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POTENTIAL ISSUES WITH AIA'S 2017 CONSTRUCTION AGREEMENT INSURANCE EXHIBIT

*An Addendum is Likely Warranted
in Almost Every Construction Agreement*

Fast Facts

- AIA's 2017 changes have made it somewhat easier to extract the insurance requirements of owners and contractors by making them part of an Exhibit to the General Conditions of the Contract for Construction, now referred to as AIA Document A101 – 2017 Exhibit A – Insurance and Bonds.
- AIA Forms, including the most recent 2017, are not a panacea and need to be tailored to the needs of a client, whether it's the owner or contractor.
- Some of the sections of the AIA 2017 template may create unintended results such as the waiver of claims by the owner for loss of use of property for insured or uninsured losses, regardless of the cause.
- A major concern in the 2017 AIA template is the absence of a reference to subcontractor's coverages, conditions and requirements.
- Many lawyers would not know the intricacies of coverage endorsements or options when negotiating contracts for owners or contractors. It is often worthwhile to retain insurance counsel to assist in the process.

For many years, The American Institute for Architects (“AIA”) has developed and published standardized contract forms to achieve some consistency in construction agreements between owners and contractors. This has also included the ever-changing area of insurance coverage and bonds. These templates are used by many and usually are updated by AIA every ten years. In the 2017 update, the AIA uses an Exhibit format to address insurance and bonds.

The seven pages of the Insurance Exhibit are, overall, better designed and laid out than what you would find in nonstandard construction agreements, particularly as respects builder’s risk coverage issues. Nonetheless, some exposures are not clearly addressed. Here are some comments which are particularly applicable to owners:

1. Exhibit A’s insurance provisions are not to be read alone. There remain insurance requirements and conditions in Section 11 of the AIA General Terms and Conditions including reference to notices of cancellation, the waiver by the owner of loss of use claims, and settlement of losses.
2. Subcontractor coverages are not addressed. Notably missing from the AIA Exhibit is the obligation of the contractor to assure that its subcontractors maintain coverage at least as broad as that required of the contractor including additional insured requirements in favor of the owner.

Also, not addressed are any conditions under the contractor’s CGL policy that its subcontractors have certain limits and specific coverages. For example, some CGL policies will require that the subcontractor indemnify the contractor and owner and include specific limits. If they do not, a claim could under the contractor’s CGL could be excluded or a higher self-insured retention / deductible could apply. It is important to attempt to negotiate such endorsements away or to limit it to the higher self-insured retention condition.

3. There is no stated requirement that the contractor’s workers’ compensation policy include a waiver of subrogation. This leaves the owner exposed to a subrogation claim by the contractor’s workers’ compensation carrier. While the indemnity obligations of section 3.18 extend some protection to the contractor, the better risk management is to have a waiver of subrogation in the first place to block the claim.
4. The Insurance Exhibit optional coverage requirement check-boxes are general in nature. There are specific issues under each of those optional policies that need to be considered if such exposures exist.
5. It is required under this Exhibit that the owner obtain the builder’s risk coverage and do so on an “all-risks” basis and that property coverage be maintained beyond the substantial completion of the job. It is also required that the owner insure existing structures which

most builder's risk policies do not automatically include, unless endorsed. In most cases, the owner should avoid electing to have the contractor provide the builder's risk policy.

6. Deductibles of the owner under builder's risk and property insurance are stated as the responsibility of the owner. Thus, if there is a \$50,000 deductible on the builder's risk policy, this is arguably not recoverable against a negligent contractor who caused the fire or other covered loss.
7. Coinsurance penalties under property insurance are the stated responsibility of the owner. These clauses should be negotiated from the policy(ies) where possible.
8. There is no requirement that the contractor insure underground property or work under the builder's risk or property insurance. This should be kept in mind where such exposures exist such as on sewer projects.
9. Flood and earthquake coverages are required of the owner. These are not automatic under most builder's risk or property insurance policies. Moreover, where coverage is secured in these areas and there are sublimits, they must be listed under the cause of loss section of the AIA form.
10. In the Section 11 general terms and conditions the owner waives all "rights of action" against the contractor and architect for loss of use of the property including consequential damages. This is an issue in the event of any uninsured or underinsured loss. What if the owner's insurance for some reason does not pay?
11. Cyber coverages are optional on the Exhibit. However, the description is very vague and does not reference whether the "loss" to be covered is first or third party, involves penalties, etc. If these exposures are apparent, they should be specifically addressed.
12. Specific CGL exclusion prohibitions. There is no prohibition against the contractor's general policy excluding claims related to:
 - Scaffolding
 - Cranes
 - Structural wall modifications
 - Buildings more than a certain number of floors

These exclusions should be carefully considered considering the work being done.

13. There is no additional insured requirement in favor of the owner as to auto claims or pollution policies. This should be addressed on a project by project basis.

14. Where pollution coverage is required, there should be an amendment to the insured versus insured provision so that only claims of “named insured” v. “named insured” are excluded. This would protect the owner in the event of a claim of pollution injury by a third party unrelated to the contractor.
15. There is no option to require that the contractor procure employment practices liability coverage. Consideration should be given to whether this is important. However, even if coverage is secured, it is unlikely that it would cover the owner as an insured.

CONCLUSION

AIA’s 2017 modifications to the insurance requirements of contractors address some key issues but leave other exposures open-ended. No template addresses all the issues for a specific project and that is precisely the point. The problem is that many lawyers negotiating these contracts do not have the background to enable them to understand what coverages should be required. It is often worth the time and resources to obtain an insurance expert to assist in the negotiating process.



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