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BY JAMES UNTIEDT & CYNTHIA JOHNSON

# Seven Strategies to Improve Subcontractor Insurance Compliance

The cornerstone of a successful contractual risk transfer program is a uniform, consistently followed approach to subcontractor insurance compliance.

Managing subcontractor risk transfer and perfecting the process of protecting the upstream party's interests can be challenging for both contractors and subcontractors. After countless reviews of subcontractor insurance (and resulting litigation), here are seven practical strategies to improve subcontractor compliance.

## Ensure Insurance Requirements Are Current

Make sure your company's subcontractor insurance requirements are current with the recent Notice of Cancellation and Additional Insured changes. Certificate of insurance providers no longer promise or endeavor to notify the certificate holder of a policy cancellation. You should contractually require the subcontractor (or sub-subcontractor) to notify you directly if any of its policies are cancelled; they frequently are the only party receiving the cancellation notice.

Be specific on which edition of additional insured endorsements your company will accept. In 2013 the Insurance Services Office (ISO) updated the standard CG 20 10 and CG 20 37 forms, which provide less protection to upstream parties. See Exhibit 1 on the next page for the evolution of ISO additional insured forms CG 20 10 and CG 20 37.

(For a more in-depth look at additional insured endorsements, read "Certificates of Insurance Can Create Troubling Coverage Gaps" by Chandra D. Lantz & Collin J. Hite in the September/October 2013 issue.)

## Make Insurance Requirements an Addendum to the Subcontract

Make your insurance requirements visible to your subcontractors and update them annually. Experienced GCs typically include insurance requirements as an addendum to their subcontract agreement and provide their subcontractors with a sample certificate of insurance and required

endorsements customized for each job. This facilitates sharing them at bid, prequalification, and contract execution. Avoid a scenario where your subcontractor is the low bidder and listed on your job but can't meet your insurance requirements. By sharing your requirements early and often, you can ensure your subcontractors are aware of and can meet them.

A sample Subcontractor Insurance Requirement begins a few pages ahead. To view a sample Certificate of Insurance form, visit [www.cfma.org/sample\\_cert](http://www.cfma.org/sample_cert).

## Verify Lower-Tier Contracts Are Signed

Identify all lower-tier subcontractors, verify that your insurance requirements have been passed down to them, and make sure that your direct subcontractors have received a signed contract with appropriate certificate of insurance and additional insured protection from each of them.

Today's additional insured endorsements require that a signed written contract or agreement must be in place for additional insured status to be granted. If your lower-tier subcontractors are working without a signed contract, then your additional insurance protection from their actions is likely void.

## Audit Subcontractor Certificates at Least Twice a Year

Enlist the help of your insurance broker to assist with the certificate review process. Your broker should audit certificates from your most frequently used subcontractors at least twice a year to determine if your subcontractors are in compliance. If they're not, it will provide real world examples of the follow-up actions your staff could take.

Some of the deficiencies uncovered recently in subcontractor audits include:

- No mold coverage for subcontractors performing building envelope penetrations.
- No residential coverage for subcontractors working on apartments.

- No subsidence coverage for subcontractors grading foundations.
- No professional liability coverage for subcontractors doing design-build or using BIM.
- No signed contract/agreement with lower-tier subcontractors, invalidating additional insured protection for prime subcontractor, GC, and owner.
- Self-insured retention of \$500,000 on workers' comp self-insured groups.
- Subcontractors exclusively using temporary labor on the jobsite without a workers' comp waiver of subrogation from the employee leasing firm.
- Additional insured endorsement for ongoing operations only and limited to the sole negligence of the subcontractor.
- Additional insured endorsement limited to vicarious liability of the GC.

A broker can also help determine if you need two versions of subcontractor insurance requirements for “high hazard” and “low hazard” subcontractors. Several national GCs have adopted this approach to deal with the higher risk factors associated with subcontractors performing more complicated or dangerous work. In addition, GCs have required higher limits of primary general liability coverage for work performed in “horizontal exhaustion” states such as California.

### Involve PMs

Jobsite accidents can happen the first day a subcontractor starts work, but the accounting department's review to ensure proper coverage is in place may not occur until 45-60 days after work starts. The PM and/or estimator must take the lead in verifying:

- All subcontractors (including lower-tier) are identified.
- All subcontractors have been provided insurance requirements with request to name the GC and other required entities (e.g., the owner) as additional insureds.

