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ON TIME EVERY TIME
The construction season is in full swing and we are expecting a busy fall as well. Contractors, suppliers and those that service our industry are all reporting strong workloads and have a positive outlook for the Greater Capital District and up through Essex and Franklin counties to the north.

I am happy to share some of the work that is taking place within our geographic footprint as we look at the Adeline Graham Theatrical Training and Innovation Center at Proctor’s Theatre in Schenectady in this latest edition of Construction Connections. This project and others, including the Albany Convention Center and Plattsburgh International Airport (featured in earlier magazines), are additional examples of our members constructing buildings that have an important economic impact in Upstate New York. We look forward to sharing other projects in future magazines and based on the more than 3,000 bidding projects reported in our planroom so far this year, there will be plenty to feature.

While the actual building phase is exciting, there is a lot of preparation that takes place before shovels hit the ground. As such, we continue to look at topics that impact the process and hope you find some key takeaways from our articles on how to recognize and avoid insurance traps and financing for construction projects. We are fortunate to have members with their fingers on the pulse of the industry who are willing to contribute to this publication and thank them for sharing their industry insight and expertise.

Congratulations are also in order, as a featured member, Atlantic Testing Laboratories, is celebrating its 50th anniversary this year and longtime ECA treasurer Roger Jones was honored by the Association for his dedication to the industry.

ECA’s mission is to provide leadership in the construction industry through promotion of a stable labor relations climate, development and education of a skilled workforce, encouragement of safety in the workplace, advancement of economic growth and being a resource for construction industry data and information.

As we continue to grow this publication, we hope to provide readers with evidence of those points as we highlight and promote the activities and achievements of our members as well as provide information to the community at large on the many aspects of our industry.

I hope you find great value in this magazine, and I welcome suggestions for future content.
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Eastern Contractors Association, Inc. (ECA) is a trade association of union signatory general contractors and subcontractors, suppliers and service firms engaged in commercial, industrial and institutional construction throughout eastern New York. ECA traces its history to 1890 and is the region’s only “full-service” contractor association serving the needs of all segments of the construction industry, providing labor relations assistance, planroom services, networking opportunities and other valuable membership benefits.
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The new Adeline Graham Theatrical Training and Innovation Center ("The Addy") is set to bring a new dynamic to downtown Schenectady when it opens in October of this year. Empire State Development (ESD) CEO and commissioner Howard Zemsky describes the project as "complementing the ongoing revitalization happening in downtown, supporting the arts and converting vacant space into an important workforce training facility for the Capital Region".

HONORING HISTORY

The Addy is named after the late Adeline Graham, a longtime Schenectady resident and former director of Proctors, who used philanthropy to support education, the arts and community. Proctors on State Street
in Schenectady was built in 1926 and has since been the Capital Region’s destination venue for major Broadway shows, cutting-edge film festivals, exciting special events and more.

The third story of the Schenectady Arts Complex (formerly the Carl Company Building) has been vacant for quite some time and was one of the last undeveloped spaces on downtown’s State Street thoroughfare – before becoming the future home of The Addy.

“The idea has been under consideration for the last five years,” states Philip Morris, CEO of Proctors, who admits that financing has been the key issue holding the project back. “Finding all of the right players and partners took time. It finally came to a head nine months ago. We were able to fundraise in Adeline Graham’s memory the last bit of money needed.”

According to Morris, the new facility brings together three convergent themes.

“The first is our professional theatre education program, which has been ever growing,” he says. “The second is our study of the creative economy and our finding that we need more creative professionals in the arts. And the third is the ongoing success of the Empire State Youth Orchestra’s CHIME program, which is currently in its third year. The program provides a way out of poverty for youth from economically disadvantaged communities.”

To that end, The Addy will include a 100-seat theatre, multi-use classroom, media lab and rehearsal room/flex space. The facility
will serve 1,000 students and 20,000-plus patrons annually.

The $2.2-million project will influence the region’s youth in terms of their future in the creative arts through a partnership with the Schenectady School System that will expand summer and after-school arts education programs. It will also affect the future of career opportunities in the creative arts through partnership with the Workforce Development Institute and private sector partners through a new initiative called Producing Creative. The new program will provide people with the training needed for the 30,000-plus jobs in the region’s creative sector.

“It’s a huge opportunity for young people in the region to learn about the art of creating a theatrical production – the rigging, the set design, the production – all of the behind-the-scenes work,” adds Morris. “Not to mention the opportunity of being able to work with professionals.”

Additionally, The Addy will provide Proctors with another venue for the upwards of the organization’s 1,700 annual performances.

**REACHING A NEW LEVEL**

Duncan and Cahill Inc. was chosen as the general contractor for The Addy project in June 2017. The company is a third-
generation construction company that has been in business since 1933.

“This is a really nice-sized project for us,” comments Alisa Henderson, president of Duncan and Cahill. “It’s a good fit in that it has a lot of carpentry work. It’s also a good fit for us because we like those projects where we can work personally with the owner. We like to work hand-in-hand with the owners every step of the way.”

