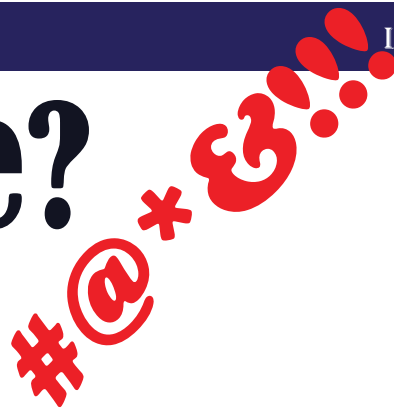


Foul Language?



Words Make A Difference For Contractors In Recent Insurance Certificates

BY BRUCE BUCKLEY

A recent change to regulations for certificates of insurance is creating considerable consternation and confusion within the contracting community, with some firms put at risk of contractual non-compliance. Other contractors have seen payments delayed by owners grappling with the issue, and some subcontractors have reported the problem complicates their agreements with general contractors.

Specifically at issue is new language that tightens requirements for notice of cancellation or non-renewal of insurance. Under the previous language, insurers were to “endeavor” to provide notice when a policy was canceled or terminated but were not held liable if they didn’t do so. The new forms have removed that wording and now require insurers to adhere strictly to policy provisions regarding such notices. The requirement has sparked considerable debate within the insurance community about how to address the issue, which many argue poses big administrative challenges.

Claims from losses incurred under a policy that has been canceled without notice are very rare, observers note. However, the risk that it could happen is enough to raise red flags in contracts.

Whether it is a contract between an owner and a general contractor or between a contractor and a subcontractor, upstream parties require provisions to indemnify themselves in the case of a loss involving the downstream party. Mike Kennedy, general counsel for the Associated General Contractors of America, says contractors are concerned the new notice requirements won’t be met, creating a technical non-compliance with the insurance provisions of a contract.

“As a practical problem, this rarely comes up, and there is some question as to how much of a practical problem it’s going to be,” Kennedy says. “But to the extent that it’s holding up payments to contractors, it’s a huge problem.”

Notice of Cancellation

The issue stems from a change introduced in September 2009 by the Association for Cooperative Operations, Research and Development, which creates standardized forms for the industry. Mike Campo, construction team leader at brokerage firm Lockton, Kansas City, Mo., says the ACORD changes were made, in part, to better comply with state insurance laws.

Previously, ACORD 25’s Certificate of Liability stated that if a policy were canceled, the insurer should “endeavor to mail a written notice [stating the number of days left on the policy] to the certificate holder”; however, failure by the insurer to do so would

“impose no obligation or liability of any kind upon the insurer, its agents or representatives.” The new version of ACORD 25 removes that language and states that notice will be provided “in accordance with the policy provisions.”

Although language now points to the policy for guidance regarding who is responsible for providing notice of cancellation, experts say most existing policies do not adequately address the issue. Historically, policies that require the carrier to provide notice rarely have been endorsed.

Although certificates of insurance commonly suggest the “insurer” should “endeavor” to provide such notice, experts say these certificates do not amend the policy. As a result, this discrepancy can trigger a technical non-compliance within contracts requiring that notice be provided.

“This is a contractual requirement that has long been widely disregarded, and the discrepancy was papered over in the certificate of insurance,” says one industry insider. “There’s no longer this fig leaf over the non-compliance with this provision.”

Triggering a Notice

Faced with the threat of having to amend thousands of existing policies, the insurance industry has responded with a variety of solutions. Some carriers have issued endorsements that agree to notify a third party about a policy cancellation. However, carriers have differing views on which parties should be notified as well as the circumstances that would trigger a notice, such as non-renewal, material change in coverage or non-payment. At an insurance roundtable held on Feb. 1 during AGC’s 2011 Conference on Surety Bonding and Construction Risk Management in Naples, Fla., the group identified 62 proprietary forms available through 22 different carriers to address the issue.

Seth Hausman, head of operations for the Zurich, Schaumburg, Ill., construction division, says notice requirements have emerged as “the No. 1 issue on the minds of our customers.” Last year, the company produced a blanket endorsement form that provides electronic notice for cancellation other than non-payment. Hausman concedes that it is “not a complete solution,” particularly for customers who require mailed notification or cancellation notices for non-payment.

Hausman says that although some carriers are drafting endorsements, carriers are ultimately “not in the best position to solve this problem for customers.” Carriers are not privy to contracts between customers and their clients, lack sufficient data and don’t have the infrastructure to meet all notice requirements, he says.

Hausman notes that many brokers who issue certificates of insurance already have the necessary infrastructure in place. Furthermore, as contractor concerns revolve around contractual non-compliance, the root of the problem exists within the contracts, not the insurance policies, he says.

Checklist Compliance

Many contractors have moved to work with owners and subcontractors but with mixed results. Scott Trethewey, executive vice president of risk management and finance at Moss & Associates, Fort Lauderdale, Fla., South Florida Chapter AGC, says that while many sophisticated private owners are working with contractors to remedy the issue, public owners can be more challenging. “My concern is with public owners who may be following a checklist,” he says. “If they are checking boxes and they don’t see a form that complies with the contract, that’s a problem.”

Trethewey says the issue has led to some payment delays from owners.

Subcontractors are feeling the effects as well. Lockton reports that some general contractors have asked subs to provide notices every 30 days or every time a sub asks for payment—strategies that Lockton advises against, Campo says.

David Dolnick, risk manager at the Brady Cos., San Diego, San

Diego Chapter AGC, says some general contractors that work with Brady have raised concerns about notification. “Our feedback to GCs has been to say, ‘Let’s step back and be rational. This hasn’t been an issue in the past, and we will do what we can to reasonably meet your needs now,’” he states.

Although many are looking to amend policies or contracts to address concerns, Campo says the industry should not completely discard third-party notification. He says that since brokers already provide certificates of insurance, they have the infrastructure to provide notification on the carrier’s behalf, if the carriers would agree to let the brokers do so. “Upstream parties have legitimate reasons to know if a policy has gone bad,” he adds.

Paul Becker, the construction practice leader at New York City-based brokerage firm Willis, which is a member of several AGC chapters, says that to provide clarity to the industry, a consistent solution needs to be put in place, rather than a “mishmash” of forms from insurance carriers and a variety of contractual remedies. Although large contractors may have the resources to tailor their own strategies, Becker says other contractors could face a daunting challenge.

“Until the industry comes up with a standardized approach, we won’t resolve this issue,” he says. “It will go on and on.”

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