## Exhibit 1: A Historical Look at ISO Additional Insured Endorsements

Edition Dates	No Longer Generally Available				
	04/2013	07/2004	10/2001	03/1997	11/1985
<b>CG 20 10</b> Ongoing Operations	Who is an insured includes organizations shown in Schedule but only with respect to liability “caused, in whole or in part, by: 1. Your acts or omissions, or...those acting on your behalf; in the performance of your ongoing operations for the additional insured and...to the extent permitted by law...[and] will not be broader than that which you are required by the contract or agreement to provide for such additional insured. The most [the insurer] will pay is the amount required by the contract or available [in the policy]; whichever is less.” (emphasis added)	Who is an insured is amended to include the person(s) or organization(s) shown in the Schedule, “but only with respect to liability...caused in whole or in part by: 1. Your acts or omissions; or 2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured(s)...” (emphasis added)	Who is an insured is amended to include the person or organization shown in the Schedule, “but only with respect to liability arising out of your ongoing operations performed for that insured.” (emphasis added)	Who is an insured is amended to include “the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.” (emphasis added)	Who is an insured is amended to include “the person or organization shown in the Schedule, but only with respect to liability arising out of ‘your work’ for that insured by or for you.” (emphasis added)
<b>CG 20 37</b> Completed Operations	Who is an insured includes the person(s) or organization(s) shown in the Schedule, “but only with respect to liability...caused in whole or in part by ‘your work’ and included in ‘products-completed operations hazard’...but only applies to the extent permitted by law...[and] will not be broader than...required by the contract or agreement to provide. The most [the insurer] will pay is the amount required by the contract or available [in the policy]; whichever is less.” (emphasis added)	Who is an insured is amended to include... the person(s) or organization(s) shown in the Schedule, “but only with respect to liability...caused, in whole or in part, by ‘your work’... performed for that additional insured and included in the products-completed operations hazard.” (emphasis added)	Who is an insured is amended to include...the person(s) or organization(s) shown in the Schedule, “but only with respect to liability arising out of ‘your work’...performed for that insured and included in the products-completed operations hazard.” (emphasis added)		



- All subcontractors have signed and returned the subcontract agreement before starting work – otherwise the additional insured status may be voided.
- A deadline is set to obtain updated certificates and endorsements when the subcontractor's insurance is renewed *and* before final retention payment is made. This will guarantee additional insured protection and confirm coverage has not been cancelled through the subcontractor's contract period.

### Maintain Proper Records

To help ensure documents are not destroyed prematurely, contractors should develop a comprehensive record retention policy. Keep all certificates of insurance with endorsements, a copy of the subcontract agreement, and the subcontractor's scope of work and field notes for a minimum of 12 years following completion of the project.

Many states have 10-12-year statutes for bringing property damage claims, but no limitation for bodily injury claims. Some litigation for bodily injury claims involving asbestos and pollution liability that allegedly occurred as far back as the 1960s is still ongoing today.

The immediate benefit of keeping these insurance records is to avert litigation costs of a 10-year-old construction defect claim to your lower-tier subcontractor's insurance company, thereby avoiding the impact of these expenses on your balance sheet or loss ratio. With the popularity of digital storage options, it is best to keep records permanently.

### Reduce Paperwork with a Master Subcontract

If your company frequently uses subcontractors that perform low-hazard work, consider issuing a master subcontract agreement with an annual certificate of insurance and additional insured endorsements for "all work performed for GC under the master subcontract dated xx/xx/xxxx." This will reduce the insurance paperwork and ensure that the subcontractor is always working under a signed contract; however, you should always use signed work orders for each specific job.

### Conclusion

Contractors that have implemented these seven strategies have seen subcontractor insurance compliance rates as high as 90% – up from an average compliance of 50-70%. Having the correct subcontractor certificates and additional insured

endorsements at the time of a claim ensures a better result, leading to fewer litigated claims and a stronger balance sheet.

Regularly reviewing and updating your company's requirements, involving PMs and estimators early on in the process, and verifying contracts have been signed will also improve your company's subcontractor compliance. ■

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JAMES UNTIEDT, CPCU, ARM, is President of PentaRisk Insurance Services, LLC, a construction insurance brokerage with offices in California and Atlanta.