To that end, Duncan and Cahill was able to suggest a couple minor tweaks in The Addy design that proved beneficial to the project, such as the expansion of a hallway by six inches to accommodate the piano’s movement off and on the stage.

The general contractor was also able to provide an October 2017 completion date for all 10,000 square feet of the project, rather than completing only the first stage within that time frame.

According to Henderson, a lot of the heavy work has already been completed. All of the infrastructure has been finished. The framing is up and the theatre seating platforms are in place.

“There were a couple of very interesting features to the design, says Henderson. “The raised theatre seating, for example, had to be perfectly laid out and dimensioned. That takes a real skill. I always marvel at carpenters’ ability to put together such precise mathematical formulations.”

Another distinctive feature of The Addy is the radius wall that greets people as they congregate before the show. The wall incorporates a concession bar for drinks and snacks.

“The wall has a curved wood panel face that calls for a specialty type of wood that can withstand the curvature,” states Henderson.

The Addy also incorporates some of the existing design features from when the space was used as a department store, such as the columns and ceilings. Many of the columns have become prominent design elements, while the ceiling, in places, has been kept original but refinished in a black matte paint.

TOGETHER WE CAN

Although The Addy may have taken a few years to evolve from conception through to design, it is now only months away from becoming a vital part of the downtown Schenectady cultural scene, not to mention an invaluable educational venue. It’s also a project that has drawn the enthusiasm, excitement and support of the entire community.

“The response from the community has been amazing,” adds Morris. “The Addy will have the ability to really empower the youth of Capital Region and put the power of the arts into action and change people’s lives. It will be a wonderful center for education and workforce development; provide new opportunities for the community and for our programming. And it points to a bright future for one of the last undeveloped spaces on the 400 block of State Street.”

Indeed, The Addy will act as a beacon of opportunity for many years yet to come.

“It took a long time to build the coalition responsible for making The Addy a reality, but the end result will be well worth it,” concludes Morris.”

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The scaffold law, also known as Labor Law 240/241, became a law in the 1880s.
Despite market prices that are up to five times higher than any other state, most national insurers will not write construction policies in New York. In 2012, the insurance trade publication, A.M. Best, noted that a “mass withdraw of construction insurers” was tied to the Scaffold Law. Insurers are unwilling to write policies in New York for any price. Without an equitable application of liability, insurers cannot properly judge risk, so most insurers have chosen to leave the New York market altogether.

Opponents of Scaffold Law reform insist that insurers need to “open their books.” That is exactly what the ISO data represents; insurers have opened their books, and the books are clear that the Scaffold Law is driving a massive increase in insurance costs. The opponent’s position assumes that insurers are making money off of the Scaffold Law, but if that were even remotely true, why are the insurers leaving?

PUBLIC COSTS
While the private sector shoulders billions in additional costs due to the Scaffold Law, the public sector is also deeply affected. A report by the Rockefeller Institute at the University of Albany estimates that the Scaffold Law costs taxpayers $785 million in additional construction costs every year.

Every infrastructure project costs more because of the Scaffold Law. The law is estimated to add $200 to $400 million to the cost of the Tappan Zee Bridge. The data on bridge projects are particularly compelling because they show how these costs are unique to New York. Bridge projects that cross borders have significantly higher insurance loss costs on the New York side of the project. Data from the Port Authority shows that the insurance costs on the New York side are, on average, $22.7 million, but only $10.3 million on the New Jersey side. Same project, same crews, vastly different liability law.
The costs to infrastructure are critically important to help regular people understand that they are paying for this law. These costs are not just endured by contractors and construction professionals, but by every New Yorker.

**SCHOOLS, MWBES AND DISASTER RELIEF**

The Scaffold Law does not just add costs to roads and bridges, but also to schools. The New York City School Construction Authority (NYSCA) estimates that the law cost them an additional $215 million in 2015. Their $240-million policy would have cost $25 million in New Jersey for a difference of $215 million, enough to build two to three new schools every year. At that cost, the general council of the NYSCA stated, “we could bus all our students to New Jersey every morning and still save money.” Upstate, the New York State School Boards Association estimates that the Scaffold Law costs them $200 million in additional costs.

School construction is a critical part of the state’s efforts to increase the participation of minority and women-owned business enterprises (MWBEs). As part of those efforts, the NYSCA created a mentor program in which the authority covers the insurance for the MWBE. In 2014, that program was threatened, as the NYSCA could not find an insurer to underwrite the program. In a letter to over 800 MWBEs, the NYSCA cited the Scaffold Law as the primary reason they could no longer get insurance.

Disaster relief organizations like All Hands Volunteers, the St. Bernard Project and Habitat for Humanity, also discovered the catastrophic effect of the Scaffold Law after Superstorm Sandy. While many of these organizations operate and find insurance in every other state, they could not find it in New York, leading them to write a joint letter to the New York Senate, Assembly and Gov. Andrew Cuomo calling for reform.

**INJURY DATA**

When the Scaffold Law was closest to reform in 2013, the executive director of the trial lawyer/ labor front group, the New York Committee on Occupational Safety and Health (NYCOSH), howled that “we’d be picking up bodies in the streets.” Of course, this person failed to mention that New York is the only state to have this statute – a fact that would immediately reveal the dishonesty of this statement.

