

CONTRACTOR INSURANCE REQUIREMENTS – A PRIMER



Jennifer has recently been promoted to head of the risk management department at Thyme Manufacturing Co, Inc. The owner, Justin Thyme, has directed Jennifer to focus on the upcoming construction project for Thyme's new manufacturing facility, with particular attention to the insurance requirements to be imposed on the general contractor and any subcontractors. Justin's charge to Jennifer is broad: protect Thyme, but don't make the insurance requirements so onerous that contractors are discouraged from bidding on the project.

As Jennifer has not been involved in a construction project before, she looks into Thyme's archives and finds insurance requirements from a project completed almost twenty years ago.

OUTDATED INSURANCE TERMINOLOGY

What strikes Jennifer about the old insurance requirements is the insurance terminology used. There is reference to "comprehensive general liability insurance" including endorsements listed as "broad form property damage," "broad form blanket contractual liability," "cross liability," "XCU" and "additional named insured." The limits are also listed as split limits – one applicable to bodily injury, and another lesser limit applicable to property damage.

Similarly, the auto insurance requirement refers to "comprehensive auto liability" and workers' compensation insurance includes the "broad form all states endorsement." Further, all of the requirements are to be evidenced by a certificate of insurance that provides Thyme 30 days advance notice of cancellation. It becomes readily apparent that these requirements are so outdated as to be virtually useless – the coverage, endorsements and limits listed are obsolete and are no longer available. She must start from the beginning.

LEARNING THE SCOPE OF INSURANCE AND RISK ANALYSIS

After a substantial amount of research, including acquiring an understanding of the scope of today's most common insurance policies, Jennifer analyzes the risk confronting Thyme. Jennifer concludes that her goal, consistent with Justin's directive, is to write the insurance requirements to provide broad protection, while at the same time ensuring the requirements are both reasonable and understandable to the contractors. She will use today's insurance terminology, including requiring policy form numbers, in order to be specific and make it easier for both Thyme and the contractors to determine if the required coverage is being purchased.

As a general matter, Jennifer wants the contractors to have limits more in keeping with today's custom and practice, and includes Thyme as an additional insured. In fact, when considering the order she wants the contractor's policy to respond, Jennifer knows it is important to make sure the insurance requirements clearly state that the liability policies on which Thyme will be an additional insured will respond *first* – the contractor's policies will respond *before* Thyme's own liability policies – and that the contractor's liability insurance must agree to not seek contribution from Thyme's own policies – the oft-mentioned "primary and noncontributory" order of coverage.

With respect to workers' compensation insurance, Jennifer's first concern is to make sure all persons that are or *could be* covered by the contractor's workers' compensation insurance are in fact covered. She is well aware that Thyme might have to pay the state statutory workers' compensation benefits of the contractor's or subcontractors' employees if they have not purchased the state-required workers' compensation insurance. Finally, Jennifer learns about the principle of subrogation and how it differs from contribution; she understands this will require the contractor's insurers to waive their rights of subrogation against Thyme.

THE RESULTING INSURANCE MINIMUM REQUIREMENTS

Jennifer writes the following insurance requirements as basic requirements applicable to all contractors, subcontractors and sub-subcontractors for consideration by Thyme's legal counsel in drafting the bid specifications as well as the resulting construction contracts:

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CONTACT

To learn more about how AmWINS can help you place coverage for your clients, reach out to your local AmWINS broker or marketing@amwins.com.

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All insurance must be written with an insurance company authorized to do business in the state in which the project is located and shall be placed with insurers with an A.M. Best rating of A- VIII or better.

General Liability

Commercial General Liability insurance using ISO's CG 00 01 or its substantial equivalent with Thyme as an additional insured using ISO's CG 2038 or CG 2010 or its substantial equivalent for ongoing operations and ISO's CG 20 37 or its substantial equivalent for completed operations with the following limits:

- \$1 million Each Occurrence
- \$1 million Personal and Advertising Injury
- \$2 million General Aggregate – per Project using ISO's CG 25 03 or its substantial equivalent
- \$2 million Products-Completed Operations Limit

Contractor must disclose to Thyme any endorsements that limit or exclude coverage customarily provided by ISO's CG 00 01. Thyme reserves the right, prior to acceptance of the contractor's bid, to either require additional types of liability coverage or require greater limits based on the nature of the operations being performed by the contractor.

The contractor's insurers will provide insurance to Thyme on a primary basis and agree not to seek contribution from Thyme's insurance by using ISO's CG 20 01 or its substantial equivalent. Contractor's insurers also agree to waive rights of subrogation against Thyme using ISO's CG 24 04 or its substantial equivalent.

