



It Takes More Than a Certificate to Protect Owners, Developers and Contractors

By Derek E. Steffen | Tuesday, March 24, 2020



Businesses often look for ways to protect against the risks they confront on virtually every project from design and construction through completion. This includes conducting due diligence and negotiating contracts that include the appropriate insurance coverages from the contractors, subcontractors design professionals and others involved with the project.

Once the due diligence is completed and the contracts are executed, the focus generally shifts to the logistics of getting the project started: who will do what and when will they do it?

Despite the desire to move forward as quickly as possible, there are still some additional administrative tasks to be completed in order to obtain the best protection. Most importantly, owners and contractors need to ensure that the proper insurance coverages, including professional liability insurance, are in place by requesting a copy of the certificate of insurance (COI) from all applicable entities directly involved with rendering professional services.

Many have the mistaken belief that the COIs are issued by the insurance carriers. They are not. A COI is typically issued by a licensed insurance broker and provides a summary of the insurance policies and/or coverages, such as general liability (GL), professional liability (PL), workers' compensation (WC), etc. that are currently in place for an entity. The COI typically identifies the policyholder's name, carrier, policy number, effective dates, limits, coverage type and the operations/locations of the insured.

If a business entity desires additional assurances regarding adequate insurance coverage from the parties involved in a project's construction, they can also request copies of some or all of the policies listed on the COI. With those policies in hand, they can review the specific terms, conditions and exclusions for each policy.

Furthermore, a business can request to be granted an additional insured status from its client for any of the identified policies. Doing so on the GL insurance policy, which covers bodily injury and property damage on a first party coverage basis, is a prudent risk management step that every owner, developer and contractor should consider.

Unfortunately, seeking to be identified as an additional insured on a PL policy does not provide the same protection afforded under the GL scenario.

Here's the issue: many owners, developers and contractors are under the false impression that their designation as an additional insured on a COI provides them with coverage under the policies listed on the COI. That is not the case. Generally, the COI only identifies the policies issued and the broker who represented the policyholder during the purchase of the policies. At no time does a carrier identified on the COI provide input as to any of the policies' coverage parameters.

This is especially important for PL policies as each policy is unique and terms and conditions can vary greatly between insurance companies. Unlike a GL policy, a non-professional cannot be named as an additional insured on a PL insurance policy. PL coverage is provided on a third-party basis, unlike the GL that provides coverage on a first party basis, meaning that a PL policy will respond to injuries sustained by a third person (and not a named insured or additional named insured).

PROFESSIONAL LIABILITY

By definition, a PL policy protects against the damages arising from negligent professional service acts, errors or omissions performed by or on behalf of the PL policy holder. Since an owner, developer or contractor is unlikely to perform any of these activities themselves, the likelihood of being added to the PL policy is practically nonexistent and shouldn't even be a consideration.

Accordingly, it is in the best interest of the owner, developer or contractor not to be named as an additional insured because it preserves the stakeholder's status as a third-party with the ability to exercise a claim against the named insured's PL policy. Doing so enables the business to recoup financial losses and/or rectify physical damages suffered through a professional's negligent act, error and/or omission.

Most PL policies typically include an exclusion for any claims arising against any two (or more) named insureds to a policy. Thus, if an owner, developer or contractor seeks such status, they'd be nullifying exactly what they seek, coverage arising from a professional's negligence.

While requiring that a consultant/subconsultant purchase PL insurance, owners, developers and contractors have increasingly embraced the benefits offered through the owner's protective professional liability insurance policy as a means to protect against potential catastrophic professional and pollution liability exposures. Additionally, that same policy can also fill in potential coverage gaps in the underlying consultants/contractors PL policy.

Designed specifically to protect a business' assets on a particular project, an owner's protective professional liability insurance policy provides first-party indemnity to the policyholder (insured) for damages incurred as a result of the negligent acts, errors and/or omissions in the professional services of a project's contractors and/or consultants. An owner's protective professional liability insurance policy includes separate insuring agreements that share a policy aggregate limit for protective professional indemnity, protective contractor's pollution and third-party claim defense and indemnity.

Another concern addressed by the owner's protective policy is the relatively low limits of liability commonly purchased by design professionals. In addition to being insufficient for most large projects, these limits are traditionally shared among all of the design firm's past and current projects. Therefore, the lack of adequate limits of liability being available when needed is a very real possibility.

PROPER RISK MANAGEMENT

Every project no matter the size has its twists and turns. Even the best due diligence can obscure this fact. But there are steps businesses can and should take to prepare against the unknown. This includes properly assessing the project parameters and potential challenges as well as ensuring the proper risk management strategies are in place well before the project begins. Relying on the conscientious behavior of others is not an option, especially when it comes to the project's success and the safety of everyone involved. There is simply no substitute for thinking ahead and protecting against the unforeseen.



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