Coordinating Contracts and Insurance Coverage for Third-Party Risks

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What we will discuss

- What are the third-party risks?
- How insurance addresses those risks
- How contracts assign, delegate or transfer responsibility for risks
- Critical issues with contract terms and insurance coverage
What are the third-party risks?

- Injured workers
- Injured visitors or bystanders
- Damage to abutter property
  - Including loss of use
- Damage caused by construction-related activity – even offsite!
Theories of Liability

- Contract
- Negligence (tort)
- Indemnity – express or implied
- *Respondeat superior*
- Vicarious liability
How insurance addresses the risks

- CGL (We will focus on this for our discussion)
- Business auto
- Umbrella
- Contractors pollution
- Contractors professional (design builder)
- Examples . . .
How contracts assign, delegate or transfer risk

- Assigning risk
  - Scope of work
  - Responsibility for lower tier subs
  - Obligation for safety
  - Required insurance coverage

- Delegating risk
  - Obligation for safety
  - Control over portion of work area
How contracts assign, delegate or transfer risk (cont’d)

- Transferring risk
  - Indemnity
  - Obligation for safety
  - Required insurance coverage
Contract Indemnity

§ 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, . . .

- Historical scope of indemnity – insurable risks
- Common scope of indemnity – insurable risks plus risks arising from performance of work (whether or not insurable)
Tying indemnity to insurance

- Critical parameters
  - Claims for personal injury or property damage
  - Claims arising out of performance of the work

- Duty to indemnify versus duty to defend
Consider -

- Required insurance and amounts
- Additional insured obligation
- Other terms
  - Primary and non-contributory
  - Waiver of subrogation
  - Completed operations
  - Umbrella limits
  - Exclusions
So . . .

- Focus on insurance requirements
- Examine safety and indemnity obligations
- Verify (hopefully) that indemnity obligations are insurable risks
- Verify proper endorsements in place per contract – or else modify contract
Questions?

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