Jim has been a member of CFMA's Silicon Valley Chapter since 1989, serving on its Board of Directors for 25 years.

Phone: 408-418-2734  
E-Mail: [juntiedt@pentarisk.com](mailto:juntiedt@pentarisk.com)  
Website: [pentarisk.com](http://pentarisk.com)

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CYNTHIA JOHNSON, ARM, CRIS, is Vice President of PentaRisk Insurance Services, LLC, a construction insurance brokerage with offices in California and Atlanta.

Cindy has 21 years of experience in insurance and risk management, including seven years in risk management for a national, publicly traded GC. She is an active member of NAWIC.

Phone: 408-418-2735  
E-Mail: [cjohnson@pentarisk.com](mailto:cjohnson@pentarisk.com)  
Website: [pentarisk.com](http://pentarisk.com)



## Exhibit 2: Sample **Subcontractor Insurance Requirements**

Subcontractor Insurance Requirements can be included as an attachment to the standard subcontract agreement and modified as needed without having to rewrite the entire agreement. Distributing the insurance requirements as part of the prequalification or bid process may help ensure potential subcontractors can meet your company's insurance requirements at no additional cost to you.

The recommended insurance requirements on the following pages are designed to cover most common insurable risks, with recommendations for additional coverages where exposures exist.

Note: Certain projects or contracts may require higher limits and/or specialty coverages not addressed in these guidelines.

### **Insurance**

#### **1.0 Mandatory Insurance Requirements**

Prior to commencing work and until all obligations under this Contract are fulfilled, Subcontractor shall, at its sole expense, procure, and maintain not less than the following coverage and limits of insurance. Such insurance shall be under forms of policies and from insurance companies satisfactory to Contractor. Insurance shall be placed with insurers with an A.M. Best rating of at least A- IX, and insurers must be authorized to do business in the state in which the work is being performed.

#### **1.1 Workers' comp and Employers Liability Insurance as required by applicable law or regulations**

- 1.1.1 Employers Liability with a \$1,000,000 limit.
- 1.1.2 Waiver of subrogation endorsement in favor of the Contractor and Owner.
- 1.1.3 U.S. *Longshore and Harbor Workers' Compensation Act* and *Jones Act* coverage is required if any exposure exists.
- 1.1.4 Programs underwritten by any Self Insured Group require Contractor's prior written approval.
- 1.1.5 If Subcontractor leases employees through an employment management, professional employer organization, or other such company, evidence of insurance must be provided through an Alternate Employer/Leased Employee endorsement naming Subcontractor on the employment company's workers' comp policy.

#### **1.2 Commercial General Liability (CGL) Insurance on a coverage form at least as broad as 2001 ISO Occurrence form CG 0001**

1.2.1 The minimum limits of liability shall be as listed below, or as required in the prime contract, or as carried by the subcontractor, whichever is greater:

- \$2,000,000 each occurrence
- \$2,000,000 personal and advertising injury

\$2,000,000 general aggregate

\$2,000,000 products and completed operations aggregate

These limits can be provided in combination with an umbrella or excess policy.

#### 1.2.2 Coverage shall include:

- Per project general aggregate endorsement
- Broad form property damage including Completed Operations
- Coverage for claims arising out of subsidence or earth movement
- Contractual Liability insuring obligations assumed in this agreement

1.2.3 Subcontractor shall maintain general liability and completed operations coverage through the expiration of the construction statute of repose period established by the state civil code where the project is located.

1.2.4 Claims made or modified occurrence policy forms are not acceptable.

1.2.5 A waiver of subrogation endorsement in favor of Contractor and Owner must be provided.

#### **1.3 Additional Insured and Primary Insurance Requirements**

1.3.1 The subcontractor and any lower-tier subcontractors shall endorse its CGL policy to add all parties required to be named as additional insured in the prime contract including (without limitation) Contractor, its directors, officers and employees, and Owner.

1.3.2 The form of the Additional insured Endorsement shall be ISO CG 20 10 11 85 (or unmodified equivalent) or ISO CG 20 10 07 04 in conjunction with CG 20 37 07 04.

