Certificates of Insurance
You Can't Always Get What You Want by David Surles, CPCU, AAI

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Regarding: General Liability

A certificate of insurance is an informational document issued by or on behalf of an insurance company. The certificate indicates that an insurance policy exists of a certain type and limits. Certificates are simply snapshots of basic policy coverages and limits at the time of issuance of the certificate. Certificates are not intended to modify coverages or change the terms of the insurance contract and they convey no contractual rights to the certificate holder.

The futility of depending on certificates of insurance was highlighted by the Texas Supreme Court in its recent decision in *Via Net, eta/ v. T/G Insurance Company,* eta/., wherein the Court said: "Given the numerous limitations and exclusions that often encumber such policies, those who take such certificates at face value do so at their own risk."

As a utility contractor, you are no doubt often asked to sign construction or service contracts that include certain insurance requirements that must be evidenced by a certificate of insurance. If the certificate holder desires status as an additional insured under a policy, this can only be done by endorsement to the policy, not by issuance of the certificate alone.

Problems often arise when a contract makes demands that are, for all practical purposes, virtually impossible to meet. Examples include requests for insurance for losses or damages that are uninsurable, requests that agents cannot legally comply with, requests that require inappropriate certificate wording, and requests that are impractical from a market standpoint.

As a result, insurance agents are sometimes asked to provide a certificate of insurance that cannot comply with the contract you may have already signed. In fact, you may have already completed the job and need the certificate in order to get paid. The purpose of this article is to illustrate how such problems can arise and what solutions are available, if any, to address the most common problems.

UNINSURABLE REQUESTS

Sometimes contracts will attempt to transfer risks and liabilities that are largely uninsurable. For example, the contract may require you to be responsible for "ANY negligent acts, errors or omissions" or "any and all liabilities" that result in "ANY claim, cost, expense, liability, penalty, or fine." A commercial general liability (CGL) policy typically does not cover "errors and omissions" or fines and penalties, nor will it pay for damages other than those arising from bodily injury, property damage, and personal and advertising injury liability. In addition, the word "any" implies there are no exclusions when, in fact, the policy has many exclusions ranging from pollution liability to faulty

workmanship.

Needless to say, it is advisable to have an attorney review contracts on your behalf. In addition, prior to signing any contract, have your insurance agent review the insurance specifications, preferably in conjunction with your attorney. He or she can advise what requirements may be impossible or difficult to insure. It is important to know the costs before bidding on the contract and it's possible that truly onerous insurance requirements can be deleted from the contract.

Often contracts will require your insurance to be "primary and noncontributory." The "ISO standard" CGL policy does say that it is primary with regard to the certificate holder's general liability policy IF the certificate holder is an additional insured on your policy. So, the first order of business is to make sure that the appropriate additional insured endorsement is attached to your CGL policy.

However, the undefined term "noncontributory" is meaningless on its own. The term may just be used to reemphasize that your insurance is primary, which is fine. Or the intended meaning may be that a waiver of subrogation endorsement is desired. However, often it means that the certificate holder's CGL policy will not contribute in any way to a loss even if that policy otherwise covers it. This means that you will have to pay out of your own pocket any claim that exceeds the limit of your CGL policy without contribution from the certificate holder's CGL policy.

It is in your best interest to attempt to clarify and, if necessary, strike the "noncontributory" wording from the contract. If that's impossible, consider increasing your own policy limits or be prepared to assume a potentially large uninsured loss.

ILLEGAL REQUESTS

Construction contracts sometimes require that the certificate holder be given additional insured status under a specific endorsement number and edition date. It is not uncommon for a contract to request an "ISO standard" policy form such as the CG 20 10 11 85 additional insured endorsement. Note that "11 85" refers to the November 1985 edition of this form.
These forms typically must be filed with and approved by the Texas Department of Insurance before they can be used. Since later editions may have superseded earlier editions, it could be impossible for the insurer to provide a form that is 20+ years old and is no longer approved by the Texas Department of Insurance. This is also the case in most other states where you might be working.

Your insurance agent can often provide a later edition form with comparable coverage. In some cases, two endorsements might be necessary to replace a single older form, one providing ongoing operations coverage and the other completed operations coverage.

The latter form, however, might not be available or only available at significant cost. Your insurance agent may represent more than one insurance company, making it more likely that your account can be shopped to another insurer who is better able to meet your needs. In any event, you will want to price this coverage before submitting your bid since completed operations insurance, if available, can be substantial in price.

