

## WIC Tuesday Talks:

# Alphabet Soup – Understanding the ABCs of CGL, BR, E&O, OCIP, CCIP, and Other Insurance Policies

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November 14, 2023



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YOUR 50 STATE LAW FIRM™

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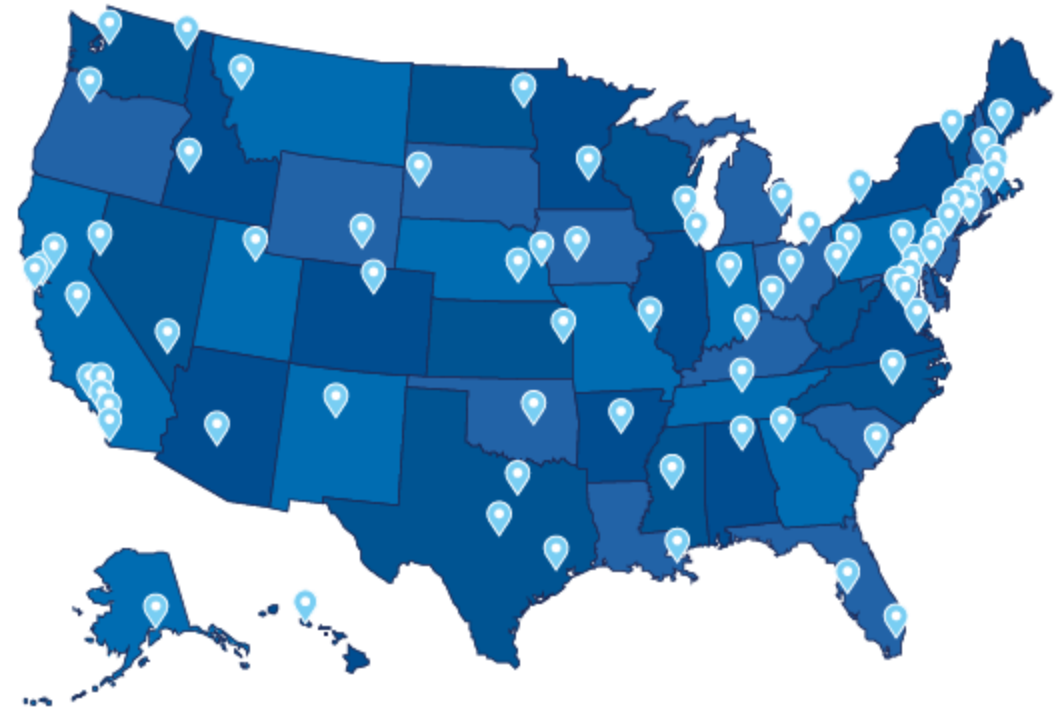
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# Alphabet Soup – Understanding the ABCs



# Why are Insurance Policies so Important?

- Risk of Loss
- Risk Management
- Contract Requirements
  - Additional Insureds
  - Evidence of Insurance





# Risk of Loss

- Personal Injury/Death
- Property Damage
- Workers' Compensation/Auto
- Professional liability
- Delay damages
- Costs to restore corrupted data
- Nonpayment by client



# Risk Management

- Cost of insurance
- Identification of uninsured risks
  - Understanding available expanded insurance coverages
- Identification of coverage gaps (CGL-E&O/Professional Liability)
- Development of industry loss history (subcontractor losses)
- Communicating scope of work to underwriters





# Risk Management

- Quantity risk on design/build and P3 projects
- Inadequate insurance from other parties
- Best practices in loss control and risk management (WC/ Auto)
- BIM (Building Information Modeling) utilization
- Enrollment in OCIP/CCIP
- Alternative Project Delivery



# Contractual Requirements

- Review your contract to understand is required
  - » Discuss with Insurance Broker
  - » Understand options
  - » Confirm you can satisfy the requirements before signing the contract
- Evaluate the costs
  - » Account for that in your contract price
- Required Coverages
  - » Is there a gap in coverages?
- Limits
  - » Sufficient?
  - » Insufficient? **What if it isn't enough?**



# Contractual Requirements

- Additional Insureds
  - » Who? Really necessary?
  - » Make sure you are name an additional insured on appropriate policies (up & down stream)
- Length of Coverage
  - » Make sure it is adequate?
  - » Is the coverage window too long or unnecessary?
- Waiver of Subrogation Provision
  - Should it be mutual?
- Obligation to provide Certificate of Insurance prior to payment – **Material breach if lapse**
- Make modifications to the above if that don't make sense
- Ask your attorney or broker to review and provide recommended red-lines



