

Certificates of Insurance

“Rolling Stone Syndrome or You Can’t Always Get What You Want”

A certificate of insurance is an informational document issued by or on behalf of an insurance company. The certificate indicates that an insurance policy exists of a certain type and limits. Certificates are simply snapshots of basic policy coverages and limits at the time of issuance of the certificate. Certificates are not intended to modify coverages or change the terms of the insurance contract and they convey no contractual rights to the certificate holder.

In your industry, you are no doubt often asked to sign contracts (or ask someone else to sign them) that include certain insurance requirements that must be evidenced by a certificate of insurance. If the certificateholder desires status as an additional insured under a policy, this can only be done by an endorsement to the policy. A certificate alone will not change the policy.

Problems often arise when a contract makes demands that are, for all practical purposes, virtually impossible to meet. Examples include requests for insurance for losses or damages that are uninsurable, requests that agents do not have authority to execute or cannot legally comply with, requests that require inappropriate certificate wording, and requests that are impractical from a market standpoint.

As a result, insurance agents are sometimes asked to provide a certificate of insurance that cannot comply with the contract you may have already signed. In fact, you may have completed the job and need the certificate in order to get paid. The purpose of this article is to illustrate how such problems can arise and what solutions are available, if any, to address the most common problems. As the Rolling Stones put it, you can’t always get what you want, but if you try sometime you just might find, you get what you need.

Uninsurable Certificate Requests

Sometimes contracts will attempt to transfer risks and liabilities that are largely uninsurable. For example, the contract may require you to be responsible, under a commercial general liability (CGL) policy, for "ANY negligent acts, errors or omissions" or "any and all liabilities" that result in "ANY claim, cost, expense, liability, penalty, or fine."

A CGL policy typically covers bodily injury, property damage, and personal and advertising injury liability that arise from "occurrences." It often does not cover "errors and omissions" or fines and penalties. In addition, the word "any" implies there are no exclusions when, in fact, the policy has many exclusions ranging from pollution liability to faulty workmanship or damage to property in your care, custody or control.

It is advisable to have an attorney review contracts on your behalf. In addition, prior to signing any contract, have your insurance representative review the insurance specifications, preferably in conjunction with your attorney. He or she can advise what requirements may be impossible or difficult to insure. It is important to know the costs before bidding on the contract and it's possible that truly onerous insurance requirements can be deleted from the contract.

Often contracts will require your insurance to be "primary and noncontributory." The "ISO standard" CGL policy does say that it is primary with regard to the certificate holder's general liability policy IF the certificate holder is an additional insured on your policy. So, the first order of business is to make sure that the appropriate additional insured endorsement is attached to your CGL policy.

However, the undefined term "noncontributory" is meaningless in isolation. The term may just be used to reemphasize that your insurance is primary and the additional insured's is excess, or the intended meaning may be that a waiver of subrogation endorsement is desired. However, it may mean that the certificate holder's CGL policy will not contribute in any way to a loss even if that policy otherwise covers it. This could mean that *you* will have to pay out of your own pocket any claim that exceeds the limit of your CGL policy without contribution from the certificate holder's CGL policy.

It is in your best interest to attempt to clarify and, if necessary, strike the "noncontributory" wording from the contract. If that's impossible, consider increasing your own policy limits or be prepared to assume a potentially large uninsured loss.

“Illegal” Certificate Requests

Certain contracts require that the certificate holder be given additional insured status under a specific endorsement number and edition date. It is not uncommon for a contract to request an "ISO standard" policy form such as the CG 20 10 11 85 additional insured endorsement. Note that "11 85" refers to the November 1985 edition of this form. These forms typically must be filed with state insurance departments before they can be used. Since later editions may have superseded earlier editions, it could be impossible to provide a form that is 20+ years old and has been withdrawn by insurance department filing.

Your insurance agent can often provide a later edition form with comparable coverage. In some cases, two endorsements might be necessary to replace a single older form, one providing ongoing operations coverage and the other completed operations coverage.