Also, contracts frequently mandate that coverage be extended to the additional insured's sole

negligence. In some states, sole negligence cannot legally be transferred to another party. Increasingly, even where insurance transfer is permitted, insurers are using additional insured endorsements that prohibit assuming the additional insured's sole negligence. The current "ISO standard" endorsements do just that.

If you are working in a state that has anti-indemnity statutes or case law, then this should not be an issue. Otherwise, you will want your insurance agent to determine if the insurer is still willing to assume sole negligence under an additional insured endorsement. If not, the contract will need to be modified or compliance will be impossible.

INAPPROPRIATE REQUESTS

Contracts often specify that the certificate of insurance provide for notice of cancellation to the certificate holder. The problem is that all "ISO standard" additional insured endorsements make no provision for cancellation notice to an additional insured. Perhaps acknowledging this, some contracts settle for the more hopeful "endeavor to" provide notice of cancellation provision.

Keep in mind that, unless the policy specifically provides for cancellation notice to the additional insured, the insurer is usually under no contractual obligation to provide such notice. Even if an attempt is voluntarily made, mistakes happen. In some cases, due to regulatory decree by the state department of insurance (New York is an example), a certificate of insurance cannot make a promise of notification unless notice of cancellation is provided for in the policy or endorsement.

Some organizations and government entities use their own certificates of insurance instead of the more standardized ACORD 25 - Certificate of Liability Insurance form. These may create problems for insurance agents because some states have laws or regulations prohibiting the use of such forms unless approved by the state department of insurance.

These forms may include wording implying coverages or rights that don't actually exist under the policy, again violating the law in many states. These certificates may sometimes be almost exact duplicates of the "ACORD standard" form(s), creating copyright violation possibilities. They may also lack disclaimers designed to protect you and the issuer.

Be very wary of these non-ACORD certificates of insurance. Rely on your insurance agent for guidance on how to handle these forms. In many cases, they can be issued, but require referral to the insurance company which can cause delays. Again, it is important to involve your insurance agent in the process as soon as possible._

IMPRACTICAL REQUESTS

The construction contract may specify that certain coverages (e.g., completed operations) be provided or that certain exclusions (e.g., pollution liability) be removed. Because of the proliferation of defective workmanship claims in the construction industry, completed operations coverage may be difficult to procure at a reasonable cost. Most insurers are unwilling to remove certain exclusions such as pollution liability and the cost to purchase the coverage separately may be prohibitive.

Be sure to give your insurance agent ample time to search for the coverages required by your

construction contracts. If coverage is available, you will want to include the premium costs in your contract bid. If coverages are not available, you may be able to negotiate such requirements from the contract or pursue another source of coverage.

It is not uncommon for your insurance agent to be unable to meet every requirement of the contract you're being asked to sign, from the standpoint of coverages, policy rights, or completion of a certificate of insurance. The other party to the contract may then inform you that they can provide a list of agents who claim they can comply with the contractual requirements in full.

While it's possible that the person requesting the certificate is aware of agents who are better able to comply with their requests, be cognizant that fraud and misrepresentation with regard to certificates is not unheard of. If you are requiring certificates from subcontractors, be aware that bogus certificates do exist.

While it is rare, there are unfortunately some insurance agents who will issue certificates that do not accurately reflect coverages and policy terms just to allow a contractor to get a job and for them to keep their business. Since certificates are rarely legally enforceable against insurers or agents, you may be incurring significant liability if an inaccurate certificate is issued. It is important that you do business with insurance professionals in which you have great trust or that you verify the accuracy of the certificate.

As outlined in this discussion, the single best thing you can do in dealing with certificate of insurance requirements is to involve your insurance agent in the process as soon as possible. He or she can counsel you on how to best meet your insurance requirements and, if not possible in some instances, provide an explanation as to why something is difficult or impossible, often to the satisfaction of the requestor.

David Surles, CPCU, AAI is the Director of Professional Liability for the Independent Insurance Agents of Texas (//AT), representing a network of more than 1,600 independent insurance agencies in Texas, and affiliated with the Independent Insurance Agents & Brokers of America (//ABA). This article was condensed from an //ABA white paper entitled "Certificates of Insurance: Issues and Answers." To obtain a copy of this report, contact an independent agency member of IIAT.