

Our Legal Reality



Understanding Customer Contract Insurance Requirement Provisions by Kent J. Pagel

At BCMC 2002, I am privileged to participate in the Risk Management and Insurance breakout session. The theme to be noted throughout the session is one of responsibility. The definition of responsibility includes what is expected and involves accountability. Certainly the process of selling, designing, manufacturing and delivering structural components gives rise to many responsibilities. However, when you add the responsibilities demanded by customers through their customer contract and purchase order forms, how to effectively manage customer attempts to impose responsibilities, many of them unwarranted, becomes a real task.

One area of great concern relates to the insurance requirements that builders and contractors are setting out in their customer contract forms. The list of requirements expected of component manufacturers and others seems to be getting longer and longer. I recently reviewed a customer contract from a "Big Builder" and the insurance requirements section of the contract and the exhibits dealing with insurance totaled 18 pages. The requirements are furthermore becoming quite complex and difficult to understand for most component manufacturers.

As the ability of your company to do business or continue to do business with Big Builder depends on understanding such insurance requirements, knowing what you can provide, how to explain why you cannot meet certain requirements, and successfully negotiating changes to the insurance requirements have become important. The discussion that follows will become of growing importance to each and every structural component manufacturer, given that insurance issues have become increasingly more complicated in the industry.

Below, I have set forth some of the more significant insurance requirements that are being requested by Big Builder, what they mean, how they apply to your work, and what can be done if you are not able to meet such requirements. My comments are intended to help component manufacturers understand what is being requested of them in many of the Big Builder customer contracts and purchase order forms and is not intended as an in depth discussion of insurance policies. We will detail insurance policies in the BCMC session.

Ideally, you will receive the insurance requirements at the time the customer contract is being negotiated and not after the product is designed, manufactured and delivered. If the insurance certificate you provide does not meet the requirements of the Big Builder's risk management department, usually a follow-up letter will be sent outlining the deficiencies. If there is still a problem, you will most likely be contacted with a reminder of the importance of meeting the

requirements. The reminder may read, "you will not be paid until we get the correct insurance certificate from you."

The best way to start is to obtain the insurance requirements section of the customer contract or purchase order form during the pre-bid stage. If you are unable to provide the coverage that is requested or if you will need to expend extra premiums to meet such requirements, this is something you want to know early on.

BEST'S KEY RATING GUIDE

Each insurance carrier is graded according to Best's Key Rating Guide. A letter of designation may be provided, denoting the strength of an insurance carrier with "A+" being the highest and a number designation given denoting the size of the insurance company in terms of assets. Generally, Big Builder will require a rating of "B+" or higher as a minimum requirement, because they want to make certain the insurance company will be around when it comes time to pay a claim. Some companies have no minimum requirements.

COMMERCIAL GENERAL LIABILITY

The Commercial General Liability policy (also referred to as a CGL policy) provides coverage to the component manufacturer for claims causing bodily injury and property damage subject to many exclusions and exceptions.

A general "aggregate" limit exists for the component manufacturer's CGL policy. Aggregate means a whole considered with reference to its constituent parts—in other words it is the total amount of coverage that applies for Personal and Advertising Injury claims (which are also included in the CGL policy), Each Occurrence, Fire Damage and Medical Expenses. What is important to note here is that Each Occurrence covers the actual occurrence of an accident and is generally what category a claim will fall under during the time a job is taking place or has been completed. What is further important is that each of these claims subtract from the General Aggregate when a claim is made.

A Products Completed/Operations Aggregate will also exist under the component manufacturer's CGL policy. If any accidents take place after a job has been completed (trusses designed, fabricated, delivered and installed), the Products Completed/Operations Aggregate will cover it. This primarily applies to property damages or structural defect claims (construction defect type claims). The Each Occurrence category subtracts from Products Completed/Operations Aggregate in the same way it does for the General Aggregate. Typically, the General Aggregate Limit and Products Completed/Operations Aggregate required by Big Builder will be a \$1.0 million limit.