# Modification of Contract Terms

- Limit Risk of Loss (Multiple GCs or Subcontractors)
  - “To the extent Subcontractor’s Work is ongoing, and prior to the placement of any other materials on Subcontractor’s Work, Subcontractor shall effectually secure and protect the work done.”
- Duty to Make a Claim (GC and Subcontractors)
  - “If GC/Sub notifies Owner/GC in writing of the need to make a claim on any of its applicable insurance, Owner/GC shall make such claims.”
- OSHA/Safety
  - “Subcontractor will not self-perform on-site construction work, the parties understand that Subcontractor will subcontract with specialty subcontractors (e.g. erection specialists) who will provide on-site safety compliance and competent persons. Subcontractor, through its designated specialist subcontractors, shall comply

# Sufficient Limits by Other Project Participants

- Owner
  - Builder's Risk (deductible amount/additional insured status)
- EOR/AOR
  - Responsible for design of structure/building code compliance
  - Limits of \$5M or more
- General Contractor
  - E&O for preconstruction services
  - Limits should be greater than \$5M
- Subcontractor/Sub-subcontractors – Flow Down
- Inspectors
  - E&O for inspection services
  - At least \$1M



# Insurance Issues Without a Contract

- Additional insured status typically requires written contract
- Waiver of subrogation requires written contract
- Commenting on “constructability” or “value engineering” may be a “professional service”
  - Should be insured by obtaining professional liability insurance with an amended definition of professional services





# Insurance Without a Contract

- Scope and damages drive insurance coverage not timing or existence of a contract
- Beware of insurance that requires work “for a fee”
- Work performed as a favor or not within scope



# Policies Overview

- CGL
- E&O/Professional Liability
- BR/Builder's Risk
- OCIP/CCIP
- Other Coverage



# ABCs of CGL

- Usually must show “bodily injury” or “property damage” to “other property” caused by an “occurrence”
- “Occurrence” defined as “accident” (varies by jurisdiction)
- Includes a duty to defend the insured against “suits”
- Defense costs may not deplete dollar limits of coverage available





# Is the Loss Covered by CGL?

- ISO Commercial General Liability Exclusions

## COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2. **Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability** and Paragraph 2. **Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:**

1. This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or on your behalf, but only with respect to either or both of the following operations:
  - a. Providing engineering, architectural or surveying services to others in your capacity as an engineer, architect or surveyor; and
  - b. Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with construction work you perform.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or failure to render any professional services by you or on your behalf with respect to the operations described above.

2. Subject to Paragraph 3. below, professional services include:
  - a. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and
  - b. Supervisory or inspection activities performed as part of any related architectural or engineering activities.
3. Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor.

Excludes independent professionals you hire for engineering work

Professional services includes preparing shop drawings



# ABCs of E&O/Professional Liability

- Designer, Construction Manager, Design Builder Professional Liability
- Usually “claims made, not “occurrence” triggered
- Covers damages caused by negligent error or omission; may not cover express contractual undertakings
- Does not require “bodily injury” or “property damage”



# ABCs of E&O

- Tail coverage
- Defense costs deplete limits of coverage available (“wasting”)
- Limits of coverage
- Practice versus project-specific policy





# Relationship Between E&O and CGL

- Ask your insurer(s) for CGL and E&O to agree to a “Mixed Claims” endorsement or agreement
- It should address:
  - Definition of a mixed claim
  - That a claim cannot fall between general and professional liability policies because one insurer says it is professional services and the other says it is means and methods
  - Dispute resolution process
- If your CGL/Umbrella liability insurer(s) requires a professional services exclusion, ask that they use only one: ISO endorsement 22 80 (only):

## COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability and Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you, but only with respect to your providing engineering, architectural or surveying services in your capacity as an engineer, architect or surveyor.

Professional services include:

1. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and
2. Supervisory or inspection activities performed as part of any related architectural or engineering activities.

This exclusion does not apply to your operations in connection with construction work performed by you or on your behalf.



# Blurred Lines of BIM and Alternative Delivery Methods

- Blurring of responsibilities
  - The insurance industry already struggles with:
    - » Professional services vs. means and methods
  - BIM and the project delivery methods it will support will only further blur the lines
  - While the overall risk may be lower, sorting out claims where traditional roles are changed will be complex



# Blurred Lines of BIM and Alternative Delivery Methods

- Professional Liability BIM Endorsement:
  - Broader coverage for **professional services**, i.e. technical consulting
  - Broader coverage for errors and omissions arising out of the BIM model
  - Provide coverage when acting as BIM model manager
  - Coverage for problems arising out of BIM-related technology issues
  - Excess and DIC coverage for project-specific BIM insurance
  
- Alternative Delivery Method
  - Make sure the scope is covered



# ABCs of Builder's Risk

- First Party property coverage during the course of construction
- Typically covers direct physical loss or damage
  - » Does it cover materials?
  - » Collapse of structure
- Usually Owner must purchase unless other election
  - » Additional insured status
  - » What happens if not procured – is it addressed by the contract?
- Other forms of first-party property insurance may also provide coverage



