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Risk Management Bulletin
Subcontracts – Endorsements

Having the appropriate insurance coverages and limits outlined in a subcontract agreement is a good thing. This helps ensure there are funds available for damages and legal expenses when a subcontractor is legally liable for damages. It is also important to outline specific endorsements within the agreement to help ensure risk is transferred properly. The following is a high level overview and importance of some of the key endorsements that should be included.

Subcontract agreements should include a requirement to provide a certificate of insurance (COI) to verify the insurance coverages match up with those outlined in the contract. The problem is that this certificate provided by the insurance agent that placed the coverages is only good on the date of issuance. In order to ensure that the insurance coverages are actually in place at the time of loss a "Notice of Cancelation" endorsement should be included on each policy. Absent this endorsement, policies could be changed or cancelled the day after the COI was issued, leaving the subcontractor with potentially no coverages in place to respond to a loss.

When damages occur resulting from a subcontractors activities, the upper tiered contractor or owner would prefer not to participate in the loss. In order to help ensure their policy does not respond initially or on a pro-rata basis the contract should include "Primary and Non-contributory" wording. The goal of requiring insurance from the subcontractor is to help insulate the upper tiered contractor / owner from participating in a loss. Absent this endorsement they are likely to share in legal expenses and funding the claim. The primary and non-contributory wording is a vital piece of any risk transfer process. It is not only important for the subcontractor's insurance policies to respond on a primary basis, the upper tiered contractor or owner should have the right to tender any claim arising from the subs work to the subs insurance carrier. This is accomplished by a contractual requirement to be named as an "Additional Insured" (AI). This should be required on each policy that might involve a third party law suit. It is not appropriate for a Workers Compensation and Professional Liability policy. On the Commercial General Liability (CGL) policy the additional insured verbiage should stipulate it applies to "ongoing" and "completed operations". Absent this wording the subcontractor's insurance carrier may deny the additional insured protection, requiring both parties to participate in the claim. There are many different types and edition dates for additional insured endorsements, each with different terms, so it is important to specify the specific AI endorsements by name in the contract. The CG 2010 11/85 is the broadest CGL additional insured endorsement, it provides ongoing and completed operations and additional insured protection even if the claim arises out of the sole negligence of the upper tiered contractor or owner.

This endorsement may provide broader protection than allowed by State anti-indemnity statutes. In order to avoid the conflict with these statutes, including a savings clause i.e. “to the fullest extent allowed by law” is a good practice. At a minimum we see most contracts requiring that the endorsements be “at least as broad as a combination of CG 2010 04/13 and 2037 04/13”. Requiring additional insured protection is a vital piece to any risk transfer process and must be worded appropriately in order to help ensure the coverage is triggered in the event of a claim.

If a subcontractor employee is injured on the job site their employer should have a Workers Compensation policy in place to respond. This policy will provide coverage for lost wages and medical bills for the injured worker. Well worded subcontract agreements include a “Waiver of Subrogation” requirement that prohibits the Workers Compensation insurance carrier from pursuing subrogation against the upper tiered contractor’s liability insurance carrier if they are partially responsible. The waiver of subrogation endorsement should also be required on auto liability and general liability policies. This is also an important component on builders risk policies to avoid a builder’s risk insurer from subrogating against the liability carrier of a subcontractor should they cause the loss. On the surface, this endorsement may seem unfair, allowing the responsible party from escaping responsibility for a loss. The logic for this requirement is to avoid unnecessary litigation between insurance carriers when there is an insurance policy in place to cover the loss.

There are many other insurance requirements that should be addressed in a subcontract agreement, but the notice of cancellation, primary and non-contributory, additional insured and waiver of subrogation endorsements warrant special attention. These provisions should be structured properly to help ensure the insurance policies respond as expected at the time of loss. If you have questions about your insurance program structure, the risk transfer process, or need assistance with other loss control or risk management issue, please feel free to call or drop me a note.

THANKS

Mark

For more information about Subcontracts and other solutions from Marsh Wortham, contact your local representative or:

Mark Gaskamp

Marsh Wortham – Austin

512.532.1536

mark.gaskamp@worthaminsurance.com

www.worthaminsurance.com