AUTOMOBILE LIABILITY

The types of automobile liability coverage are listed on the left side of any certificate of insurance form. If Big Builder has checked the "Any Auto" box, you will be obligated to provide all auto coverage. Otherwise, one or more of the following three types of coverage may be

required:

- **Owned Vehicle** (any company owned vehicle) or a **Scheduled Vehicle** (one of your company owned vehicles listed or scheduled on the Automobile Liability policy) coverage is available. The Scheduled Vehicle coverage is least preferred, as you may forget to add that new truck and trailer you recently purchased to the policy and no coverage would be available for the vehicle not added.
CASE EXAMPLE: If you have Owned Vehicle coverage, this would apply if one of your company-owned vehicles damages another vehicle at the jobsite. If you have Scheduled Vehicle coverage, this would apply if one of your company-owned vehicles that is also listed on the policy damages another vehicle at the jobsite.
- **Non-owned Vehicles**—applies to employee-owned vehicles that may be involved in an accident with another vehicle at the jobsite.
CASE EXAMPLE: In the event that an employee-owned vehicle was involved in an accident with another vehicle at the jobsite, the employee's personal insurance would pay first, then the component manufacturer's automobile liability insurance would pay if held liable.
- **Hired Vehicles**—applies to rented or hired vehicles that may damage another vehicle.
CASE EXAMPLE: You hire a trucking company to deliver trusses to the jobsite and as the driver is pulling onto the site, he backs into another vehicle. In this case, the trucking firm's insurance would pay first and your insurance would then pay if held liable.

EXCESS LIABILITY

This coverage is in excess or in addition to the limits shown in the General Aggregate and Products Completed/Operations Aggregate of your CGL policy and the limits of your Automobile Liability policy. In other words, this type of insurance would become effective if the limits of the underlying policy were consumed with one claim or a number of claims. It is not uncommon for Big Builder to require that a component manufacturer maintain some defined amount of Excess Liability insurance.

PROFESSIONAL LIABILITY (ERRORS & OMISSIONS)

Professional liability coverage (commonly referred to as E&O insurance) applies to the errors or omissions made by a subcontractor or supplier in the course of performing their work. This coverage is typically provided to surveyors, architects and engineers. As most CGL policies exclude professional liability, some Big Builders request E&O coverage from component manufacturers as they or their risk managers view the truss manufacturer as in some ways providing engineering or design services. As most, if not all truss manufacturers do not carry E&O insurance, they must define for themselves an approach that enables them to convince Big Builder that such a request is unreasonable.

WAIVER OF SUBROGATION—WORKER'S COMPENSATION POLICIES

Many customer contracts will request that the component manufacturer provide a “waiver of subrogation” in favor of Big Builder. This most likely will pertain to the component manufacturer's Worker's Compensation coverage, as Big Builder is looking to prevent the

component manufacturer's Worker's Compensation insurance carrier from suing Big Builder to recover any loss for a Worker's Compensation claim.

CASE EXAMPLE: A worker delivering trusses to a jobsite is injured and can no longer work. Anytown U.S.A. Truss Company's Worker's Compensation carrier in turn pays ongoing medical expenses and continuing wages. If such truss company's Worker's Compensation carrier investigates the injury and determines fault lies with Big Builder they may demand reimbursement from Big Builder. With a Waiver of Subrogation, Anytown U.S.A. Truss Company's Worker's Compensation carrier has legally waived all rights to demand reimbursement.

CANCELLATION & MODIFICATION PROVISIONS

Insurance certificates typically provide the following wording relating to cancellation:

"Should any of the above described policies be canceled before the expiration date thereof, the issuing company will endeavor to mail 30 days written notice to the certificate holder...but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives."

Essentially what this says is that the component manufacturer's insurance carrier may try and mail notices of cancellation to Big Builder, but there is no assurance that this will get done. As uncertainty is of concern to Big Builder, the component manufacturer can expect a request that the words "endeavor to" and "but failure to" be deleted.

ADDITIONAL INSURED ENDORSEMENT REQUIREMENTS

With greater frequency, I am seeing Big Builder request component manufacturers to provide one of the following additional insured endorsements: CG2026-11851; CG2010-1185; or CG2010-1093, but only if modified to delete the word "ongoing" and if the following sentence is inserted: "Operations include ongoing and completed operations." Each of these endorsements provide Big Builder with the kind of overreaching insurance coverage they seek, especially with respect to construction defect litigation.

Regardless of which endorsement is requested, Big Builder may request that the insurance provided via the additional insured endorsement shall be "primary and non-contributory to any other insurance that may be available to the additional insureds." This clause makes the component manufacturer's insurance pay first, exhausting all of its coverage, before Big Builder's policy will pay.

¹For a more detailed discussions on additional insured endorsements, see ["Big Builders' Reaction to Construction Defect Lawsuits: The Dilemma for Truss & Wall Panel Manufacturer"](#) from Jan/Feb 2001.

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