



# Risk Transfer Considerations for Public Projects

by Allen R. Wolff

**P**ublic sector projects, like private sector projects, face risk that must be managed through insurance coverage. Contractors undertaking large and complicated public projects bear greater obligations and burdens as a cost of doing business. For example, contractors usually face increased bonding requirements on public projects because public property is exempt from mechanic's liens. Contractors are also often required to manage additional risk that has been shifted away from the public entity sponsoring the project.

Public projects are expensive and can involve dangerous work building bridges, tunnels, power plants, waste processing facilities and public transportation infrastructure. Unfortunately, someone is probably going to get hurt before the job is complete. With so many different participants performing so many different functions on a public project, it is essential that the risk of loss be transferred to the party best able to control and manage it. But owners, architects, engineers, construction managers, contractors, subcontractors and suppliers often bring different kinds of insurance policies into the mix, and they often do not all cover the same kinds of loss. Meanwhile, insurance companies have shown that they do not take risk transfer efforts lightly, and they have successfully defeated such risk transfer on the basis of legal technicalities and grammar.

A project owner that does not actively manage the project bears great risk but has little control over it. Therefore, there should be an additional insured to every contractor, subcontractor or supplier on a project. The professional liability policies of architects and engineers usually prohibit extending additional insured status to anyone who is not a design professional rendering services on the project. But when necessary, architects and engineers may also have general liability policies to which additional insureds can be named. These general liability policies

usually contain exclusions for the design services of a design professional, but their other negligence can be covered by a general liability policy.

A construction manager that manages the project also bears great risk relating to the management of the project, but usually performs little, if any, of the actual construction work. As such, like the owner, the construction manager should be an additional insured to every contractor, subcontractor, or supplier on the project.

The general contractor also should be an additional insured to every subcontractor and supplier on the project. Subcontractors and suppliers do not usually require and are not usually named as additional insureds to others on the project.

In 1985, the standard form of the additional insured endorsement used in insurance policies conferred much broader protection than the forms published in 2004 and 2013. The net effect has been a narrowing of the risk transfer that can be achieved through standard form additional insured endorsements. Since then, court decisions have further limited the reach of additional insured coverage available under the current standard forms.

In *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 31 N.Y.3d 131 (2018), coverage was denied because the policy limited additional insured coverage to those "with whom



you have agreed to add as an additional insured.” The insurance company argued that this was different from a requirement to extend such status to someone “for whom” you agreed to extend additional insured coverage. The use of the preposition “with,” versus “for,” completely changed the outcome of the case because the court ruled that it introduced the additional requirement of a direct contract between the primary insured and the additional insured. Every party involved, other than the insurance company, had agreed that coverage should be extended. But the court supported a precise and legalistic reading of the policy and rejected the custom and practice so commonly seen in the construction industry.

In *Burlington Insurance Co. v. New York City Transit Authority*, 29 N.Y.3d 313 (2017), the contractor’s insurance policy required fault on the part of the contractor, at least partially, for coverage to be extended. When a Transit Authority employee was injured, the insurance company successfully argued that no coverage was available because the Transit Authority had buried the live cable and had failed to advise the contractor of it. The contractor’s actions were causally linked to the accident because “but for” the contractor’s striking the live cable, the accident would not have occurred. However, the insurance company argued that the actions of the insured had to be the “proximate” cause of the accident. These different forms of causation are familiar to lawyers and insurance companies, but they do not have a lot of relevance to construction workers on a job site.

The narrowing of additional insured coverage will force companies to depend more on contractual indemnity provi-

sions. When needed, execute direct contracts between primary and additional insureds, if for no other reason than to satisfy the “with whom” requirement.

Even where a project involves a project specific insurance program like an OCIP, CCIP or other wrap-up, some form of additional insured coverage is still likely to be needed because some participants and some risks will be excluded from the program. Some design professionals and some trades may not be eligible to participate in the program; some may not qualify due to nature of their work; some may not qualify due to their work comp history or other factors; some may fabricate materials away from the job site and need separate coverage for that location and in transit. Whenever these problems arise, they will need to be addressed on both sides of the equation. The project specific insurance program must accommodate the involvement of these “outsiders” and the separate insurance coverage they bring with them, and the “outsiders” separate insurance coverage must extend additional insured status to those inside the OCIP/CCIP and not be excluded because the project is otherwise covered by a wrap up (a common exclusion).

Risk managers embarking on public projects should carefully analyze their risk transfer program and engage knowledgeable brokers, lawyers and others to ensure that their expectations are met and that they are not disappointed in the event of a loss. ■

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