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Additional Insureds In Your Contracts

It is common during construction contract negotiations for an owner to include the project's architect (amongst others) as an additional insured under the contractor's commercial general liability policy. But should general contractors agree? The answer is usually no. Including architects or other third-parties as additional insureds under your policy increases costs and claim complexity without a commensurate increase in coverage. At a minimum, you will be required to name the owner (and often its lender) as additional insureds. Negotiating the expected coverage and understanding the various additional insured endorsement forms is critical for appropriately adding an additional insured to your policy.

Conversely, we are seeing a trend of sophisticated subcontractors pushing back on naming additional insureds on the subcontractors' policies. Any additional insured limitations sought by a subcontractor should be closely reviewed and compared against the general contractor's obligations to the owner under the prime contract. Further, verification of the subcontractor's coverage through a review of certificates of insurance is critical to ensure both the subcontractor and the general contractor have satisfied their contract obligations.

Additional Insureds 101

An additional insured is a person or organization not included as a named insured under an insurance policy who is added to the policy at the request of the named insured. The extent of the benefit/coverage provided to the additional insured will be governed by the specific endorsement adding the additional insured. There are numerous additional insured endorsements which should be considered. The most common additional insured endorsements are the ISO Form CG 20 10 (ongoing operations) and CG 20 37 (completed operations) as an endorsement for the owner and ISO Form CG 20 32 as an endorsement for the architect or construction manager. The AIA suite of contracts generally requires endorsements to provide coverage that meets or exceeds the ISO update issued in July of 2004.

Previous versions of the ISO endorsements, such as the CG 20 10 11 85 from 1985, offer broad coverage to the additional insured even if the additional insured was entirely at fault for the damage, essentially insuring the additional insured for its own mistakes. Some carriers no longer offer additional insured coverage under the 1985 version of these forms due to the breadth of coverage they offer. The ISO endorsements remained "broad" until July, 2004 when the language was revised to require the named insured on the policy to bear some portion of the fault at the time of the loss, which is more consistent with the trend of requiring each party to a dispute to bear responsibility for its own negligence. For that reason, Form CG 20 10 07 04 is generally considered an intermediate form. More recently, the April 2013 and December 2019 updates to the CG 20 10 and CG 20 37 series forms further limit coverage to that which is permitted by law and required by the contract. These updates essentially turn the parties' construction contract into a policy endorsement which can limit, restrict, or exclude coverage available under the policy and limit the liability of the insurer if the construction contract or subcontract contains limitations or conditions for coverage not included in the insurance policy.

Accordingly, understanding and negotiating the owner's coverage expectations as an additional insured as well as the additional insured options available from your carrier is critical to selecting the appropriate endorsement.

The Architect Should Not be Named as an Additional Insured

After agreeing upon the coverage to be provided to the owner as an additional insured, the next point of

negotiation is typically the architect. Unless you are a design-build contractor, you most likely do not have a contract with the architect. Under those circumstances, the architect is not performing design services on your behalf, and therefore neither the contractor nor the architect can be held vicariously liable for the other's acts. There isn't a situation where the architect would be responsible for damage caused by the contractor. As discussed above, commencing with the July 2004 update, additional insured status only provides coverage for damages caused by the contractor or its subcontractors. Adding to the complexity, the additional insured endorsement may include an exclusion for professional services, which would preclude coverage to the architect for design errors. Accordingly, there is no legal value in naming the architect as an additional insured, as coverage likely would not be available to the architect. All of those limitations on coverage increase the risk of the owner or architect asserting a breach of contract claim against the contractor in the event additional insured coverage for the architect is required under the contract but not available when claims arise.

Further, it is not uncommon in a claims scenario for the design to be implicated as an independent potential cause of the damage or injury asserted in the claim. In such situations, it would be inappropriate for the contractor's policy to provide coverage to the architect who would be considered a third-party defendant or non-party at fault in a lawsuit or arbitration involving the claim.

In sum, naming the architect as an additional insured increases transaction costs and adds complexity to the pursuit/defense of any claims, all without providing any significant coverage value.

Verify Subcontractors are Obtaining Appropriate Endorsements

As with prime contracts, a contractor should also negotiate subcontract terms to expressly state the coverage to be provided to additional insureds under the subcontractor's policy. Often the contractor is required to flow-down the prime contract's additional insured obligations, leaving no room for the subcontractor to negotiate. However, where the prime contract additional insured requirements lack specificity, subcontractors may seek to limit additional insured coverage, and can accomplish the limitation by expressly stating so in the subcontract or offering an additional insured endorsement under and ISO form dated 2013 or later. For example, a subcontractor may seek to limit the extent of its coverage to additional insureds to indemnification only. In this situation, the coverage provided under the subcontractor's policy will not be available until after resolution of a dispute. The subcontract may also impose other limitations, such as reducing the coverage limits available to the contractor and owner to an amount below the limits available in their policy or adding coverage exclusions, all of which may result in the contractor believing it has more coverage than exists.

Any negotiations regarding additional insured coverage should be closely reviewed and scrutinized. The subcontractor's obligations should be no less than those required by the prime contract. Once coverage expectations have been established, the contractor must also include language requiring proof of compliant insurance coverage before the subcontractor is entitled to payment. Review of proof of insurance forms by the contractor is then the final step to ensure compliance with the insurance requirements of both the prime contract and the subcontracts. Failure to confirm the required coverage can cause the subcontractor to become liable for damages that would have been covered by the subcontractor's insurance. And a breach of contract claim against a subcontractor is no substitute for contractually required coverage.

Conclusion

Additional insured provisions should be closely reviewed in both prime contracts and subcontracts. Once the coverage expectation is agreed upon and expressly stated, the appropriate endorsement should be procured and verified to ensure coverage exists. The contractor should not agree to name the architect as an additional insured because it increases cost and complexity without providing the commensurate coverage value. BBG can help with this review and can incorporate custom provisions into your prime contracts and subcontracts to better address the specific risks posed to your project.