# ABCs of OCIP/CCIP

- One insurer insures all project participants
- Owner or Contractor controlled (OCIP/CCIP)
- Single project or multi-project
- Can result in cost savings to project
- Can avoid coverage disputes/gaps
- Greater risk management



# Other Coverage

- Excess/Umbrella
- Workers' Compensation
- Pollution/Environmental
- Subcontractor Default
- Cyber





# ABCs of Excess/Umbrella

- Typically excess coverage to CGL
- May be contractually required
  - » But is it necessary?
  - » Waiver of consequential damages
  - » Limitations of liability
- Should obtain even if not required based on exposure?
- Don't focus solely on the size of the project
  - » What is the risk associated from bodily injury or property damage?
  - » Lost income
  - » Other damages



# ABCs of Workers' Compensation

- Statutorily required by each state
  - Medical expense paid
  - Liability does not have to be proven
- Covers injuries that occur “in the course and scope of employment”
- Meant to be the Exclusive Remedy for injuries that occur on the job
  - Employers cannot be sued for negligence
  - Is a subcontractor’s employee allowed to sue the GC?
  - Indemnity provisions usually address this
- Workers’ compensation does not prevent claims for injuries or property damage caused by non-employers to injured workers



# ABCs of Pollution/Environmental

- Coverage for unexpected pollution exposures not covered by standard CGL or property policies
  - » Pollution
  - » Hazardous materials
- Covers
  - » Personal injury
  - » Property damage
  - » Clean-up costs
  - » Legal representation
- Catastrophic v. Non-catastrophic
  - » Sudden events (fires or explosions)
  - » Hazardous events occurring over time





# ABCs of Pollution/Environmental

- Who needs coverage?
  - High volume of potential pollutants
  - Use of chemical
  - Transportation of hazardous materials
  - Toxic waste or hazardous materials on-site



# ABCs of Subcontractor Default

- Protect Owners and GCs from financial risk of default
  - » Cost of completing the work
  - » Replacement contractor
  - » Other damages (direct and indirect costs)
- Alternative to performance bonds
- Gives insured more control over the claims process
  - » Pre-qualification of subcontractors
  - » Require subcontractors to share risk – deductibles
- Not available for public projects



# ABCs of Cyber

- Significant risks
  - » Type/severity of attack
  - » Size of business
  - » Measures taken to recover
- Recent survey more than 75% of respondents in construction, engineering, and infrastructure had experienced a cyber incident in the past year.
- Costs business approximately \$6 TRILLION/year (as of 2021)
  - » Average data breach costs is almost \$5 million





# ABCs of Cyber

- Coverage for cyber attacks against construction companies
- Coverage for cyber events affecting supply chain
- Recover fraudulent wire transfers
  - » Wire transfers intercepted or faked
- Limit costs for cyber event
  - » Cyber attack specialist



# What to do When a Potential Claim Arises?

# Determine Facts

- Investigate immediately
  - Video footage
  - Photographs
  - Secure the site
  - Prevent spoliation of evidence
  - Witness interviews/statements
  - Gather all relevant documents





# Determine What Policies Exist/Apply

- Gather relevant policies and determine which apply
- Notify affected parties
- Notice to the insurer
  - Comply with the policy provisions
- Indemnity Demand
  - Duty to indemnify typically exists beyond insurance limits
  - If the claim exceeds the limits, the balance is the insured's responsibility

# Determine Coverage

- Timing
  - » Policy period
  - » Occurrence policy vs. Claims-made policy
- Exceptions/Exclusions
  - » Determine potential exclusions to coverage
  - » Evaluate legal positions on coverage/exclusions



# Who Pays? And How?

- Where is the money coming from: Deductible/ SIR
- Settlement Authority
- Rights to recover attorneys' fees/indemnity if provided by carrier
- Damages Considerations
- Tort Cases Allow for Recovery of Amounts Paid by Insurance Carriers Under the Collateral Source Rule
- Breach of Contract Cases Allow for Recovery of Damages Paid (See Bramalea California, Inc. v. Reliable Interiors, Inc. 119 Cal. App 4<sup>th</sup> 468 ( 2014))
- Medical Expenses Paid By Carrier vs. Billed by Medical Provider (See Howell v. Hamilton Meats & Provisions, Inc., 52 Cal 4<sup>th</sup> 541, (2011))



# Takeaways

- Construction projects are risky places involving large monetary risk
- Make sure you understand the risks before entering a contract
- Evaluate the contract requirements and make modifications
- Ensure that you have proper coverages and limits
- When a claim arises, investigate, preserve evidence, and evaluate insurance coverage and requirements to preserve the claim



**Questions?**



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