Since that time, researchers at Cornell University exposed this lie even further. In an effort to assess the costs and benefits of the Scaffold Law, researchers were shocked to discover that the law has no benefits at all. In a report titled, researchers revealed that the purported benefits of the Scaffold Law, researchers have no effect on accidents in the same way liability is applied in every other part of New York state law. In his memo of support, the Assemblyman specifically cited the impact of the law on schools, affordable housing, infrastructure and MBWEs – all issues of great interest to the Democratic New York Assembly Majority.

We are hopeful that with Assemblyman McDonal’s leadership, this bill will eventually pass.

**NEXT STEPS**

You can help. Let your local Assembly member know about A.5624 and ask them to support the effort by co-sponsoring the bill. Talk to your state senator as well. You can use our form at www.scaffoldlaw.org to contact your representatives and Gov. Cuomo directly.

You can also participate at the local level. So far, 36 counties’ legislatures have passed resolutions in favor of reform. See if your county has passed the resolution, and if not, talk to your county legislator and urge them to pass the resolution. You can find supporting materials at www.scaffoldlaw.org to help you state your case.

If you need further help, please let us know. The LRANY would be happy to join you at any meeting or event to help spread the word about this destructive, costly and dangerous law.

It has been a long battle, but with your support, we can finally achieve reform.

**ABOUT**

Tom Stebbins is the executive director of the LRANY. 😊
Collett Mechanical, Inc. located in Latham, NY founded by Jack Collett, President/CEO. CMI is a mechanical contractor, providing commercial/residential plumbing, heating, ventilation and air conditioning, & mechanical services.

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Eastern Contractors Association, Inc. recognized Roger Jones earlier this year with its Special Recognition Award for his many years of service to the construction industry.

For nearly 60 years, Jones has been a part of the construction industry working for just one firm, Campito Plumbing and Heating, Inc. Along with the work he has done there for so many years, he is also a recognizable face throughout the Capital District, New York State, and nationally for the work that he does on behalf of the industry as a whole.

Fresh out of Albany Business College, Jones began his career at Campito as the office manager and handled everything from general accounting and payroll to answering phones and helping out wherever else he was needed. He eventually became treasurer of the company, a role he continues to hold today.

As Jones was taking on more responsibilities for his employer, he was also taking on bigger roles within the construction community, serving as a voice and advocate. Through the years, he has been involved in numerous industry organizations, serving as a board member or officer. In 1974, he was appointed to the board of directors for the Northeast Subcontractors Association (NESCA) and went on to serve as president in 1980. He also served as a board member and president of the state and national organizations. Beyond his time as a member of these groups, he has also served on various committees and attended many events on behalf of the industry, too numerous to count.

At ECA, Jones has been just as busy, having been named to the board of directors in 1999. Since then, he has served on numerous committees, including membership, programs, legislative and the Alternative Dispute Joint Labor-Management Oversight Committee. After serving on the board for eight years, he was asked to provide his expertise and serve as the organization’s permanent treasurer, a position on the executive committee that he has now held for 11 years.

Those who know Jones through his involvement in the above-mentioned organizations know he fully commits the each one of them. He has personally recruited dozens of new members for each group and is a dynamic participant on any committee that he is involved with. He has also been active with legislative issues, clocking many miles in the hallways of the New York and U.S. Capitols.

He and his wife, Alice, reside in Clifton Park and have a daughter, Elaine, and a grandson, Mason.
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By Natasha Burns

Atlantic Testing Laboratories (ATL) was founded in 1967 by Spencer F. Thew, PE/LS, in Canton, NY. Thew recognized a need for an independent construction materials testing laboratory operating under national quality standards and started the business out of an old farmhouse, doing most of the work himself. Through his pioneering efforts, Thew helped bring a quality component to the local
construction industry and established in-roads for future advancements in both the private and public sectors. After 40 years in business, he retired in 2007, and Marijean B. Remington, CEO, became the majority owner.

ATL is now a WBE-certified company, and offers subsurface investigation, water-based investigation, geotechnical engineering, environmental services, special inspections, construction materials testing, pavement engineering and non-destructive testing services. Despite having such a wide variety of services, ATL has never sacrificed quality throughout its 50-plus years in business, making quality service one of its top priorities.

The firm’s other priority is safety – new employees are required to complete ATL’s safety orientation and the OSHA 10-Hour General Construction Industry Training Program. Employees providing environmental services or working on hazardous waste sites also complete OSHA 40-hour safety training for hazardous waste operations, as well as an annual OSHA eight-hour refresher course.

“The best part of my job is working with, training and mentoring staff,” says Remington. The skilled ATL workforce
is comprised of professionals from many different areas of the construction spectrum, including professional engineers, concrete special inspectors, NDT technicians, welding inspectors, hazardous materials managers, erosion and settlement control inspectors, masonry technicians and more. If there is any construction material testing and inspection required, ATL is capable of covering almost any need.