1.3.3 A separate Primary and Noncontributory endorsement stating that Subcontractor's insurance shall apply as primary and any other insurance carried by Contractor or Owner will



be excess only and will not contribute with this insurance. The form of the Primary and Noncontributory endorsement shall be ISO CG 20 01 04 13 or unmodified equivalent.

1.3.4 Additional insured endorsements shall be provided through the end of the construction period and for the warranty term following project completion.

#### **1.4 Automobile Liability Insurance on a coverage form at least as broad as ISO CA 0001, including**

1.4.1 \$1,000,000 Combined Single Limit for bodily injury and property damage.

1.4.2 Coverage on any automobile basis, including all owned, non-owned and hired autos.

1.4.3 Any subcontractors subject to the *Motor Carrier Act of 1980* must provide a MCS-90 endorsement with a primary limit of \$1,000,000 each accident.

#### **1.5 Umbrella or Excess Liability Insurance**

1.5.1 If higher limits of coverage are required by the prime contract, the subcontractor will comply with such limits by providing evidence of an umbrella or excess liability policy. This policy shall be subject to all the requirements of the general liability policy as stated in section 1.2 and 1.3.

#### **1.6 Certificates of Insurance**

1.6.1 Subcontractor shall furnish certificates of insurance and required endorsements acceptable to Contractor before commencing any work on the project, and before payment of final retention.

1.6.2 Payment may be withheld or work suspended, at the option of Contractor, until such acceptable certificates and endorsements have been furnished. Failure to provide acceptable certificates and endorsements shall be considered a material breach of contract. Copies of subcontractor's insurance policies shall be furnished upon reasonable request.

1.6.3 Subcontractor shall immediately notify Contractor in writing after receiving a notice of cancellation of any insurance policy applicable to this Agreement. Payment may be withheld or work suspended until withdrawal of cancellation or reinstatement of the canceled policy.

1.6.4 Acceptance of certificates of insurance by Contractor shall in no way limit Subcontractor's duties and responsibilities under this Agreement, including the duty to indemnify Contractor and Owner.

#### **1.7 Insurance Requirements for Sub-Subcontractors, Truckers, Trucking Brokers, Sub-Haulers, Vendors, and Suppliers**

1.7.1 Subcontractor is responsible for verifying that its Subcontractors, Truckers, Trucking Brokers, Sub-Haulers, Vendors, and Suppliers of any tier maintain insurance in like form and amounts, including the Additional Insured requirements stated in Section 1.3, and will provide Contractor evidence of such insurance before allowing the lower tier subcontractors to begin work on the project.

#### **1.8 Builder's Risk Insurance**

1.8.1 Subcontractor shall satisfy itself as to the existence and extent of Builder's Risk insurance prior to commencing work.

1.8.2 If Builder's Risk insurance purchased by Owner or Contractor covers loss or damage to Subcontractor's work, Subcontractor shall be responsible for the insurance policy deductible.

1.8.3 If Owner or Contractor has not purchased Builder's Risk insurance covering the full insurable value of Subcontractor's work, Subcontractor may procure such coverage at its own expense. Such insurance shall also apply to Owner's or Contractor's property in the care, custody or control of Subcontractor.

1.8.4 Contractor and Subcontractor waive all rights against each other and against all other Subcontractors and Owner for loss or damage to the extent reimbursed by Builder's Risk or any other property or equipment insurance applicable to the work, except such rights they may have to the proceeds of such insurance.

#### **1.9 Other Requirements**

1.9.1 Insurance coverage in the minimum amounts set forth herein shall not relieve Subcontractor for liability in excess of such coverage, nor shall it preclude Contractor from taking other available actions under any other provision of this Agreement or law.

1.9.2 Subcontractor's obligations for loss or damage arising out of Subcontractor's work are not limited to the types or amounts of insurance set forth above. To the extent Subcontractor maintains insurance greater than these minimum requirements, Subcontractor agrees that such insurance shall be applicable to any of Subcontractor's liability obligations arising out of this Agreement.

1.9.3 Subcontractor shall be responsible for any deductible amount or any loss arising out of coverage denials by its insurance carrier.

1.9.4 Contractor makes no representation as to the amount of insurance coverage required to protect Subcontractor's interests.

