

# INSURANCE PROGRAMS FOR LARGE CAPITAL PROJECTS

## Why or Do you need an insurance program?

Robert K. Stone

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# Program Coverage

- Owner or Contractor provides insurance for prime contractor(s) and all subcontractors working on a single project or a program of projects, usually:
  - General Liability (often combined with WC)
  - Workers Compensation (and related worker protection – Jones Act, Harbor Act)
  - Builders Risk
- **Whether provided by the owner or the contractor, these insurance products allow an owner to recover from a catastrophic incident.**

# Other Important Coverages

Often Contractor provided, but could be included in an insurance program:

- Environmental Pollution\*
- Railroad Protective\*
- Errors and Omissions (design liability)\*
- Completed Operations
- Software/Technology Operations
- Automobile/Vehicle Liability

\*Covered by separate policies when coverage not included in GL or Builder's Risk policies

## Reasons to consider an insurance program:



















# Other Good Reasons to Have an Insurance Program:

## ECONOMIC:

- Reduce overall project costs by leveraging economies of scale to reduce insurance costs
- Contractor may not be able to obtain or maintain sufficient coverage for catastrophic loss
- Owner shares insurance burden = more bidders
- Reduced claims/litigation costs

# Other Good Reasons to Have an Insurance Program:

## RISK MANAGEMENT:

- Insurer oversight provides better project safety
- Eases public perception of project risk
- Program covers “Negligence Gap” and public agency’s strict liability - (California rule):
  - Civil Code secs. 2782, 2782.05 (comparative fault)
  - *Holtz v. Superior Court*, 3 Cal.3d 296 (1970); *Holtz v. Bay Area Rapid Transit Dist.*, 17 Cal.3d 648 (1976) (public agency has strict liability under inverse condemnation principles)

# But maybe you don't need an Insurance Program:

- Owner must analyze the risks posed by the work – Contractor provided insurance may be sufficient
- Probably not useful for small, single contractor projects (but what is “small” – what is your agency’s “Risk Appetite”?)
- Requires owner coordination and expertise
- Requires hiring insurance broker (and often claims administrators and safety consultants)
- Program costs may exceed benefits to project
- May create ambiguity as to delegation of site control and contractor’s indemnity to owner (Privette Doctrine)











# Types of GL insurance:

- Contractor Provided
- Owner Controlled Insurance Program (OCIP)
- Contractor Controlled Insurance Program (CCIP)
- Owner Provided Excess Insurance Programs for construction

# Contractor/Consultant Provided (Traditional)

- Contractor/Consultant provided general liability, owner is additional insured
- Errors and Omissions covers consultant only
- General Liability and E&O Policies – two types:
  - Contractor's Corporate/Practice Policy
  - Project Specific Policy
- Workers Comp is often included with GL
- Single policy or low primary + excess coverage

# Contractor Provided, cont.

## **BENEFITS:**

- Time tested – we all know how it works
- Contractor and its broker have better knowledge and experience – they know how it works
- Contractor leverages long-time relationships with brokers and underwriters to public agency's benefit
- Very low administrative costs for owner
- Competitive bid for the contract sets insurance price = no cost/price analysis needed
- Safe and Experienced Contractor = Cheaper Insurance
- Owner benefits from Contractor's captive programs

# Contractor's Corporate Policy

## **BENEFITS:**

- Coverage renews annually
- Defense costs generally do not erode coverage (but you should confirm that)
- Premium is accounted as corporate overhead so insurance costs are spread over all of contractor's projects

# Contractor's Corporate Policy, cont.

## ISSUES:

- Losses on other projects erode coverage on your project without your knowledge
- Multiple (sub)contractors on a project = cross claims
- Multiple broker's fees = higher costs
- Inexperienced small contractors may be priced out
- No privity between owner and insurer (Additional Insured is not the same status as Named Insured)
- Policy may be cancelled without owner's knowledge

# Project Specific Policy

## **BENEFITS**

- Guaranteed coverage amount for life of project
- Coverage dedicated to the project (claims from other projects do not erode coverage)

## **ISSUES:**

- Claims permanently erode coverage (generally no annual policy renewal)
- Defense costs erode coverage = owner pays to argue with insurer over coverage



# Owner Controlled Insurance Program (OCIP)

- Owner purchases GL/WC and/or Builder's Risk to cover all prime and subcontractors on the project (other insurance may also be included)
- Each prime and sub carry a non-insured deductible – necessary for “skin in the game”
- Owner may carry a deductible; zero deductible is very expensive
- Owner administers claims within the deductible, but insurer may require use of outside counsel
- Insurer may require use of claims/loss fund
- Owner administers project safety program with insurer oversight

