



## FEATURE

### **Additional Insured Provisions, Traps and Pitfalls**

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Many, if not all, construction subcontracts contain a provision requiring the subcontractor to name the general contractor, owner, and others as “additional insureds” on the subcontractor’s liability insurance policies. Contractors include such “additional insured” clauses, or AICs, to obtain coverage under the subcontractor’s insurance policies for claims against the contractor, and the other additional insureds, related to the subcontractor’s work.

Not all AICs, however, are created alike. Sometimes even small changes in the language used can significantly affect the coverage the subcontractor needs to have to satisfy the subcontract’s requirements. Subcontractors need to understand what coverage such AICs require, so they can verify with their insurance lawyer and agents or brokers whether they have the required coverage and, if not, negotiate revised subcontract terms. Failing to do so could open up a subcontractor to unexpected additional insured claims. Worse, it

could leave a subcontractor in breach of the agreement on thus liable for all “uncovered” claims—which can reach amounts that would jeopardize a business’s very survival.

Determining the coverage an AIC requires depends on its particular terms. The following offers examples and explanations of key AIC provisions that often affect the scope of the coverage required.

- **Whom the Subcontractor Must Name as “Additional Insured”:** Typically, an AIC requires the subcontractor to name the contractor and owner as “additional insured.” But, some clauses expand the scope of coverage to unnamed individuals, as this example illustrates: “The Subcontractor shall cause the commercial liability coverage required by the Contract Documents to include the Contractor, the Owner, and any of their agents as additional insureds.” Unfortunately, this language does not specifically identify these “agents.” This group could

#### **RESOURCES:**

##### **Additional Insured**

*Under “Insurance and Risk Management” in Member Resources area of ASA Web site, [www.asaonline.com](http://www.asaonline.com):*

- Subcontractor’s Negotiating Tip Sheet on Additional Insured
- White Paper: Addressing the Additional Insured Problem

*Under “LogIn/Access Member Resources” on ASA Web site, [www.asaonline.com](http://www.asaonline.com):*

- Video-on-Demand: Hold Harmless or Hold Harmful? Limiting Your Liability for Others’ Mistakes (Item #8030)
- Risk Transfer: Surviving the Circling Sharks (Item #8004)

include individuals or entities that the subcontractor would not have agreed to name as an additional insured if specifically identified. As a result the subcontractor has agreed to provide additional insurance coverage to unknown parties.

Agreeing to such a requirement could lead to unexpected additional insured claims and higher future premiums on the subcontractor's liability policies.

- **The Primary/Non-Contributory Requirement:** More often than not the AIC will require that the subcontractor provide the additional insureds coverage that is "primary and non-contributory to any of the additional insured's general liability insurance policies." This provision means that the subcontractor's policy must provide that in the event of a claim for which the policy provides coverage to the additional insured, the subcontractor's policy responds to that claim first, with the owner's and general contractor's policies providing coverage once the subcontractor's policy is exhausted.
- **Ongoing and Completed Work Requirement:** Typically, the AIC demands that the subcontractor's coverage for additional insureds applies to both "ongoing and completed operations." This means that the subcontractor's insurance would cover not only claims that arise while the subcontractor is actually performing work, but also those related to claims arising from the subcontractor's work once completed. Accordingly, the subcontractor needs to make sure that its policies cover both scenarios.
- **Coverage for Claims Where Additional Insured Is Solely Liable:** Often, an AIC will require the subcontractor's policies to cover the additional insureds "even for any of their sole negligence." At first glance it may seem odd that a subcontractor would have to provide coverage where others, such as the contractor or owner, have sole responsibility. This requirement, however, is meant to address a particular situation.

Where a subcontractor employee suffers injury, illness, or death, workers' compensation laws limit the employee's recovery against the subcontractor. Those laws, however, do not apply to general contractors or owners, as they are not the injured person's employers. Consequently, employees often bring an action against just those entities, making them "solely liable" based on the allegations. AICs' "sole negligence" language addresses this situation. Such language, however, puts the subcontractor in a problematic situation. Few insurers will easily provide subcontractors additional insured coverage for that additional insured's "sole negligence," making it very difficult to comply with a subcontract's "sole negligence" requirement.

- **Policy Endorsements:** In some cases, an AIC will require the subcontractor's insurance contain particular additional insured endorsements, almost always referenced by a number, e.g. CG 2010 1185 (the "1185 Endorsement"). These endorsements refer to prescribed policy provisions used throughout the insurance industry. For example, the 1185 Endorsement "include[s] as an insured" any entity listed on a prepared schedule "with respect to liability arising out of [the subcontractor's] operations." Although 1185 Endorsement was once widely available, times have changed. To limit losses, the insurance industry has moved aggressively to rein in the scope of coverage available to an additional insured. This creates a problem where a subcontractor agrees to provide the coverage required by the identified endorsement, but then fails to obtain that exact coverage because the endorsement no longer exists or is available. In that case, the subcontractor has breached the terms of the subcontract's insurance requirements. So, for any claim for which the subcontract required the subcontractor to obtain coverage, but the subcontractor failed to do, the subcontractor would bear full responsibility. The subcontractor would effectively become the

insurance carrier for the additional insureds—an extremely undesirable position.

As the above illustrates, AICs present many traps for the unwary. To avoid falling into these, subcontractors must have their counsel and insurance agents or brokers (the "Advisory Team") review additional insured requirements (plus all other subcontract insurance requirements). The Advisory Team needs to make sure the insurance policies comply with any AICs and other insurance requirements. Subcontractors can help this process by using the above discussion as a guide to make sure to ask their Advisory Team the right questions. Failure to conduct a proper insurance review could subject a subcontractor to unintended and undesired liability. The subcontractor could become a project insurer—exposing the business to liability that could ruin the company.

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