You can see the end result of ATL’s expertise across New York – the firm has worked on a number of highly visible projects, including the Onondaga Lake cleanup, Tappan Zee Bridge replacement, various wind tower projects, Gilboa Dam and numerous colleges and schools throughout New York state. ATL has also worked on a number of projects in the Capital Region, including the Hudson River cleanup, Albany Capital Center, New York State Police Troop G Headquarters in Colonie and St. Peter’s Hospital in Albany.

Why is ATL based in New York? There are a number of advantages to running a business in the area, according to Remington. “There is an established workforce in upstate New York that ATL can tap into, and every employee brings a strong work ethic to their job,” she says.

ATL is a certified WBE. The firm has an office serving the Albany area at 22 Corporate Dr. in Clifton Park. They can be contacted at (518) 383-9144. Visit them online at atlantictesting.com.
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Established in 1961 by James Jordan, and incorporated in 1973, Quality Painters & Decorators is a family business, motivated not just by success but also by the pride of hard work and accomplishment, a credo passed down from father to sons.

“My brother and I have learned a lot from my father’s work ethic. He has showed us that hard work and dedication will pay off,” says Jeffrey Jordan, current president of Quality Painters. “I would see my father working on blueprints every night at the kitchen table, and I would always be asking him questions about the blueprints. Jobs that he was currently working on were always a topic of conversation at the dinner table. Starting at the age of 16, my father would always take a job to put my brother and I on for the summer to keep us occupied through summer vacation.”

Quality Painters is based in Amsterdam and services many parts of the Albany area. Jordan sees the continued growth potential of the region, and as the area continues to grow and prosper, so too

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does the company. The business offers a variety of services, including painting, taping, wall coatings, vinyl wallcoverings and epoxy floor coatings, as well as a variety of other interior finishing services and maintenance. Quality Painters offers a wide array of different types of work available in the painting industry from commercial such as schools, hospitals, office buildings, multi-family residential and industrial. The company has also serviced many key projects in the Capital Region, including Guilderland Central School District, Regeneron Pharmaceuticals, St. Peter’s Hospital, ZEN Building, Renaissance Hotel, the new Rivers Casino Resort Hotel in Schenectady, the gym at Siena College and Albany RV.

As with many service industry companies, what sets Quality Painters apart is the company’s combined dedication to their craft and to their client. Many projects and new clients come from personal recommendations from previous clients, owners and architects.

“We always try to hold our work to a higher standard, and I am always preaching that same idea to our employees," says Jordan. “We are always looking for projects that are unique with different types of finishes and substrates. A good-looking end product always makes you feel proud and gives you the drive to keep going.”

Quality Painters is located at 4654 State Highway 30 North in Amsterdam and can be reached at (518) 842-5447.

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The Empire State

Eastern Contractors Association 25
Are you a tough-minded leader? Before you answer that question, let me give you some information that will enlighten you about what tough-minded leadership is, and then you can decide.

Tough doesn't necessarily mean hard. For example, a piece of granite is a hard substance, yet if you hit it with a hammer, it will shatter into pieces. Now think of a piece of leather: if you hit the leather with a hammer, it doesn't make a dent — in fact, hitting leather with a hammer will make it more pliable and supple.

That's what you want from tough-minded leadership: a durable mindset to deal with whatever specific needs arise. The leader who expects his or her people to perform their best will achieve the greatest results. Setting the expectation for your team members is key.

The tough-minded leader believes that performance is all that matters. This may sound a little rigid at first. Team performance is typically defined in terms of getting things done. In a tough-minded leader's point of view, performance means total performance. An emphasis on qualities like commitment, courage, integrity, loyalty, hard work and fairness matter as much as talent, ability and skills.

The tough-minded leader respects the dignity and worth of each team member and guides each person to integrate his or her best performance into the framework of the organization by doing the following:

- Encourage input from everyone. Ideas, suggestions — whatever it takes to help define the best possible mission.
vision and goals to move the workplace forward on a path to continuous improvement.

- **Develop clear and specific performance standards.** Measure performance against set standards — no compromising.

- **Implement a pay-for-performance evaluation process.**

- **Develop processes and procedures** for people to follow to achieve consistency of excellence on the job.

- **Use ongoing training and coaching** to develop and hone the skill sets of your team.

- **Challenge your people to strive for continuous improvement every day.**

- **Develop and maintain emotional vulnerability** (the capacity to let others in and let yourself out). This required communication that includes shared meaning and shared understanding.

- **Provide consistent interaction** and MBWA (manage by walking around).

- **Expect the best** from team members every day.

  Let’s circle back to the beginning. With this additional information, how can we expand on the definition of tough-minded leadership?

  Let’s take the definition of leadership and expand it to encompass tough-minded leadership principles: “the development of clear and complete expectations in order to identify and utilize the strengths of all resources in the organization — the most important of which is people. Set the pace with high expectations for all players in the process.”

  These ideas are tough but not hard. So let me end with the following questions – do you care enough to lead? Do you care enough to expect the absolute best from your people?

  I think you know the answer. The tough-minded leader will settle for nothing less.