## OCIP, cont.

### **BENEFITS:**

- Can cover multiple prime contractors within a project or program – best coverage for interface work, eliminates conflicting forms
- Eliminates contractor and subcontractor cross complaints – effectively creates a no fault program
- Perceived to encourage small business participation (but no hard evidence)
- Project-wide safety program benefits contractor employees and public

## OCIP, cont

### ISSUES:

- Increased administration costs - owner must hire broker and program/claims administrator
- Owner's claims administration and litigation oversight may be inexperienced or inefficient
- Insurer may require use of designated outside counsel = additional attorney costs if in-house counsel must also review claims and settlements
- Claim fund locks up project money for years (until SOL runs)
- Unclear if OCIP increases small business participation

# OCIP, cont.

## ISSUES:

- Eliminates competitive advantage of experienced and safe contractors and those with captive insurance programs
- Limited number of brokers/underwriters have experience with large public works projects = higher prices
- OCIP may benefit unsafe contractors and subs if safety experience is not used as a bidder prequalification
- Safety program can undermine owner's delegation to contractor of site control and can make the owner an alternate employer under OSHA regs (California rule)
- Time must be allocated to market capital project to underwriters

# Contractor Controlled Insurance Program (CCIP)

## **BENEFITS:**

- Contractor does it all, low owner admin costs
- Similar benefits to OCIP –
  - No-fault program -eliminates subcontractor cross complaints –
  - Perceived to encourage small business participation
  - May benefit subcontractors with limited experience

# CCIP, cont.

## **BENEFITS, cont.**

- Project-wide safety program benefits contractor employees and public
- Likely to be more economical and efficient than OCIP - contractor can use its captive program
- Contractor may be in better position to negotiate premium than owner
- No site control delegation or OSHA alternate employer issues

# CCIP, cont.

## ISSUES:

- Difficult to use for projects with multiple prime contractors – one prime usually controls the program
- May undercut competitive advantage of experienced and safe subcontractors
- Eliminates competitive advantage of subcontractors with established or captive insurance programs
- Additional contractor overhead and administration costs, and not all contractors have experience or desire to use CCIP
- CCIP may be profit center for contractor with captive program

# Owner Provided Protective Insurance & Excess Insurance Programs

- Owner purchases excess coverage for single contract or entire program
- Excess policy sits above primary limits
- Owner Professional Protective Indemnity (OPPI) for design
- Each prime provides its own primary coverage usually with a non-insured deductible (“skin in the game” is required)



# OPPI and Excess Insurance, cont.

## **BENEFITS:**

- Flexible, owner-designed
- Certainty of coverage above primary levels
- Reduces primary coverage requirements = Reduced insurance costs
- Can increase opportunities for small business participation
- Can drop down over varying levels of primary coverage
- Can cover owner E&O and integrated design team E&O

# OPPI and Excess Insurance, cont.

## **BENEFITS, cont.:**

- Can be applied to multiple primes, JVs, and subconsultants
- No cross-claims above primary coverage levels
- If primary coverage requirement is sufficiently high, excess program will not undermine competitive advantage of safe, experienced consultants/contractors

## **ISSUES:**

- Requires owner to hire insurance broker
- Limited number of underwriters and markets
- Expensive

# Owner's Insurance Broker

- Broker's duties:
  - Markets the project to underwriters
  - Places/ obtains policies
  - Owner's fiduciary and advocate - assists in presentation/administration of claims to carrier
  - Provides insight to insurance markets and underwriters' concerns
  - Assists in placement/order of underwriters for excess coverage

# Owner's Broker, cont.

- Crucial to hire experienced broker
- Not possible to purchase insurance without a broker
- Conflicted fiduciary – negotiated fee is generally calculated based on percentage of premium, even where stated as flat fee - 10 percent is standard
- RFP selection based on experience and nonbinding premium estimate
- Owner beware of Contractor's broker: No privity = No duty to owner

# FTA Issues

- Culture Clash – insurance industry is based on relationships, transactions are not transparent
- Broker may provide some cost/overhead information, but full analysis of “fair and reasonable” cost/price not possible b/c underwriters will not cooperate
- Impossible to audit underwriter costs/prices – no privity and not an industry practice
- Comparison of products not possible - underwriters will not provide bids for alternate insurance coverage on the same project