

# Certificates of Insurance Do Not Ensure Coverage

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Insurance is an expensive, but necessary cost of construction. By procuring the proper insurance, an owner, contractor and/or subcontractor can be protected from, among other things, claims for property damage, personal injury and auto accidents. The key is to make sure that the proper insurance is procured by your own insurance broker/agent and that all downstream contractors and/or subcontractors are also obtaining the proper coverages, with the all-important additional insured coverage.

At the beginning of a project, contracts and subcontracts are skillfully negotiated, drafted and executed. Then the craziness begins as seen by the rush to mobilize and to have all documents in place so that construction can begin in earnest. All permits must be obtained. Schedules, safety plans, shop drawings, submittals and mock ups must be submitted to the owner, reviewed and hopefully approved. Unfortunately, what gets lost in this ramp up is insurance and the required protections needed before proceeding with the work.

Contracts (and subcontracts) have artfully drafted insurance provisions that specifically delineate the types of insurance coverages required and the limits of coverage for each policy. These provisions also often specify the additional insured coverage, to protect those individuals and entities who may not be in contractual privity with the entity procuring the insurance (e.g., owner is a named additional insured on a subcontractor's policy).

In practice, a subcontractor will provide the general contractor with certificates of insurance that indicate the contractually required insurances have been procured with the required limits. One would think that an owner and/or general contractor could rely on the certificate of insurance and that the proper insurances have been procured, however, as a recent case has held, a certificate of insurance is of no import and does not evidence that the required insurance has been procured.

In the recent case, a general contractor commenced a lawsuit against its asbestos removal subcontractor and the subcontractor's insurance brokers claiming fraudulent misrepresentation and sought damages, including recovery of increased premiums for the general contractor's workers' compensation policy, as a result of the subcontractor's failure to maintain workers' compensation insurance when two of the subcontractor's employees were separately injured and then filed workers' compensation claims against the general contractor.

Before the subcontractor commenced work on the project it provided the general contractor with a certificate of insurance which, the general contractor alleged, caused it to believe that the necessary and required workers' compensation coverage was obtained and that the general contractor was a named additional insured on the subcontractor's policies and was a named certificate holder. The certificate of insurance was provided by

an insurance broker that indicated the coverage period, the name of the insurer and the policy number. Four months after the subcontractor began performing work one of its employees was injured. It was then discovered that there was no workers' compensation policy in place and the general contractor was required to use its own workers' compensation policy to cover the injured employee's claim. This resulted in an experience rating and an increase to the general contractor's premium.

Thereafter, the subcontractor provided the general contractor with a second certificate of insurance for workers' compensation insurance coverage. Again, the certificate of insurance named the general contractor as the certificate holder and included the name of the insurer and the policy number. After the second certificate of insurance was issued, a second employee of the subcontractor was injured. It was discovered that there was no workers' compensation coverage in place based upon the second certificate of insurance, thus requiring the general contractor to use its own policy again, which increased its rating and premium expense.

The general contractor then commenced an action for fraudulent misrepresentation against the subcontractor and the subcontractor's insurance brokers. The subcontractor's insurance brokers moved to dismiss the action against them based upon alleged disclaimer language in the certificates of insurance. Specifically, the certificates stated in capital letters:

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

Relying on the disclaimer language in the certificate of insurance, the court dismissed the action against the subcontractor's insurance brokers. The court held that a certificate of insurance with the disclaimer language is insufficient, by itself, to establish that insurance coverage had been purchased. The court further held that a certificate of insurance is evidence of a contract for insurance, but is not conclusive proof that the contract exists and not, in and of itself, a contract to insure.

### Commentary

This case is a reminder to all owners, general contractors and subcontractors that certificates of insurance are essentially worthless and cannot and should not be relied upon as proof that required insurance obtained. As seen in this recent case, the general contractor's failure to confirm that the contractually required insurance was actually procured by the subcontractor resulted in an increase to the general contractor's rating and premium expense on two separate occasions. This subcontractor's lack of coverage will now follow the general contractor as it will have to pay increased premiums on future

projects. This eventuality could have been easily avoided.

Before any individual steps foot on a construction site, proper insurance coverage must be confirmed, including the types of insurance, limits of insurance, exclusions and/or exceptions to coverage and, most importantly, additional insured coverage. This may require the owner, general contractor and subcontractor to request and review parts, if not all, of the insurance policies. This will not only ensure that the proper insurance is procured, but that there are no exclusions and/or exceptions that would result in an insured event. A prudent owner, general contractor and subcontractor may also request proof of payment of insurance premiums. This is a form of risk management that must be performed. You cannot afford for an accident or injury to hit your own insurance policy, or even worse, a disclaimer by your own insurance carrier resulting in an insured event.

Feel free to contact me to discuss insurance coverage and making sure that you are obtaining the proper coverages from your general contractor and/or subcontractors.