The latter form, however, might not be available or only available at significant cost. If your insurance representative is an independent agent, he or she will represent more than one insurance company, making it more likely that your insurance can

be offered to another insurer who is better able to meet your needs. In any event, you will want to price this coverage before submitting your bid since completed operations insurance, if available, can be substantial in price.

Also, contracts frequently mandate that coverage be extended to the additional insured's sole negligence. In most states, sole negligence cannot legally be transferred to another party. Increasingly, even where insurance transfer is permitted, insurers are using additional insured endorsements that prohibit assuming the additional insured's sole negligence. The current "ISO standard" endorsements do just that.

If you are in a state that has anti-indemnity statutes or case law, then this should not be an issue. Otherwise, you will want your insurance agent to determine if the insurer is still willing to assume sole negligence under an additional insured endorsement. If not, the contract will need to be modified or compliance will be impossible.

Inappropriate Certificate Requests

Contracts often specify that the certificate of insurance provide for a notice of cancellation to the certificate holder. The problem is that all "ISO standard" additional insured endorsements make no provision for cancellation notice to an additional insured. Perhaps acknowledging this, some contracts settle for the more hopeful "endeavor to" provide notice of cancellation provision.

Keep in mind that, unless the additional insured endorsement provides for cancellation notice, the insurer is usually under no contractual obligation to provide such notice. Even if an attempt is voluntarily made, mistakes happen. In some cases, due to regulatory decree by the state department of insurance (New York is an example), a certificate of insurance cannot make a promise of notification unless notice of cancellation is provided for in the policy or endorsement.

Some organizations and government entities use their own certificates of insurance in lieu of the more standardized ACORD 25 - Certificate of Liability Insurance form. These may create problems for insurance agents because some states have laws or regulations prohibiting the use of such forms unless approved by the state department of insurance.

These forms may include wording implying coverages or rights that don't actually exist under the policy, again violating the law in many states, and may lack disclaimers designed to protect you and the issuer. These certificates may sometimes be almost exact duplicates of the "ACORD standard" form(s), creating copyright violation possibilities.

Be *very* wary of these non-ACORD certificates of insurance. Rely on your independent insurance agent for guidance on how to handle these forms. In many cases, they can be issued, but require referral to the insurance company which can cause delays. Again, it is important to involve your insurance representative in the process as soon as possible.

Impractical Certificate Requests

The contract may specify that certain coverages (e.g., completed operations) be provided or that certain exclusions (e.g., pollution liability) be removed. Because of the proliferation of defective workmanship claims in the construction industry, completed operations coverage may be difficult to procure at a reasonable cost. Most insurers are unwilling to remove certain exclusions such as pollution liability and the cost to purchase the coverage separately may be prohibitive.

Be sure to give your insurance representative ample time to search for insurers willing and able to provide the coverages required by your contracts. If coverages are available, the premium costs need to be included in your contract bid. If coverages are not available, you may be able to negotiate such requirements from the contract or pursue another source of coverage.

It is not uncommon for your insurance representative to be unable to meet every requirement of the contract you're being asked to sign, from the standpoint of coverages, policy rights, or completion of a certificate of insurance. The other party to the contract may then inform you that they can provide a list of agents who claim they can comply with the contractual requirements in full.

While it's possible that the person requesting the certificate is aware of agents who are better able to comply with their requests, be cognizant that fraud and misrepresentation with regard to certificates is not unheard of. If you are requiring certificates from subcontractors, be aware that bogus certificates do exist.

While it is rare, there are unfortunately some insurance agents who will issue certificates that do not accurately reflect coverages and policy terms just to allow a contractor to get a job or a loan to close and for the agent to retain the account. Since certificates are rarely legally enforceable against insurers or agents, you may be incurring significant liability if a certificate is issued that does not accurately reflect contract terms. It is important to do business with insurance professionals you trust implicitly and that you verify the accuracy of the certificate.

As outlined in this discussion, the single best thing you can do in dealing with certificate of insurance requirements is to involve your independent insurance agent before committing yourself to something that cannot be accomplished. He or she can counsel you on how to best meet your insurance requirements and, if not possible in some instances, provide an explanation as to why something is difficult or impossible, often to the satisfaction of the requestor.