**ABOUT**

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INSURANCE TRAPS FOR CONTRACTORS ON CONSTRUCTION PROJECTS
HOW TO RECOGNIZE AND AVOID THEM

By Patrick J. Higgins and Paul von Schenk

PART I
RECOGNIZING CONTRACTOR INSURANCE TRAPS

Everyone is busy in the construction business. Between bidding, scheduling and completing work, contractors are always in motion. Throughout this process, contractors tend to focus on what they do best – building things. Today, however, a contractor must also understand the insurance component of its work to protect its business. This includes recognizing and avoiding construction project insurance traps. Part I of this discussion focuses on the specific insurance traps. Part II of the discussion will focus on strategies to avoid these traps.

COVERAGE TRAP 1 – ILLUSORY COVERAGE — “YOU HAVE INSURANCE FOR THIS JOB BUT NO COVERAGE”

As illogical as it may seem, insurance companies have issued a policy to a contractor for a particular job (or geographic area), but then added endorsements or exclusions to the policy limiting or eliminating coverage for that job or area. In such a case, a contractor that pays the premium for the policy, and receives the actual policy, believes that it has coverage protecting its workers and business from bodily injury or property damage claims. However, if an incident occurs, and the contractor tenders the claim to the insurance company, the contractor may find that it has purchased the illusion of coverage, and nothing else. In such cases, the contractor may be faced with an uncovered claim.

A case illustrating the point is 720-730 Fort Washington Ave. Owners Corp. v. Utica Fort. Ins. Co. 1 Builder-owner 720-730 Fort Washington Ave. Owners Corp. (“Fort Washington”) hired general contractor DNA Contracting (“DNA”) to renovate Fort Washington’s building. DNA, in turn, hired subcontractor Rauman Construction Company (“Rauman”) to perform masonry and roofing work for the project.

The contract between DNA and Rauman required Rauman, as the subcontractor, to purchase commercial general liability (“CGL”) coverage that included DNA and Fort Washington as additional insureds. 4 Rauman purchased such a policy. However, buried in that CGL policy were three exclusions that took this protection away from Fort Washington and DNA. First, the CGL policy did not cover bodily injury for any employee of Rauman injured in the course of the project work. Second, the CGL policy excluded coverage for “roofing work” and, third, the CGL policy excluded coverage for liability assumed under a contract. No one at Fort Washington apparently understood that the CGL policy excluded the risks that Fort Washington thought were covered.

During the project, Rauman employee Marcos Castellon suffered an onsite injury, allegedly from a falling concrete block. He brought suit in the Bronx County Supreme Court against Fort Washington as owner of the property. Mr. Castellon alleged that the concrete block fell on him because it was not adequately secured in violation of Labor Law §§200, 240(1) and 241(6). He could not sue Rauman, his employer, because workers compensation, his exclusive remedy against Rauman, barred such a claim.

Upon receiving the suit papers, Fort Washington demanded coverage for the loss under Rauman’s CGL policy naming it as an additional insured. Rauman’s CGL insurer, Utica First Ins. Co. (“Utica First”), denied providing Fort Washington with coverage based on the three exclusions cited above.
Fort Washington sued Utica First. It claimed that Utica First had issued a worthless, misleading policy excluding the risks that it had been purchased to cover, and that public policy required that coverage be provided as intended. The Bronx County Supreme Court agreed that the policy was worthless and misleading, but still found against Fort Washington. It held that parties to an insurance contract chart their own course in their agreements. The buyer had to beware. There was no law or statute that required that First Utica provide a minimal level of coverage.

Thus, Fort Washington should have confirmed that the CGL policy its contractors and subcontractors provided for the job contained adequate coverage and protection. It did not, however, conduct due diligence, so the fault lay squarely on its shoulders. Rauman had no assets to speak of, so DNA and its insurance carrier were left to pay the claim. DNA had indemnified shoulders. Rauman had no assets to speak of, so DNA and its insurance carrier were left to pay the claim. DNA had indemnified.

The Fort Washington case is uncommon, but not unique. It demonstrates why the illusory coverage trap exists: contractors generally do not expect that a policy would exclude the coverage that they purchased it to provide. As a result, they may accept the policy without recognizing the danger, and start work without adequate coverage. Knowledge comes only after an injury or property damage on a construction project with the resulting claim and denial. By then, it may be too late for the contractor.

COVERAGE TRAP 2 – NOT UNDERSTANDING THE POLICY EXCLUSIONS, ENDORSEMENTS AND INSURING AGREEMENTS LIMITING OR ELIMINATING INSURANCE COVERAGE

A similar issue arises when a contractor receives the policy that it expected, but does not understand that the “standard policy” purchased does not cover the intended risk. In this case, there is nothing misleading about the policy. The coverage trap exists because of the disconnect between what the insurer has covered and what the contractor believes the insurer has covered.

The disconnect exists because the contractor does not understand the terms and limitations of the insurance policy. A contractor’s insurance policy contains many pages of fine print. Judges – no strangers to hands up at the unintelligible drafting of some insurance contracts. Yes, it is hard to review insurance contracts. But without understanding them, including their coverage limitations and exclusions, the contractor cannot know if it has the coverage it paid for.

