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Commentary: Beware of Recent Changes in Certificates of Insurance

05/16/2012

By Sean H. Brogan, A. Peter Prinsen and Richard H. Lowe

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In September 2009, a change made to the Association for Cooperative Operations Research and Development's (ACORD) Form 25, Certificate of Liability Insurance, eliminated language in the old form where the insurer agreed to "endeavor" to provide notice to the certificate holder of a cancellation of the first named insured's policy—and instead clarified that the policy itself governs the duty to notify of cancellation of the policy. As a result of this change, the following question arises: Should any action be taken?

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The simple answer is "yes," but different action is suggested for different scenarios.

The most basic action that should be considered is to review pending contracts to determine if the change in the terms of the ACORD certificate leads to a situation where the lower-tier party cannot comply with the insurance provisions of its construction contract. This could occur in an owner-general contractor contract, if that contract requires the general contractor to provide a certificate of insurance that requires the contractor's insurer to provide notice to the owner regarding the cancellation of the contractor's liability policy.

Inability to comply with contract terms could easily occur, because many contracts have provisions that require the general contractor to deliver a certificate of insurance that contains specific language. If the contract under review contains such language, but there is no longer any "endeavor to" language in the ACORD certificate to satisfy that contractual obligation, a general contractor could easily be in violation of its contract if the policy follows the

familiar path of not requiring the insurer to provide notice to anyone other than the general contractor as the first named insured. In such a case, the following possible solutions may be worth consideration.

Starting with the easiest scenario, the policy might already require the insurer to provide notice to certificate holders or additional insureds. If so, a copy of the relevant portion of the insurance policy can be appended per the new ACORD certificate as "additional evidence" on a separate sheet—as part of the certification that the policy complies with the contractual requirement.

If the insurance policy does not require the insurer to provide notice of cancellation to certificate holders or additional insureds, it may be possible to add an endorsement to the insurance policy whereby the insurer agrees to provide notice of cancellation to specified entities. This endorsement could either list specific entities to whom the insurer agrees to provide notice or agree to provide "blanket" notification to a list of organizations shown on a schedule provided by the first named insured. It is more likely that an insurer would be willing to agree to the former to potentially avoid any additional administrative burden on the insurer.

The endorsement approach may not be speedy enough to serve as a practical solution, however, since insurers may take much longer to issue endorsements than the time it takes a broker to issue an updated certificate.

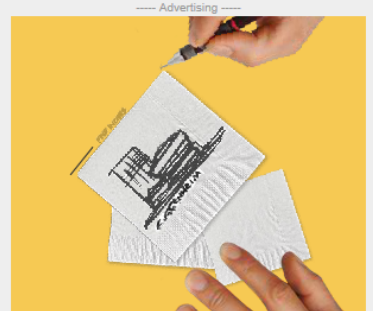
'No-Cost' Change Order

A more challenging scenario may be when the insurance policy does not contain language compatible with the contractual obligations and the insurer will not agree to add an endorsement addressing the issue. In this case, the lower-tier party (the general contractor) who needs to be in compliance with its contractual obligations may have another way to address the issue. Perhaps the contractual language is vague about how the notice can be given.

For example, the language may be written in passive tense, not specifying who needs to give notice but merely that notice of cancellation must be provided. Thus, the possibility remains that the lower-tier party could comply with its contractual obligations by giving the required notice (typically 30 days). To be safe, perhaps the lower-tier party could suggest that the two parties enter into a "no-cost" change order, clarifying that the lower-tier party can provide the notice itself.

Keywords: [Association for Cooperative Operations Research and Developments Form 25](#); [ACORD](#); [Certificate of Liability Insurance](#); [Construction Management](#); [Risk Management](#)

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The higher-tier party (the hypothetical owner) may object to this approach because of the risk of relying on the lower-tier party for notice—when the likely reason for having to provide the notice is the fact that the lower-tier contractor has failed to pay its insurance premium.

But perhaps the higher-tier party can require the lower-tier party to provide new and updated certificates of insurance on a monthly basis—perhaps with payment applications—to confirm that the insurance remains in place. Even if there is a cancellation without prior notice, the period that could be subject to the lapse of coverage would be relatively short and contained.

If the higher-tier party refuses to enter into a “no-cost” change order to address the changes in the ACORD certificate, the lower-tier party may provide notice to the higher-tier party that its refusal to accept notification from the lower-tier party is a “force majeure” event, should the lower-tier party be able to show that its inability to comply with the contractual requirements arises from actions beyond its control.

It is important to consider that both parties might try improving their abilities to track the dates on which policies expire. Third-party vendors can help with this task.

The risk of cancellation of a policy may not be the largest risk that a higher-tier party faces. The greater risk to an owner may be that its general contractor fails to assure that its subcontractors continue to provide new certificates of insurance after the coverage period reflected in the certificate of insurance provided when the subcontracts originally commenced. A renewed sense of vigilance to confirm that the insurance actually does remain in place for the duration of a project may be a favorable benefit of issues raised by the new ACORD forms.

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