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1.9.5 Should any insurance policy lapse or be canceled during the contract period, Subcontractor shall, prior to the effective expiration or cancellation date, furnish Contractor with evidence of renewal or replacement of the policy. Failure of the Subcontractor to provide timely notice of pending cancellation shall be considered a material breach of contract.

## **Additional Insurance Requirements (use as needed)**

### **2.1 Professional Liability Insurance**

2.1.1 Professional Liability insurance in the amount of \$1,000,000 per claim/aggregate shall be carried by Subcontractor if work under this Agreement includes any professional services, design assist, design-build, stamped drawings, or LEED certification services.

2.1.2 Evidence of coverage in the form of a certificate of insurance shall be provided prior to the start of the project.

2.1.3 Claims-made policies must have a retroactive date prior to the first date design services were performed under the Scope of Work, and coverage must extend a minimum of five (5) years beyond Consultant's completion of Scope of Work, or end of this Agreement, whichever is later.

2.1.4 If Claims-made coverage is canceled or non-renewed, and not replaced with another claims-made policy with a retroactive date prior to the Agreement effective date, the Consultant must purchase Extended Reporting Tail coverage for a minimum of five (5) years beyond completion of Scope of Work or end of this Agreement, whichever is later.

### **2.2 Pollution Liability Insurance**

2.2.1 Contractor's Pollution Liability insurance with limits no less than \$1,000,000 per occurrence and \$2,000,000 aggregate is required if Subcontractor or their Subcontractors or Suppliers of any tier:

2.2.1.1 bring pollutants to the jobsite, or;

2.2.1.2 if their operations create a pollution exposure, or;

2.2.1.3 if they are performing work on, penetrating, or sealing the building envelope or dealing with water. Coverage for mold and bacteria is required in these cases.

2.2.1.4 if their work could in any way contribute to or cause airborne silica to be released. Coverage for silica is required in this case.

2.2.2 The Owner and Contractor must be named Additional Insured on this policy.

### **2.3 Hazardous Materials Abatement**

2.3.1 Contractor's Pollution Liability with limits no less than \$5,000,000 per occurrence and \$5,000,000 annual aggregate is

required if Subcontractor or their Subcontractors or Suppliers of any tier are required to perform remediation of hazardous materials as those terms are defined in federal, state or local law; or if their operations involve an exposure to hazardous materials.

2.3.2 The Owner and Contractor must be named Additional Insured on this policy.

2.3.3 If Subcontractor or their Subcontractors or Suppliers haul hazardous materials, the policy must extend pollution coverage to the transportation of hazardous materials or pollutants by waste hauling vehicles. If Subcontractor is subject to the *Motor Carrier Act of 1980*, then the Motor Carrier Act endorsement MCS-90 must be obtained and attached to the policy.

### **2.4 Riggers Liability**

2.4.1 Subcontractor shall carry Riggers Liability Insurance with limits no less than \$1,000,000 per occurrence if Subcontractor's work involves moving, lifting, lowering, rigging or hoisting of property or equipment belonging to others. Such insurance shall insure against physical loss or damage to the property or equipment. Deductibles greater than \$50,000 require Contractor's prior written approval.

### **2.5 Work Near Railroads**

2.5.1 If Subcontractor or their Subcontractors or Suppliers performs any work or conducts any operations within fifty feet of any railroad (including light rail, fixed rail or any other rail system), Subcontractor CGL policy shall be endorsed to delete any exclusion, including the Contractual Liability exclusion, for work performed within 50 feet of a railroad. A copy of such endorsement shall be provided to Contractor before work within 50 feet of the railroad commences.

### **2.6 Aircraft/Helicopter Insurance**

2.6.1 Aircraft Liability insurance with limits no less than \$10,000,000 per occurrence, including Passenger Liability, shall be provided if the Subcontractor or their Subcontractors use any owned, leased, chartered, or hired aircraft of any type in the performance of this Agreement.

2.6.2 Subcontractor or their Subcontractor shall name Contractor and Owner as Additional Insured as respects aircraft liability and provide a Waiver of Subrogation endorsement of Contractor and Owner as respects physical damage to the aircraft or helicopter hull.

2.6.3 Evidence of coverage in the form of a certificate of insurance and acceptable endorsements shall be provided prior to the start of the project.