Contractor's Commercial General Liability insurance will remain in force with annual policy periods for the period of the statute of repose applicable to this project. **Alternatively, if a "project-specific" General Liability policy is used to satisfy these requirements, it must be endorsed to provide extended completed operations for the period of the statute of repose applicable to this project.**

Automobile Liability

Business Auto Coverage Form using ISO's CA 00 01 or its substantial equivalent including liability coverage for all autos owned, rented, hired or borrowed by the contractors as well as liability coverage for mobile equipment subject to compulsory insurance or financial responsibility laws or other motor vehicle insurance laws with the following minimum limit:

- \$1 million – Any One Accident – Combined Single Limit

Thyme reserves the right, prior to acceptance of the contractor's bid, to require greater limits based on the nature of the operations being performed by the contractor.

Workers' Compensation and Employers' Liability

Workers' compensation and employers' liability insurance using NCCI's WC 00 00 00 B including coverage for all persons subject to the Workers' Compensation Act as well as coverage for sole proprietors, partners of a partnership, members of a limited liability company or officers of a corporation whether or not such coverage is optional under the Workers' Compensation Act, unless workers' compensation coverage for such sole proprietors, partners, members or officers is prohibited by the Workers' Compensation Act.

Contractor's workers' compensation insurance shall pay all benefits required to be paid under the Workers' Compensation Act and employers' liability insurance will be written with the following minimum limits:

- Bodily Injury by Accident - \$500,000 Each Accident
- Bodily Injury by Disease - \$500,000 Policy Limit
- Bodily Injury by Disease - \$500,000 Each Employee

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Contractor's workers' compensation and employers' liability policy will list the state of the project in item 3A of the policy's Information Page and will list on Part Three – Other States Insurance item 3C of the policy's Information "all states except the states listed in 3A or any monopolistic state." Further, contractor's workers' compensation and employers' liability policy is to include a waiver of subrogation endorsement using NCCI's WC 00 03 13 or its substantial equivalent.

Thyme reserves the right, prior to acceptance of the contractor's bid, to either require additional types of workers' compensation or employers' liability coverage or require greater employers' liability limits based on the nature of the operations being performed by the contractor.

Umbrella or Excess Liability

In addition, contractor shall provide umbrella or excess liability insurance providing in excess of the underlying Commercial General Liability, Business Automobile Liability and Employers' Liability insurance above, with the following minimum limits:

- \$5 million – Each Occurrence
- \$5 million – Annual Aggregate (where applicable in the underlying)

Such umbrella or excess liability policy shall provide substantially the same coverage as the underlying Commercial General Liability (including Thyme as an additional insured), Business Automobile Liability or Employers' Liability insurance and shall expressly provide that the umbrella or excess policy will drop down over a reduced or exhausted aggregate limit of the underlying insurance. The umbrella or excess policy shall also be primary insurance to Thyme (including primary insurance to Thyme's own Commercial General Liability and Umbrella policies) and contractor's umbrella insurer agrees not to seek contribution from Thyme's insurance.

Thyme reserves the right, prior to acceptance of the contractor's bid, to require greater limits based on the nature of the operations being performed by the contractor.

Any subcontractors engaged by the contractor shall comply with all of the above requirements.

CONCLUSION

Jennifer now has a very keen sense of the difficulty in writing insurance requirements that protect her employer but are also reasonable, clear and specific for the contractor. She also understands that regardless of what is contained in the insurance requirements, a contractor or subcontractor may not comply and therefore Thyme must be prepared to bend when it is reasonable to do so. Thus, it is her recommendation to the owner, Justin, as well as legal counsel, to remain diligent in overseeing and enforcing the insurance requirements and to keep in mind the absolute importance that those persons actually handling the enforcement have a strong understanding of insurance and its role in the construction project.

NOTE: The next article on Thyme Manufacturing will recount Jennifer's charge to handle the insurance requirements for the builder's risk policy to be purchased by Thyme for the manufacturing facility, including coverage for soft costs and delay in startup/loss of income.

AmWINS Editorial Note: AmWINS represents a myriad of E&S carriers that often have strict and varied requirements relative to the insurance and indemnification provisions that they require be incorporated into contracts. Many markets enforce these requirements by use of warranty endorsements that penalize an insured for their failure to comply – at times even eliminating coverage completely. It is therefore very important to understand each carrier's requirements and forms. AmWINS brokers are well-versed in the requirements and coverage terms offered by our markets. Your AmWINS broker stands ready to provide you with assistance with the requirements of any specific carrier proposal.

About the Author - Craig F. Stanovich, CPCU, CIC, CRM, AU is co-founder and principal of Austin & Stanovich Risk Managers, LLC, a risk management and insurance advisory consulting firm specializing in all aspects of commercial insurance and risk management, providing risk management and insurance solutions, not insurance sales. Services include fee based risk management, expert witness and litigation support and technical/educational support to insurance companies, agents and brokers. Email at cstanovich@austinstanovich.com. Website www.austinstanovich.com