For example, the standard CGL policy may exclude or limit coverage for pollution-related damages or damages associated with a contractor’s excavation, collapse and underground-related operations. Coverage may also be limited for claims related to the contractor’s own work, for work performed on residential homes or for work performed by a contractor’s downstream contractors. A CGL policy may also exclude claims alleging sexual harassment, discrimination, workplace errors, intentional acts or punitive damages. Policies also may not cover liquidated or consequential damages, or limit such coverage.

COVERAGE TRAP 3 – NOT UNDERSTANDING THE INDEMNITY AND INSURANCE REQUIREMENTS OF THE CONTRACT

There are two critical elements to a construction contract that a contractor must review and understand: the indemnities that run to the owner as the upstream party from the contractor, and the insurance that the contractor has agreed to provide to benefit the owner.

a. The contractor’s indemnity of the owner and the insurance needed for that indemnity – getting the contractor’s “house in order”

In most construction contracts between an owner and a contractor, or a contractor and a subcontractor, the party “downstream” in the chain of work will indemnify the party “upstream.” Generally, this indemnity includes bodily injury and property damage arising from either the downstream party’s work, or the negligence of the downstream party and its employees. There may be little negotiating room on these indemnity clauses. If the downstream party wants the work, it typically agrees to the contractual terms and conditions as presented. The courts will generally enforce these clauses if they are consistent with governing law and statutes.

1. Recognizing the contractual indemnity and managing its related risks

The contractor must first understand that it has agreed to pay damages to or on behalf of the owner (or upstream contractor) if certain events occur. Once that understanding exists, the focus shifts to what trigger obligates the contractor to pay damages to or on behalf of the owner (or upstream contractor). Is it limited to bodily injury and property damage arising from the contractor’s own work? Does it also include indemnity for the work of subcontractors? Answering these questions helps the contractor to determine if its insurance program provides adequate protection for these contractually assumed indemnities. Failing same, the contractor has left itself open to out-of-pocket costs when the upstream party (such as the owner) calls in its indemnity and no coverage exists. Few contractors have the resources or “deep
proper coverage has been purchased and is in effect, and that
construction project. would protect the contractor’s insurable interest in the applicable
discussed above, the downstream subcontractor may also be required
to maintain Builders Risk/Installation Floater insurance, which
performed. Finally, depending on the terms of the contract, as
pollution liability, etc.) depending on the scope of work being
contractor, and owner, as additional insureds.

Coverage limits maintained by a contractor should reflect the risks associated with the contemplated operations.

Indemnity alone, however, does not adequately protect the contractor. In most instances, the issue of loss transfer downstream arises with downstream subcontractors. Many of these downstream subcontractors lack adequate capitalization, and ultimately may be unable to pay a judgment. Winning on a contractual indemnity claim, therefore, may be a hollow victory.

Therefore, the contractor’s downstream subcontractor must not only contractually indemnify the contractor, but also under the contract must be required to purchase adequate insurance to fund that contractual indemnity. Typically the contract will also require that the downstream subcontractor purchase adequate CGL insurance, workers compensation and employers liability insurance, commercial automobile insurance and commercial umbrella/excess liability insurance. The policies as discussed above must name the contractor, and owner, as additional insureds.

In addition, a downstream subcontractor may be required to maintain additional types of insurance (i.e., professional liability, pollution liability, etc.) depending on the scope of work being performed. Finally, depending on the terms of the contract, as discussed above, the downstream subcontractor may also be required to maintain Builders Risk/Installation Floater insurance, which would protect the contractor’s insurable interest in the applicable construction project.

Before the work begins, the contractor must confirm that the proper coverage has been purchased and is in effect, and that the contractor has been named as an additional insured on the downstream subcontractor’s relevant policies.

In this way, if a bodily injury claim occurs on the project, and the owner tenders the claim to the contractor under the contractor’s indemnity to the owner (resulting in a notice of claim with the contractor’s insurance carrier), the contractor can tender the bodily injury claim to its downstream subcontractor (and the subcontractor’s carrier) for handling/disposition as an additional insured, and the contractual liability provisions in the subcontract.

Without such a loss transfer mechanism, the contractor may find itself between a rock and a hard place. It must contractually indemnify the owner, but cannot transfer this obligation to its downstream subcontractor or secure insurance coverage from the downstream subcontractor’s CGL carrier. In such a case, “the buck stops here” for the contractor and its insurance carrier.

**COVERAGE TRAP 4 – NOT HAVING ENOUGH LIABILITY INSURANCE FOR THE RISK**

Contractors understand overhead, and balancing cost management with quality work. Some, however, view liability insurance as an overhead line item ripe for cutting. This view may be penny-wise and pound-foolish. Coverage limits maintained by a contractor should reflect the risks associated with the contemplated operations. Of particular concern are construction projects that involve work at elevated heights. The New York State Labor Law §240(1) holds owners, contractors and their agents statutorily liable for injuries to a worker resulting from a violation of the statute. For instance, if a 19-year-old laborer is catastrophically injured on a construction site by falling from an “elevated height” (which could be as low as a step ladder), the contractor may face millions of dollars in damages. This risk – if not adequately covered – could jeopardize the business of many contractors.

