

What Your CGL Policy Won't Pay For If a Builder's Risk Policy Is In Place



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In today's competitive contracting environment, owners have a clear advantage when placing projects out to bid. As the economy continues to sputter, contractors know that they must provide very competitive pricing, as well as contractual terms that are favorable to the project owner. They are often concerned that any misstep at any stage of a project could cause the loss of future projects with an owner. One result of this competitive environment is that both general contractors and subcontractors are reluctant to submit a claim under the project Builder's Risk policy because they don't wish to upset the owner. Instead, they often look to their own Commercial General Liability (CGL) policy for claims payment even when a Builder's Risk policy is in effect.

While we understand the competitive environment and reasoning behind the desire to avoid a Builder's Risk claim, there are several important factors that argue against this remedy. In particular, contractors need to understand the intended purpose and coverage details of a Builder's Risk policy, as well as the "Other Insurance" Clause found in the CGL policy. Other vital considerations are application of the Builder's Risk deductible and the adverse impact that CGL claims can have on a contractor's future premiums.


The Builder's Risk policy (also known as a Course of Construction policy) is a property policy that insures against accidental loss or damage to contractors' work and property during the period of construction. It usually extends coverage to equipment, materials, and supplies to be used and incorporated into the project. Since construction projects adhere to strict schedules, both owners and contractors want to avoid delays due to a claim. The Builder's Risk policy was created to ensure a quick resolution if a property claim occurs on a construction project. It covers the project and can include the owner, general contractor, and subcontractors as Named Insureds, thus avoiding the "finger pointing" between parties regarding responsibility for the loss, resultant delays, and payment for damages.

The project contract allocates responsibility for obtaining Builder's Risk coverage to the project Owner, Developer, or General Contractor. The industry's standard contract (American Institute of Architects' AIA Document A-201 (1997 or 2007), General Conditions of the Contract for Construction) delegates responsibility to the Owner, but that may be amended. The AIA contract also states that the Builder's Risk policy is to cover the interests of the Owner, General Contractor, and all tiers of Subcontractors (General Conditions, subparagraph 11.4.1 or 11.3.1).¹ Additionally, the contract usually requires that the policy provide a Waiver of Subrogation, which essentially means that the contractor or subcontractor who caused the damage is considered a covered party under the Builder's Risk policy. Consequently, the insurer cannot require claim payment reimbursement from the at-fault contractor. In other words, the Builder's Risk policy is a first party coverage specifically tailored to protect the financial interests of the project owner and contractors.

Contractors often believe that their Commercial General Liability policy will pay for property damage that occurs on a project covered by a Builder's Risk policy. However, it is important to keep in mind that CGL is a third party coverage that applies to alleged negligent acts by the insured contractor (and its employees) which cause bodily injury or property damage to others. There is no coverage for the contractor's own property or for the property of others unless the contractor is found negligent. Additionally, the "Other Insurance" Clause in the CGL policy (ISO CG 00 01 10 93 form, Conditions section) clearly states that the policy will respond only in excess of other, more specific coverage in place, including Builder's Risk:

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

(1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work"



In order for the CGL policy to respond, the loss would need to exceed the limits of the Builder's Risk policy and the insured contractor would have to be found negligent.

A related consideration is the Builder's Risk deductible. In the standard, unmodified A201 (1997 or 2007) - the Owner is responsible for the policy deductibles. This may have been amended via Supplemental Conditions or Addendum placing the at-fault contractor responsible for the deductible, which can be significant on larger projects. We have often found that contractors assume their CGL policy will pay the deductible on their behalf whenever they are contractually responsible. However, the "Other Insurance" Clause also addresses this scenario:

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

Since the CGL policy is excess of the Builder's Risk policy, the CGL insurer's intent is to also be excess of the Builder's Risk deductible. A prudent approach would be to ensure that the Builder's Risk deductible is identified in the project contract and negotiated to an amount that all parties can agree upon. A bit of pre-planning can save many headaches after a claim occurs.

A final consideration is the impact of Builder's Risk claims on a contractor's loss ratio and future premiums. Since most Builders' Risk policies are project specific, it is advantageous that claims be made under the Builder's Risk policy rather than the at-fault contractor's Commercial General Liability. That way the loss experience stays with the Builder's Risk policy and does not impact the contractor's General Liability loss ratios and premiums for the next several years.

In this difficult economy, the construction industry faces many challenges. There are steps that you can take that will protect your company's financial well-being and provide a competitive advantage. Understand the nuances of the project specific Builder's Risk policy, negotiate for an acceptable deductible agreement in the contract, and protect your General Liability loss experience by reporting claims under the Builder's Risk policy. These steps can help you maintain a good, professional working relationship with an owner for future projects as well as current ones.

¹ Project architects and engineers are not covered under the Builder's Risk policy; their Professional Liability policies would respond in the event of a loss caused by their design work.