The Basics of Controlled Insurance Programs

by Gary Strong

Controlled insurance programs (CIPs), also referred to as wrap or wrap-up insurance, refer to project-based insurance programs designed broadly to cover the project-related risks and losses of all program participants. CIPs have been growing in use across the country, so familiarity with their intricacies is important in complex construction cases.

Participants in a CIP typically include the project owner or developer, the general contractor/construction manager, subcontractors, architects and engineers. Coverage provided through a CIP may include workers' compensation, employers' liability, general liability, builders' risk, property, auto, pollution and environmental. CIPs often will not include coverage for professional liability, and small subcontractors, vendors or suppliers are frequently not included as program participants.

A CIP replaces individual coverages provided by the project's participants and, instead, is sponsored either by the owner (OCIP) or a primary contractor (CCIP). Rather than requiring subcontractors and lower-tier participants to acquire and pay for their own insurance and name the owner and general contractor as additional insureds, the owner or general contractor sponsors the CIP and requires the necessary participants to buy into that program. The participants in a CIP are typically identified as named insureds, but some covered individuals or entities may also be covered under a broadly defined category of insureds.

Who is Covered?

Typically, in the OCIP, the owner is the first named insured, but the general contractor, subcontractors, consultants and subconsultants of every tier are also named insureds. In a CIP, the general contractor is usually the first named insured and named insured status is extended to subcontractors, consultants, and subconsultants of every tier. Some experts advise that the owner should be merely an 'additional insured,' not added as a 'named insured,' in a CIP, in part, so the owner cannot extent 'additional insured' status to others.[1] However, this can introduce a host of additional insured issues that are best avoided. Many CIPs, therefore, include the owner as a named insured.

A typical OCIP named insured endorsement may provide:

> NAMED INSURED ENDORSEMENT (OCIP)
>
> *This endorsement modifies insurance provided under the following:*
>
> COMMERCIAL GENERAL LIABILITY INSURANCE FORM
>
> Policy Declaration, "Names Insured" is amended to include as Named Insureds:
>
> All contractors and/or subcontractors/consultants and/or subconsultants for whom the Owner or Owner's agent are responsible to arrange insurance to the extent of their respective rights and interests.
>
> Coverage afforded by this policy is automatically extended to contractors who are issued a Workers' Compensation policy under this Owner Controlled Insurance Program (OCIP). All other contractors not issued a Workers' Compensation policy must be endorsed onto the policy to be afforded coverage under this policy.
>
> "Named Insured" does not include vendors, installers, truck persons, delivery persons, concrete/asphalt haulers, and/or contractors who do not have on-site dedicated payroll.
>
> All other terms, conditional and exclusions remain the same.

This endorsement extends named insured status only to those subcontractors/consultants or subcontractors for whom the owner or the owner's agent are responsible to arrange insurance *and* to whom a workers' compensation policy has been issued. This does not mean everyone who may be onsite.

Excluded contractors and activities often include some or all of the following: security guards; suppliers; vendors; material dealers; truckers; haulers; sometimes design consultants and subconsultants; subcontractors with scopes of work less than $10,000, $15,000, or some other amount; and others with little or no onsite payrolls. The rationale for excluding these entities is that CIP coverage should not be provided to parties whose work and safety is not controlled by the CIP.

CIP coverage is typically limited to onsite risks, losses and casualties. Particularly given modern construction practices, determining whether an accident is an onsite or offsite loss may not be straightforward. For example, steel assemblies or subassemblies may be specially manufactured and then brought onsite for final assembly and installation.[2] Difficulties can also arise from ambiguous descriptions of the covered project site. The contract documents, the CIP manual, and the policies must define the 'project site' in the same way. If the CIP endorsement refers only to a street address, it can be difficult to determine if coverage includes access roads, adjacent lots, staging areas, storage areas, project offices, trailers, parking areas, etc.

Even if the initial CIP policies provide comprehensive coverage for the project site, appropriately defined, because many projects continue for several years, the CIP participants run the risk that sometime during this period one or more CIP insurers may cancel, refuse to renew, or materially change their policies. If this happens, the other participants need to be sure they are promptly notified of the change and that notice is not be limited to the sponsor, as the first named insured. Otherwise, they can have a nasty surprise when a claim arises. Insurers are not likely to agree to provide such notice to all participants, but they sometimes will agree to provide notice to both the owner and the general contractor. In any event, the sponsor and the CIP administrator can be required to provide such notice.

Benefits and Risks of a Controlled Insurance Program to Contractors and Subcontractors

The primary benefit of wrap-up insurance to contractors and subcontractors is that it allows them to work on projects they might otherwise not be able to properly insure. Furthermore, general contractors can sometimes obtain CIP at a lower total project cost than conventional insurance programs in which insurance costs are included in every subcontractor's bid. This can provide a competitive advantage to a general contractor bidding on new projects.

In recent years, a greater proportion of projects are going into CIPs.[3] A wrap-up CGL insurance policy can also provide broader coverage for the construction team in terms of environmental risks. The additional cost of a program administrator is often less than the costs of having to monitor the myriad of insurance certifications, additional insured endorsements, renewals and premium audits that accompany traditional multiple liability insurance policies for each of the project participants.[4]

The primary risks for contractors and subcontractors are that the coverage afforded under the wrap-up CGL insurance policy will have gaps and will not cover them sufficiently for future losses. Contractors need to exercise diligence in screening coverages afforded under a proposed OCIP.[5] Similarly, subcontractors need to carefully review the provisions of any proposed OCIP of CIP before bidding. If insufficient information is provided in the invitation to bid, subcontractors should qualify their bid. Subcontractors need to be particularly aware of 'rolling wraps,' or CIPs that cover more than one project. Under a rolling wrap, there is a risk that the rolling wrap-up insurance policy could be depleted by losses on other projects.[6]

Duration of the CIP

Usually a CIP continues until project acceptance by the owner or the project is 'complete.' Setting aside 'completed operations' coverage, which is discussed below, such termination provisions can be problematic. It is not always clear when a project, or a portion of it, will be deemed complete. Standard general liability policies often provide that "Your Work" will be deemed completed at the earliest of the following times:

> When all of the work called for in your contract has been completed.
>
> When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
>
> When that part of the work done at a job site has been put to its intended use by a person or organization other than another contractor or subcontractor working on the same project.
>
> Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as complete.

Other policies may have similar provisions, or may also deem the project complete whenever a temporary or permanent certification of occupancy is issued.

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Endnotes

1. Tracey Alan Saxe, Construction Wrap-Ups: Owner and Contractor Controlled Insurance Programs, *Construction Law Handbook* § 19.03(B) (Richard K. Allen & Stanley A. Martin eds., 2009).
2. *See, e.g. Zurich Am. Ins. Co. v. Pa. Mfrs. Ass'n Ins. Co.*, 2003 WL 23095605 (N.J. Sup. Ct. App. Div. May 7, 2003) (Zurich argues leaking windows were not an onsite exposure since the shop drawings were not prepared on site and the windows had been manufactures and tested off site. The court concluded that the occurrence was when the windows were installed at the site.).
3. *See* The State of Wrap-ups April 2008, by R. Resnick, http://irmi.com/expert/Articles/2008/Resnick04.aspx.
4. *Id.*
5. *Id.*
6. *Id.*