**COVERAGE TRAP 5 – ACCEPTING A CERTIFICATE OF INSURANCE AS PROOF OF BEING INCLUDED AS AN ADDITIONAL INSURED ON THE POLICY**

In many construction contracts, contractors require their downstream subcontractors to include them as an additional insured on the subcontractor’s liability insurance policies. This requirement may also apply between a subcontractor and a downstream subcontractor. This process allows the contractor to claim against the downstream subcontractor’s policy (rather than its own) if a subcontractor’s work causes injury or damage. As a result, the subcontractor’s policy would pay for defense costs and indemnity incurred by the contractor (thereby preserving the coverage of the general contractor’s insurance policy). However, while conceptually simple, this process also requires attention to detail.

In most cases, a downstream subcontractor will provide the general contractor with a document, such as an “ACORD 25-3 (2014/01),” generally described as a “Certificate of Insurance.” However, a Certificate of Insurance does not constitute or provide insurance coverage.

Thus, a contractor should not accept an insurance certificate as proof of coverage, because it is not that. Instead, before the work
starts, the contractor must receive actual proof of additional insured status that will be legally recognized and upheld. The downstream subcontractor should furnish to the contractor the declarations page from the downstream subcontractor’s insurance policy (listing the named insureds and all policy forms/endorsements/exclusions) and the specific additional insured endorsement naming the contractor on the policy. We discuss this further below.

**COVERAGE TRAP 6 – NOT SECURING AN “ALL RISK” POLICY**

A well-rounded risk management program typically includes Builders Risk/Installation Floater insurance, which covers damage to the physical structure and its related materials that may be in transit or stored offsite during construction.

Problems arise when the contract does not establish who will secure the Builders Risk/Installation Floater coverage. To resolve this problem, many standard contract forms require that the owner purchase Builders Risk insurance. Even with contractually assigned responsibilities, however, often the owner may not be aware of the obligation or may assume that the contractor will cover it. A coverage trap can exist when none of the parties purchase this coverage, leaving a significant potentially uncovered loss for, among other things, the physical structure.

To address this potential coverage trap, the contractor should insist that it receive a copy of the Builders Risk policy that the owner purchased covering the project before starting work. The contractor should also review the policy to ensure that critical building components are covered (i.e., the existing structure on a renovation job, property while in transit or at a temporary storage location, etc.) and to ensure the necessary endorsements are included on the policy (i.e., Flood & Earthquake coverage, Equipment Breakdown, Soft Costs, Permission to Occupy).

**FOOTNOTES**

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4. Id. at 504-505.
5. Id. at 512-513.
6. See Littlejohn v. Dominos Pizza LLC, 130 A.D.3d 500, 14 N.Y.S.3d 13 (1st Dep’t 2015) (remarking that a deductible equal to its coverage limit rendered a primary liability policy purchased by a tenant illusory).
Project financing is usually comprised of two separate and distinct loans – an interim, short-term construction loan and a long-term, permanent mortgage loan. Both loans have very different features and potential lenders of both loans have completely different criteria and goals.

**CONSTRUCTION FINANCING**

All construction loans require the developer to have a permanent long-term mortgage in place by a lender prior to issuing a commitment to finance the construction costs. The long-term permanent mortgage is typically called a “takeout” loan as it is intended to pay off or “take out” the construction lender upon successful completion of the project. Most construction loans are made by commercial banks with the specific strategy of making a series of advances to the developer at certain milestones (i.e. completion of site work, completion of structural steel work, issuance of certificates of occupancy). Typical construction loans are repaid within 18 to 36 months depending on the size and complexity of the project. The construction loan lenders are looking to lend money over short periods to maintain their liquidity.

Construction loan lenders have become very sophisticated about the construction process often hiring teams of experienced lenders and project managers to monitor all phases of the construction period. In some cases, a personal guarantee of the construction loan may be required.

The single most important phase of applying for a construction loan is the proper preparation of the construction budget. In addition to the hard costs of material and labor, the construction budget must include soft costs such as permits, approvals, engineering and architect fees, as well as construction period interest expense, real estate taxes, insurance costs and legal and accounting fees. Other soft costs would include loan origination fees, surety bond costs and bank inspection costs. Adequate contingency reserves in the construction budget are often either overlooked or inadequate to cover unexpected project delays such as weather, material shortages, subcontractor delays or unexpected construction costs or inefficient labor issues.

The risk to the construction lender is that the funds disbursed to the developer or contractor become insufficient to complete the project. Without a certificate of completion, the construction lender will be unable to be paid back their loan from a permanent mortgage lender. Therefore, the construction lender employs procedures to ensure that the periodic takedown draws are supported by AIA-signed documents and the lender project team is physically inspecting the construction process to protect their loan investment. The construction lender will normally monitor payments to material suppliers as well as subcontractors to avoid a “mechanics’ lien” on the project for unpaid services. Mechanics’ liens in most states take precedence over construction loans. This single risk to construction lenders requires the developer or borrower to insist on a contractor or subcontractor to supply surety “completion” bonds to the owner/developer.

