10 Insurance Tips to Help Manage Construction Risk

by Allen R. Wolff, Dennis J. Artese and Robert M. Horkovich

Construction involves risks that can and should be managed, often by transferring that risk to insurance. The following 10 tips can help in that effort:

1. **Remember that the construction contract is the cornerstone of risk management.** The contract documents should set forth the risk allocation plan, including additional insured provisions, indemnity and exculpation clauses.
2. **Builder's risk insurance might be important.** Builder's risk can be purchased on a broad form policy that is usually not very expensive. It can protect against damage to the project and lost profits resulting from many different perils.
3. **Do not buy insurance coverage unless it is necessary.** Use an experienced broker who knows the nature of the work involved and who asks the right questions about the project and the risk being managed. Some insurance is superfluous to certain projects. Ask why each part of insurance is needed for each project. Do not assume anything. Really work on not buying insurance that is not necessary.
4. **Read the policy as soon as you get it.** There is no substitute for reading the policy. Do not rely on an insurance certificate. Policyholders (and additional insured parties) always should review the policy promptly upon receipt and reject the policy if its terms do not align with the specifications and indications that were in hand when the insurance was purchased.
5. **Mind your prepositions.** At least one court has held that a blanket additional insured endorsement agreeing to provide coverage to an organization "with whom you have agreed to add as an additional insured," did not extend coverage to a prime contractor of a construction project despite the fact that the policyholder agreed to provide such coverage in its contract with the financier of the project and even issued a certificate of insurance evidencing that such insurance was in place. According to the court, the prime contractor was an entity "for whom" the policyholder had agreed to provide coverage, but that did not meet the "with whom" requirement of the policy.
6. **Be clear about just who exactly is "another party."** Most standard CGL policies exclude coverage for contract-based claims except where, among other things, the claim arises out of an "insured contract," i.e., an agreement under which the policyholder assumes the tort liability of another party to pay for bodily injury or property damage to a third person or organization. Some courts have taken the narrow view that the term "another party," as used in the insured contract exception, is limited to the policyholder's contractual counter-party. This excludes coverage for a general contractor's liability to the owner stemming from the negligence of subcontractors, even though the general contractor assumed such liability in its contract with the owner, as owners typically demand. This should be dealt with through an endorsement amending and clarifying the definition of "insured contract."
7. **Be wary of limit restrictions in additional insured endorsements.** Recent standard form blanket additional insured endorsements restrict coverage in a number of new ways. One change is to limit the amount of

coverage available to additional insureds to the lesser of that required by the contract or policy limits. An additional insured may access potentially greater policy limits by specifying in the construction contract that the limits available to the additional insured shall be a minimum specified amount or the actual limits of the policy, whichever is greater.

8. **Beware of waivers of subrogation.** A waiver of subrogation relinquishes the right to recover from others for losses that are covered by insurance. It is sometimes done reciprocally between two or more parties to a construction project. Be careful, because some insurance policies will penalize the policyholder for waiving subrogation. Make sure all reciprocal parties are doing it correctly.
9. **Consider an excess of wrap-up endorsement on your corporate program.** Owner and contractor controlled insurance programs, or wrap-ups, can bring many advantages to construction risk management, including potential cost savings, reduced finger-pointing among insurers at claim time, and access to greater policy limits for certain subcontractors. Keep in mind, however, that the limits of a wrap-up are shared by all participants and thus may not be adequate to protect your interests on the project. Since most corporate insurance programs today typically contain wrap-up exclusions, talk to your broker about endorsing your corporate insurance program to apply excess of any wrap-ups in which you participate.
10. **Make sure the risk management plan matches the project.** The establishment of field conditions and the allocation of the expense of responding to surprises are critically important. Remember that the "guaranteed maximum price" is no more guaranteed than an "all-in lump sum." The price to be paid is subject to expansion (and, less commonly, reduction) for a wide variety of reasons. Consider the nature of the work and make sure the risks are managed. Whenever appropriate, transfer the risk to insurance. Try to get "claw-back" provisions if the cost of future work insured is not currently known. ■

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