

CONTRACTS & CONTRACTUAL LIABILITY INSURANCE

As a general rule, and not considering the insurance implications, contracts are promises that the law will enforce. Contracts arise when a duty comes into existence because a promise is made by one of the parties to the agreement. Written contracts will normally contain numerous clauses defining the obligations and duties of both parties to the agreement. It may be wise to have all contracts reviewed by legal counsel and, with respect to insurance matters, by an insurance advisor.

In most such contracts, there will normally be clauses relating to:

- Insurance Requirements
- Indemnification or Hold Harmless Provisions

These provisions require careful review prior to the finalizing the agreement as modifications may have to be made to insurance programs which would require prior consent of the insurance company and, if the insurer refuses to make the needed modifications may result in a breach of contract. Under a Commercial General Liability policy, there is some protection (Contractual Liability Coverage) but it is a misconception to assume that this coverage automatically covers all duties and liabilities assumed under contract.

Insurance Requirements

Requirements of this clause differ greatly between contracts. Some considerations to be taken into account in reviewing this clause are:

1. Coverages Required:

May require coverages which are not currently carried (e.g. Professional Liability, Pollution etc.)

2. Limits of Liability:

Make sure that the limits carried are adequate to satisfy requirements

3. Coverage Modifications:

There may be requirements which go beyond the scope of the coverage carried and require the consent of the insurer and there should be agreement prior to finalizing. Examples include:

- a. Additional Insured Status
- b. Insurance as Primary Rider in favor of Additional Insured
- c. Waivers of Subrogation
- d. Extended Notice of Cancellation
- e. Required Notice of Cancellation or Material Change
- f. Modification or Deletion of Exclusions
- g. Non-Standard Certificate Forms

These are not automatic under the CGL Contractual Liability Coverage

Indemnification Clauses

Under these provisions, one party to the contract (indemnitor) assumes the liability of the other party (indemnitee). The extent of the

indemnification can vary from liability arising only from the negligence of the indemnitor to assumption of the sole negligence of the other party. Normally this would also include the cost of defense of the indemnitee. These tend to be broad in nature and may include exposures which may not be insured by Contractual Liability e.g. fines or penalties; pollution, personal injury (libel, slander) etc.

The best time to review all of these issues is before the contract is signed. Something may happen years in the future when it is too late to modify the contract terms or the insurance coverage.