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Summer is officially here and with the ensuing ramp up in construction projects comes the inevitable increase in exposure to risk for everyone involved in a project, including Owners, Developers, General Contractors (“GC’s”), and Subcontractors (“Subs”). The best way to manage this increased exposure to risk is to establish an insurance compliance program that ensures that everyone working on the project has the proper insurance coverages (“Risk Busters”). Ideally, such a program should be in place prior to starting the project; and compliance with the project insurance requirements should be continually monitored throughout the life of the project, and any applicable statute of repose period.

Contract Requirements –

The first step in establishing an insurance compliance program is drafting a contract, or subcontract that delineates the appropriate types and amounts of insurance required of various contracting parties. The contract requirements also need to address such critical issues as additional insured status, including coverage for both ongoing and completed operations; project-specific limits; and waivers of subrogation.

The most common types of insurance coverages that are required on a construction project are, Commercial General Liability (“CGL”), Automobile Liability, Workers Compensation, and Excess/Umbrella. Depending on the type of project, there might also be a requirement for various contracting parties to carry Environmental Liability, Professional Liability, or Builders Risk insurance. Another type of coverage that can be extremely important to the project Owner as well as the GC, especially for design-build projects, is Contractor’s Protective, sometimes known as “Gap” coverage, which covers a contractors' liability for design errors or omissions.

Finally, in response to the explosion of construction defect claims and the inability of many GC’s and Subs to purchase insurance coverage for residential projects, there have been insurance coverage programs created by insurance carriers and agents, which provide one or more of the types of insurance coverage listed above for all persons performing work on the project. These insurance programs include ROCIP’s, OCIP’s, CCIP’s, and GL Wraps. Requirements for mandatory enrollment in one of these programs, and the method for calculating and paying the appropriate premium must be addressed in the various tiers of contracts.

Recommended Coverage Limits – The minimum recommended limits for CGL coverage are \$1M/\$2M/\$2M; while the minimum recommended combined single limit for Automobile coverage is \$1M; and the minimum recommended limit for the Employer’s Liability portion of Workers Compensation coverage is also \$1M. These recommended limits are the minimum amounts of coverage that should be accepted from any level of contractor or professional, regardless of their tier in the contracting hierarchy.

Additional Insured (AI) Status – The single most important insurance requirement to include in a construction contract is the requirement that the Owner and the GC be named as additional insureds on the liability policies of the GC and/or the Subs. When a person or entity is an AI or has AI status, it means that person or entity is added as a covered insured under someone else’s (the GC’s and/or the

Sub's) liability policy. AI status is available under all types of liability policies, except professional liability (E&O) policies. AI status is evidenced by an endorsement to the appropriate liability policy. Under many CGL policies, the standard is to provide AI status only for ongoing operations. However, it is critical that AI status be but provided for completed operations, too. Proof of the extension of AI status to completed operations is evidenced by an endorsement to the policy.

Project-Specific Limits should also be required in construction contracts as a means of avoiding the dilution of coverage inherent in having one set of insurance limits apply to multiple projects. By doing so, the Owner and/or GC are guaranteed the contractually required amount of coverage is available for their particular project, regardless of the GC's or Sub's claims on other projects.

Waiver of Subrogation is an agreement, contained in the construction contract, in which one contracting party agrees to waive its subrogation rights ("right to be reimbursed") against the other contracting party. The intent of the waiver is to prevent the insurer of the injured contracting party from pursuing subrogation against the insurer of the other contracting party in the event of a loss by the first party that was caused by the second party. A separate endorsement to the policy is typically required to make this contractual agreement binding on the insurers of each contracting party.

Insurance Compliance Program Tips

- A.** Ensure there is a process in place for establishing appropriate insurance requirements in the contract(s), then reviewing and confirming the insurance coverages of all parties on the project.
- B.** Insurance Certificates
 - 1.** Require insurance certificates from:
 - a. The General Contractor
 - b. All Subcontractors
 - c. All Professionals
 - 2.** Require copies of all endorsements to the policies, especially those for
 - a. Additional Insured Status
 - b. Waiver of Subrogation
 - c. Primary and Non-contributory
- C.** Designate **one** person who understands the contractual insurance requirements; who can authorize any deviations from the project insurance requirements; and who understands the implications of such waivers, to review and approve insurance certificates and endorsements.
- D.** Obtain updated insurance certificates and endorsements after each annual insurance renewal.

The key to a successful project is to manage the risk inherent in the project. One way to effectively manage risk is to implement an insurance compliance program that requires the proper insurance coverages, the Risk Busters for your specific project.

If you have any questions regarding this article or any other construction law issue, call Michelle Berger at (303) 333-9810, or email her at mberger@fostergraham.com.