs work outside of the five boroughs of the City of New York, unfortunately for the contractors that perform work within the five boroughs of the City of New York, a claim submitted to its CGL insurer based upon bodily injury or property damage arising from a project performed within the five boroughs of the City of New York will be met with a disclaimer. Similarly, there are also CGL policies that contain an exclusion for work performed utilizing scaffolding. While this would not be an issue for a contractor performing work at ground level, unfortunately, for contractors that perform work requiring the use of scaffolding, such as masonry, window installation/removal, and roofing operations, a claim based upon bodily injury or property damage will also be met with a disclaimer.

It is recommended that contractors consult with an attorney familiar with construction law and insurance

coverage during the insurance procurement process, particularly when contractors routinely contract with sophisticated owners and/or developers. Alternatively, if retention of counsel is not financially viable, then upon signing a contract, contractors should provide the insurance requirements portion of such contract to an insurance professional familiar with the construction industry to ensure that the contractor has the correct insurance coverage in place that complies with the contract requirements.

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