

## Key Insurance Provisions to Mitigate Contract risk ISM webinar 8/8/2013

My notes and comments [not legal advice] from an ISM webinar about contractor insurance.

Consider the purpose of requesting a policy. It helps when considering what type of policy you would need. Helps to also consider what actions the insurance company might take if a claim is pending. Might cause us to reconsider some of the contract language and file documentation which might affect the insurance requirement. Example: adding a deliverable that specifically proves an action which is covered by insurance. E.G. a picture of the installed equipment helps to prove the loss when the equipment is subsequently missing.

Some reasons to require an insurance policy (and some actions- oversimplified – that might result)

- Guarantee performance - e.g. a bid or performance bond. Contractor is on the hook and the insurance company will pressure contractor to perform rather than have to pay the policy. We would have to prove the contractor was obligated.
- Protect against claims – insurance company is on the hook to pay the claim. Insurance company will defend themselves and try to find a loophole in the claim or contract that makes someone else responsible.
- Include 3<sup>rd</sup> party in sharing risk – insurance company will want to confirm the loss details and we will have to prove the loss was covered by the policy. E.g. during transportation – title holder is responsible if the product is lost and our insurance policy will be on the hook – unless we have separate transportation insurance.

Other benefits of insurance policies: Protect budget & cover costs, enlist expertise of insurance company, reduce business operation insurance risk. Don't forget that there are intangible risks which you might also want to insure – such as fraud.

It is important to think about the fact that the insurance policy is a contract, and thus it has to be specific about responsibilities, conditions, term, etc. Also important to note that the insurance company will protect themselves – that is they won't pay just because they want to; the insurance company will pay only because the policy says they have to AND we can prove the policy covers the event. Think about having to prove policy coverage just like you would about proving the terms of any other contract.

Thinking about insurance as a contract, simplifies the subject for me. Example: I want a policy (contract) that says a 3<sup>rd</sup> party (insurance company) is responsible if that event happens. As a contract, I know I need a valid signed agreement (policy), with specific scope (risk coverage), that is valid for the expected term of the risk (policy effective dates), and does not contain any loophole language (limitations, exclusions, etc.)

In addition, insurance policies can also include language which prioritizes multiple and overlapping coverage – I want his insurance policy to pay first, not mine. Subrogation is also a complex topic which relates to how the insurer can try to pass the risk to someone else in the event of a loss.

Speaking of loss, don't forget that the policy value should cover the expected value of the loss or risk – not just the contract value. **AND** don't forget that the policy effective dates or claim period should cover the dates that claims could be received. Industry buzzwords include an "Occurrence-based policy" that is a policy that covers a claim based on when the event occurred, not when the claim is made. Think of a contract employee showing up with a medical bill for injuries that happened in your plant, 4 days after the contract ends. Did the insurance policy expire with the contract?

We also need to consider the subject of "notice" Who is the insurance company required to notify if the policy expires, or is changed? If the contractor cancels the policy or lets it lapse because they didn't pay the premium – is the insurance company required to notify you? Who is authorized to request a copy of the policy? Where and how a claim must be reported. Remember the insurance company will protect themselves- wrong form, by an uncovered party, to the wrong person, with the wrong information = no payment.

Most policies require claim reporting to the insurer not just to the agent(contractor). Policy "notice of claims requirement clause"

Helpful when making a claim – just like any other contract. Make the claim as airtight as you can. Cite specific clauses in the contract (policy), include pictures, evidence and anything else you can in order to prove the claim and the coverage by the insurer. Caution, an agent might try to say the claim is not covered – just to avoid the problem, whereas a close reading of the policy might show the claim to actually be covered.

Apparently the two insurance industry organizations are both publishing standard insurance forms. So the ACORD insurance evidence form is similar to a different form set used by the ISO organization. (no relation to the international standards organization). Thus someone might offer a standard ACORD form or a standard ISO insurance certificate.

NOTE: The certificate of insurance is NOT the policy. It is a piece of paper that may not be right and may contain representations that are not part of the policy. Accord form or certificate is NOT proof. The certificate is not binding on the insurance company. Proof must be obtained by getting an endorsed policy. If covering the risk is important – then get a copy of the policy.

Should note that state laws differ about the responsibilities of agents and the certificate language. Example: Some states require that insurance certificate include a disclaimer that the certificate "does not amend the policy" . That is, whatever the policy says stands regardless of what the certificate says.

Here is a link to state insurance laws.

[http://www.acord.org/standards/forms/Documents/ACORD\\_CERTIFICATES\\_OF\\_INSURANCE\\_DOCUMENT.pdf](http://www.acord.org/standards/forms/Documents/ACORD_CERTIFICATES_OF_INSURANCE_DOCUMENT.pdf)

Interesting to look at WA state law. It makes it a crime to misrepresent the policy in a certificate. Of course that doesn't help if you have an uncovered claim. The last line of the RCW also reconfirms – the insurance company is only bound by what the policy actually says – not the certificate.

All insurance companies are not created equally. A contractor could be self-insured or part of an insurance pool. Industry buzzword “captive” as an insurance option. Basically means the company owns their own insurance company. We can check the reliability of insurance companies on this web site: [www.ambest.com](http://www.ambest.com)

Reluctance to provide additional endorsement coverage or information about the policy by a contractor or agent could be because they didn't ask or get the policy modified. Just like writing a contract – when it starts to sound flakey – it's time to be very careful.

Question to consider. When should we request policies vs. just the accord form. Probably an issue of risk, experience with the contractor, etc.

