Controlled Insurance Programs: Important Issues to Consider During Bid Preparation

Controlled Insurance Programs (CIPs) have been in existence for over 70 years and their use by both owners and, more recently, general contractors has continued to increase as a vehicle for risk transfer in the construction industry. The passage of anti-indemnity provisions in California effective January 1, 2013 (via SB 474) has also served to make CIPs more attractive to general contractors and government entities. However, despite this long history and relative commonality of coverages, each program is different and if not properly vetted, general contractors and subcontractors alike could be at risk. Below are a series of recommended questions to ask when preparing to bid a project insured by a CIP, as well as potential advantages and disadvantages of CIPs:

Questions all contractors should ask at the beginning of the project engagement process:

- Is a CIP in place or will each contractor provide their own insurance?
- Have all available CIP documents been provided to your broker for review and comment?
- Are insurance costs to be included or excluded from the bid and at change order, and are the bid deduction calculation procedures clear and fair to all parties?
- Is the insurance language in the Prime Contract between Owner and General Contractor, or Construction Manager, aligned with the CIP documentation?
- If the CIP is auditable confirm the process for adjudication of potential additional premiums / credits is clearly defined
- Is there a "termination for convenience" provision in the documentation?
  - If so, does it spell out recourse for compensation in order to replace the coverage?
- What lines of coverage will be provided by the CIP and at what limit of liability?
- Does General Liability provide completed operations coverage that extends through the statute of repose?
- Is coverage for repair/warranty work clearly defined and covered by the CIP?
- Are off-site manufacturing locations involved in the assembly or fabrication of products integrated into the project covered under the CIP?
- Are defense costs outside the limit of liability?
- Are their large deductibles or self-insured retentions by line of coverage?
  - If so, are they fully funded or collateralized by the owner?
  - What amount, if any, will the contractor / subcontractor be responsible for?
- Are limits dedicated to the project or shared among several projects?
- Is Builder's Risk required or provided by the project sponsor?
  - Are deductible amounts identified and application explained?

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- What insurance is the contractor required to evidence for off-site work?
- Are enrollment procedures including confirmation of enrollment/coverage explained?
  - Are enrolled and excluded parties clearly defined?
- How are claims reported and managed during construction operations and after project completion?
- Safety program requirements identified and in keeping with accepted practices?

Potential advantages of a CIP for general contractors and subcontractors:

- Broad terms and conditions tailored to the project with higher dedicated limits of liability
  - Extended Completed Operations coverage to statute of repose
- Reduced project costs through purchase of one insurance program at volume discount rather than each subcontractor bidding with (higher) insurance costs
- Coordinated Safety and Loss Control under one program
- Coordinated claims handling/adjusting procedures and claims management services
- Reduced risk of coverage disputes and subrogation between contractor and insurers

Potential disadvantages of a CIP for general contractors and subcontractors:

- Administrative burden – it can require a substantial level of effort if not managed competently both by the administrator of the CIP as well as the enrolled contractors required to comply with the terms of the program
  - This can include reviewing, clearing and tracking certificates of insurance and accompanying endorsements as well as notices of completion
- Additional accounting efforts to identify insurance costs and provide monthly payroll reports (if Workers' Compensation is included in CIP)
- Bidding can become more complicated due to bidding with and without insurance costs and uncertainty surrounding precise coverage terms of the CIP at bid date
- Potential inadequate limits of insurance or coverage breadth creates need to purchase Excess of Wrap/ Difference in Conditions coverage which increases subcontractor costs
- Reduced revenues/payrolls available to be used in marketing process for contractor's own insurance program
  - Revenues and payrolls earned under a CIP are excluded from the contractor's own policy to avoid double charging. This creates an audit risk (due to minimum premiums) and reduces the contractor's marketing leverage, potentially leading to higher rates.
- Limited access to claims process and minimal control over claims involving contractor's own workforce can negatively impact contractor's Experience Modifier
- Time involved reviewing CIP documents and insurance policy specimens