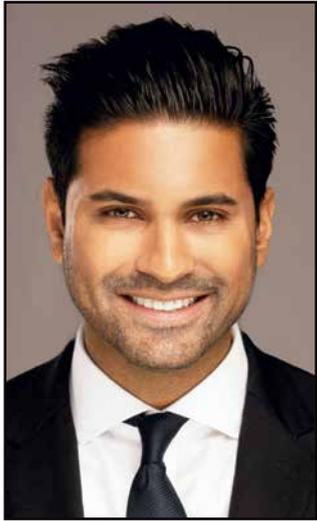


Best Practices for Ensuring Subcontractor Compliance with Insurance Requirements



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A Balanced Approach to Construction Law.

There is a saying that “we buy insurance for a reason”. Contractors buy insurance to control both foreseen and unforeseen risks on projects. Contractors also subcontract work as a means of managing and controlling risk. To assist in risk management, contractors may develop an insurance program for subcontractors. However, many in the construction industry possess only a moderate understanding of what risks insurance actually covers. This article hopes to educate the reader and provide best practices to ensure downstream subcontractor compliance with specified insurance requirements in an effort to control, mitigate, and transfer risk.

Ensuring compliance with an insurance program begins with the inclusion of those required provisions and endorsements in its written subcontracts. That contract should include the contractor’s insurance requirements and any preferred forms. The insurance requirements should include required coverage, endorsements, and limits. This initial step will serve the purpose of eliminating potential subcontractors that are unwilling or incapable of meeting the insurance requirements. By way of example, having well-drafted and thorough subcontracts, which include all necessary insurance and endorsement information, can prevent a situation where a subcontractor is unprepared or unable to meet the same after its being hired.

The key tool in a general contractor’s arsenal in managing risk is the inclusion of risk transfer language in a subcontract’s insurance provisions. This transfer of risk provision should incorporate additional insured endorsements, duty to defend, indemnification, and hold harmless provisions. Most subcontracts that contain risk transfer language usually require the following, but are subject to change depending on the needs of the general contractor and project:

- Workers compensation and employer’s liability
- General liability insurance or “CGL”
- Automobile liability insurance
- Certificates of insurance
- Insurance requirements for sub-subcontractors
- Oversight by general contractor
- Notification requirements for claims and lawsuits

Additional insurance requirements might include professional liability, umbrella or excess liability coverage, and environmental liability. There may be other insurance requirements, endorsements, or coverages

that should be included which depend on the nature of the project.

Following identification of the necessary provisions and language, the next step in ensuring compliance with a general contractor’s insurance requirements is to obtain certificates of insurance from each subcontractor, sub-subcontractor, and even sub-sub-subcontractor. That is not enough, however. As explained below, the certificates of insurance should be properly maintained and organized (perhaps by a project manager or a risk management employee) so that the contractor can quickly determine which subcontractors obtained the required insurance, which have provided certificates to that effect, and – and most importantly – what are the applicable policy periods and limits.

Policy periods expire and insurance lapses. Generally, there is no requirement that certificate of insurance provider notify the certificate holder of a policy cancellation. While most policies provide coverage for occurrences that arise during the policy period, it is incumbent upon a general contractor (or the aforementioned project manager) to verify that a policy is renewed (or new insurance policies are obtained) should a project continue beyond the specified policy period. For example, most subcontracts include language that requires the contractor to “furnish the general contractor with evidence of renewal or replacement of the policy.” The failure to maintain insurance coverage as required may be a material breach of contract and can result in termination of the same.

It is not enough to only track certificates of insurance. The development and continued use of a workable process is suggested. In some instances, it is also advisable to request that the general contractor’s insurance broker audit the policies underlying the certificates themselves. The policies must be specifically requested from the certificate holder or the insurance carrier because certificates of insurance do not include the underlying policies. An insurance broker’s review for more nuanced and necessary provisions can reveal unanticipated coverage issues. For example, whether a subcontractor performing building envelope penetrations has mold coverage, whether a subcontractor working on or in apartments has residential coverage, or if an additional insured endorsements are for ongoing operations only and are limited to the sole negligence of the subcontractor or to vicarious liability of the general contractor.

Because claims of all types and especially those involving latent defects – typically an insurable

risk – can be brought for 10 years, certificates of insurance should be retained by the general contractor for at least 10 years following project completion because claims can be filed against the project for that period of time. Institutional knowledge of which subcontractors performed specific scopes of work and which carriers provided coverage can streamline claims notice and resolution thereof.

A contractor can ensure subcontractor compliance by, once under contract, not allowing commencement of work until the subcontractor has complied with the insurance requirements by providing a full and comprehensive certificate of insurance package. Language to this effect should be included in the subcontract so as to provide notice.

Best practices for ensuring subcontractor compliance with insurance requirements focuses centrally on the development and continued application of excellent risk management processes and plans. The insurance requirements, the risk management plan more broadly, should be reviewed on an annual basis by an insurance broker and attorney with construction experience and knowledge.

In sum, the recommended best practices for ensuring subcontractor compliance with insurance requirements are as follows:

- Utilization and inclusion of insurance requirements, including preferred endorsements, in prequalification or solicitation materials.
- Inclusion of risk transfer language in subcontracts.
- Develop process for management of subcontractor insurance coverage compliance via retention of certificates of insurance.
- Request new certificates of insurance for policy renewals or replacement policies.
- Retain certificates of insurance for ten years after project completion.
- Request complete and comprehensive certificate of insurance package, including all endorsements, prior to releasing final retention payment.
- Review insurance requirements with broker/attorney on an annual basis.

Implementation of the foregoing strategies and methods can substantially increase subcontractor insurance compliance. Moreover, the proper management and retainage of subcontractor certificates of insurance and any endorsements thereto at the time of a claim ensures a cleaner and better result.