

BULLETIN 24

DO MODERN INSURANCE SPECIFICATIONS AND POLICIES SUFFICIENTLY ADDRESS TODAY'S CONSTRUCTION CONTRACTS?

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The insurance specified in the General Conditions of CCDC contracts should be considered the general minimum requirements for most projects. The language in CCDC contracts benefits from input, review and acceptance by the insurance industry. Specialized or additional coverages may be necessary to adequately insure additional risks presented by many of today's projects. This bulletin:

- Identifies some of the risks that are not insured by 'standard policies' currently available in the insurance market;
- Cautions about the hazards of recently introduced conditions, exclusions and insurance warranties; and
- Provides information and advice on how to identify risks, address requirements for necessary insurance and deal with recently introduced coverage limitations.

Contractors, owners, consultants and their insurance professionals should ensure that proper attention is paid to these matters prior to completing bid documents and submitting bids.

1. Types of insurance coverage that are NOT required by CCDC contracts

Unique exposures presented by individual projects and today's emerging risks can result in certain hazards not being addressed in CCDC contracts or provided by 'industry standard' insurance policies. At the same time, informed owners, their legal counsel and in particular financiers often seek to protect their interests by introducing a wide range of supplementary general conditions that impose responsibility on contractors to accept and/or insure these risks. This is often done without provision to fully understand the additional risks that may be imposed by these conditions. Owners and contractors need to be cognizant of these matters in order to deal appropriately with them.

Some examples of types of coverage that may be required outside 'industry standard' insurance policies include:

- Environmental Liability (Pollution Insurance), on a sudden and accidental basis or, full coverage for sudden and gradual (long term) exposure.
- Coverage for damage to existing property (in the case of renovation and addition projects)
- Delayed Start Up and Consequential Losses (Business Interruption as well as additional Soft Costs coverage)
- Occupancy Risks (from ongoing operations over which the contractor has little or no control)
- Design Risks (Errors and Omissions Insurance)

- 'Force Majeur' Risks (including Civil Commotion) and performance or efficacy risks. Sometimes financiers may also require provision of Liquidated Damages insurance in this grouping.
- Terrorism Insurance.
- Mould and Lead Abatement coverage.

Advice: Owners and contractors should never take for granted that standard insurance policies or contract insurance specifications address all of the risks associated with a project. Prior to bidding a contract, it is important to conduct a detailed review of the insurance requirements for the project with insurance professionals that are qualified to transact construction insurance. The purpose of the review should be to identify additional types or limits of coverage, if necessary, that may be required to satisfactorily protect the various parties' interests in the work. CCDC 21, A Guide to Construction Insurance provides advice on selecting a broker or agent to service construction insurance needs.

2. Risks that are excluded in Industry Standard Insurance Policies

Many insurance companies' policies now contain exclusions or come with mandatory attachment of exclusions for such risks as:

- Asbestos
- Pollution
- Cyber-risk ('Data')
- Fungi (Mould or Micro organisms)
- Terrorism

Failure by owners and contractors to address these issues may result in uninsured losses. Coverage may be available for some of these risks by means of extending standard policies for an additional premium. The resulting coverage is often limited in scope of coverage and subject to a sub-limit of insurance. Some risks may require separate, specialized insurance.

Advice: Prior to completing bid documents and submitting bids, owners and contractors should review these and 'emerging issues' with their insurance professionals, paying particular attention to how these risks may impact on the project in question. For example, asbestos may be of little or no concern in the case of stand-alone new construction that will contain none of this material. However, the mere location of an otherwise 'low risk' project in proximity to what insurers perceive to be a 'terrorism target' may render terrorism coverage unavailable or very costly. The importance of risk management with an eye towards mitigating insurable and non-insurable risks prior to the bidding process will help you protect your business.

3. Beware of recently introduced conditions, exclusions and insurance ‘warranties’.

In the current “hard” insurance marketplace, many insurers are seeking to limit or eliminate coverage for risks they did not originally intend or foresee insuring, but to which courts or recent legislation have required them to respond. Some of these risks have been identified above. Others may relate to the specific project in question. Since the wordings of construction insurance policies are not legislated to be uniform, there is considerable variation in the manner in which individual insurers address these issues. Most insurers deal with their concerns by introducing new exclusions or conditions into their policies. These can often remove or limit coverage or place onerous responsibility on project participants in order to maintain insurance coverage in force.

For example, the frequency of large fire losses has prompted insurers to make coverage for some operations such as welding/torch cutting, roofing (especially involving hot work), or construction of wood frame projects subject to insurance ‘warranties’. A ‘Warranty’ in insurance terminology has a meaning far different than in construction! An insurance ‘warranty’ is a ‘promise’ that places an obligation on the insured (in the case of construction, the contractor) to comply with specified loss prevention measures. Failure to comply with these insurance ‘warranties’ may result in having a claim denied or the policy voided. If a warranty violation results in policy cancellation, it will be very difficult to replace the coverage elsewhere. Very few insurers accept the risk of projects that are already underway. Please consider this a very serious issue.

Advice: Prior to completing bid documents and submitting bids, owners and contractors should ask their qualified insurance professionals to identify emerging exclusions, conditions and insurance ‘warranties’ that are likely to apply to the project in question. Special attention should be paid to new ones that have been introduced since insurance was negotiated for other recent projects or, in the case of contractors with ‘blanket’ policies, since their last renewal. The parties should then work with their professionals to determine means of addressing these issues. Owners and contractors must both be extremely wary of accepting policies with ‘warranty endorsements’ until they have determined that warranty conditions are practicable and can absolutely be achieved by all parties (including subcontractors) during construction. They must then ensure that measures specified in the warranty requirements are conscientiously maintained for the full duration of the insurance. It must be fully understood that all brokers and other insurance professionals must present full details on these insurance ‘warranties’ to their clients at the time of quoting, to ensure that

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