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PERMANENT MORTGAGE LOANS

As discussed earlier, a developer needs to have a permanent long-term mortgage commitment in place prior to obtaining a construction loan. The process involved in applying for a long-term mortgage also requires proper planning and cash flow projections to demonstrate the developer’s ability to repay the mortgage with adequate cash flows from the completed project. A mortgage lender will typically require the borrower to invest approximately 15 to 20 percent of the total project costs as invested equity, and finance the remaining 80 to 85 percent with borrowed mortgage funds. In many cases, both construction and mortgage lenders will require the developer to invest their 15 to 20 percent equity up front, prior to any loan advances. The owner/developer equity investment usually covers most, if not all, of the project “soft” costs.

A long-term mortgage lender will pay particular attention to the developer projection as to anticipated revenue and expense projections. Again, a conservative projection will include adequate reserves to lease out all available rentable space, including carrying costs such as mortgage interest, real estate taxes, management fees and insurance costs during the lease up period.

Typical long-term mortgage lenders are insurance companies, pension funds and some commercial banks. These lenders have a goal of seeking out strong projects with developers with a proven track record to insure a stable, reliable return on their loan over the mortgage term.

In most cases, a long-term mortgage lender will not require any personal guarantees on the mortgage note assuming the owner has invested adequate equity in the project. These loans are referred to as “non-recourse” loans.

Generally speaking, not much has changed over the years in applying for either a construction or long-term mortgage loan. The banks have become more selective as to what loans they take as compared to years ago, when “relationship” loans between developer and a local commercial banker were the norm. Added soft costs have put enormous pressure on hard construction costs potentially lowering profit margins to many general contractors. Return on a developer’s investment on a project has stayed stable, although a longer lease up period will lower such returns. Both construction lenders and permanent mortgage lenders are insisting on a higher degree of developer and contractor involvement in each project to insure each party has a significant investment and incentive to make development projects ultimately successful.

ABOUT

Joseph A. Torani is a founding and senior partner of BST & Co. CPAs, LLP with offices in Albany, New York City and Mineola. His client portfolio includes large contractors and developers, as well as closely held, family-held businesses. He can be reached by email at jtorani@bstco.com, by phone at (518) 459-6700 or in person at 26 Computer Drive West, Albany, N.Y.
RBM-Guardian Fire Protection stands by its motto: “LIVES ARE WORTH SAVING”

By Natasha Burns

In today’s fast-paced world, the work that goes into safety systems, including fire safety, often goes unnoticed until the unthinkable happens. RBM-Guardian Fire Protection, a full-service fire protection company, has made the safety of millions not only its business but also its motto: “Lives are worth saving.” This mission drives every aspect of its services and has done so for over 42 years.

Established in 1975, RBM-Guardian fabricates, installs and services all aspects of fire protection—sprinkler systems, clean-agent systems, fire pumps, fire suppression systems, and special hazard systems. The company prides itself on excellent customer service and quality work, and it has established many repeat customers over the years. RBM-Guardian is based out of Albany and serves customers all across the Capital Region, including parts of eastern Massachusetts and Vermont.

“It gives me great pride to ride around the area and see the buildings where we have installed fire protection systems,” says Roberta Young, president of RBM-Guardian. “No job is too small or too large.”

RBM-Guardian services and installs a wide variety of systems, including wet pipe, dry pipe, FM-200 systems for clean rooms, ESFR (early suppression fast response systems for warehouses), foam systems, in-rack storage sprinkler systems, pre-action fire sprinkler systems, pump and holding tank systems, and more. The company’s clients include private residences, restaurants and retail establishments, as well as hospitals, hotels, and senior living facilities. RBM-Guardian truly knows the systems its employees install inside and out—the facility also offers full fabrication and welding services. The company doesn’t just pay lip service to safety—RBM-Guardian stands by its work, offering 24-hour emergency service and inspection to keep its systems in top working order and compliant with all local building codes.

RBM-Guardian also stands by its people. Many employees have been with the company for years, some of them for more than three decades. The company employs designers who are NICET (National Institute for Certification in Engineering Technologies) Level IV certified. Additionally, with an eye toward the future of fire safety, RBM-Guardian provides an apprenticeship training program, where apprentices are trained for five years. The company appreciates the talent and skill of true craftsmen, employing Local 669 union sprinkler fitters for all projects.

Young is proud to work for a company that not only exemplifies quality services but also does so in the name of the safety and well-being of her community.

“Our greatest accomplishment is hearing that at one of the buildings that we’ve serviced, the sprinkler system was activated and saved the people in the building,” she says. “It’s a relief to hear that everyone is safe and that the fire was minimized because of the system, and we are a part of that success. It really doesn’t get any better than that.”

RBM-Guardian Fire Protection is a certified WBE. The company is located at 8 Enterprise Dr. in Albany. RBM-Guardian can be reached at (518) 463-4340 and at rbm-guardian.com.
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