2013 ISO CGL ADDITIONAL INSURED ENDORSEMENTS
AND THEIR IMPACT ON CONSTRUCTION RISKS

Not surprisingly, construction-related entities pay attention when changes are made to ISO Additional Insured (AI) endorsements given their common use in contractual risk transfer. As many will recall, the ISO 2004 amendments had a meaningful impact on the scope of AI coverage, compared to prior ISO editions.

The Insurance Services Office (ISO) has filed a series of changes to its Commercial General Liability coverage forms with April 2013 edition dates. These filings are done for a variety of reasons, including changing exposures (social media, for example), court decisions, statutory changes and feedback from brokers and insurance carriers. These 2013 CGL changes include amendments to prior ISO AI forms as well as introduction of new forms. The most important change to recognize in the 2013 ISO AI endorsements is the increased focus on aligning the scope of coverage with contract terms requiring AI coverage. Where such AI contract terms are unclear or otherwise ambiguous, the coverage afforded by the 2013 ISO AI endorsements may not necessarily align with the intent of the contracted parties.

This Blueprint focuses on select forms that impact construction risks, clarifies key differences from prior form editions and discusses new forms being introduced.

ADDITIONAL INSURED ENDORSEMENTS – KEY CHANGES

ISO’s 2013 form filing introduces new terms on all AI endorsements, including those commonly used in construction risk, such as CG 2010, CG 2037 and CG 2033. These new terms impact coverage in the following three areas:

- Coverage is restricted to the extent permitted by law
- Coverage scope is restricted to that which is required by contract
- Coverage limit is restricted to that which is required by contract

“‘The insurance afforded to such additional insured only applies to the extent permitted by law’”

This 2013 change is seen as an attempt to address the scope of coverage afforded in states where anti-indemnity laws apply to additional insured coverage, and hence avoid the need for state-specific AI endorsements.
At least 45 states have enacted laws which limit the scope of permissible indemnity in construction contracts relative to contractual indemnity provisions. A number of states extend their anti-indemnity laws to apply to additional insured coverage, or more generally, insurance. States where there exists a consistent view in this regard include CA, CO, KS, LA, MT, NM, OK, OR, TN and TX. States in which there is some question as to whether the anti-indemnity prohibition extends to insurance (in application and scope) include DE, GA and OH. There can be nuances with respect to the scope of indemnity allowed (limited or intermediate), the type of involved contract (private vs. public) and the applicability to design contracts. State-specific anti-indemnity restrictions and their applicability to insurance should be considered when evaluating the extent to which AI coverage may be intended as a contractual risk transfer mechanism.

**Coverage Scope is Restricted to That Required by Contract**

“If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.”

The 2013 AI endorsements include the same terms as those originally introduced in the ISO 2004 changes with respect to requisite liability “caused, in whole or in part” by the acts or omissions of the Named Insured (e.g., subcontractor) or the acts or omissions of those acting on behalf of the Named Insured. This 2013 change is seen as an attempt to potentially further limit the scope of AI coverage where the AI contract requirements specify a more narrow scope of coverage (e.g., vicarious liability) or, perhaps, where the requirements are otherwise unclear.

Construction contracts typically require that AI status will be arranged for the upstream contractual partner(s). Contract requirements vary widely, from simply “add us as an Additional Insured” to extensive clarifications that describe the AI coverage or reference specific ISO AI forms “or equivalent.” To the extent that the 2013 ISO AI endorsement will be used to satisfy contractual AI requirements, it is imperative that those requirements clearly delineate the intent of the parties. In the absence such clear terms, we anticipate that this changing language may be the subject of litigation seeking court interpretation.

**Coverage Limit is Restricted to That Required by Contract**

**Limits of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations; whichever is less.

This 2013 change is seen as an attempt to prevent an insurance carrier providing AI coverage from being in a position of providing greater liability limits to the AI than may have been required by contract. This is potentially the case under prior ISO form editions where, for example, an insurance carrier providing AI coverage with a $2M primary policy limit may be obligated to extend its full limit to an AI although the contract only required a $1M limit. Similar issues may arise in connection with AI coverage available through umbrella or excess coverage afforded to the downstream party. This change seems reasonable on its surface but, where the ISO 2013 form is used to satisfy contractual AI requirements, there may be some scenarios in which the coverage does not align with the intent of the contracted parties, particularly where the requirements specify separate limits for primary CGL coverage and the Umbrella/Excess. The following example illustrates this potential challenge under the ISO 2013 form.

ABC contractor and XYZ contractor enter into an agreement which requires XYZ to maintain the following coverage and include Additional Insured coverage for the benefit of ABC:

- Commercial General Liability: Limits of $1,000,000 per occurrence, $2,000,000 general aggregate, $2,000,000 completed operations aggregate
- Umbrella: Limits of $5,000,000 excess of primary/$10,000,000 general aggregate and $10,000,000 completed operations aggregate

XYZ carries a primary CGL policy with limits of 2,000,000 per occurrence, 4,000,000 for both general and completed operations aggregate and a $10,000,000 Umbrella/Excess policy.
A $3M CGL loss occurs which triggers the AI coverage. Under these 2013 ISO AI terms, the primary CGL carrier may only be responsible for providing $1M in liability limits for the benefit of the AI based on the contract requirements. The umbrella/excess carrier is not obligated to respond until the underlying $2M has been exhausted. This results in a potential coverage gap of $1,000,000 in liability limits available to the additional insured...something that clearly was not intended by contracted parties.

While some comfort can be drawn from using qualifying language in contracts such as “minimum of” or “no less than” when specifying separate primary CGL and Umbrella/Excess limits of liability, the issue may be better addressed by having the contract specify a liability limit which can be satisfied by the combination of primary CGL and Umbrella/Excess policies.

**NEW ISO ENDORSEMENTS IMPACTING AI COVERAGE**

**CG 2038 ED. 04 13 ADDITIONAL INSURED-OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS FOR OTHER PARTIES WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT**

This new endorsement mirrors the terms of ISO form CG 20 33 ed 04 13 with one important distinction: it addresses the long standing and well known limitations of the CG 20 33 form with respect to contract privity-related issues. Example: The subcontract requirements include naming the project owner as an AI under the subcontractors CGL policy, yet there exists no direct contract privity between the project owner and the subcontractor. The following illustrates the language contained in CG 2033 that has given rise to disputes under these circumstances:

Section II – Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. (Emphasis added)

Rather than amend the CG 20 33 to address this issue, ISO introduced form CG 2038 04 13 which adopts the above terms but includes an additional provision:

**CG 2038 04 13**

Section II – Who Is An Insured is amended to include as an additional insured:

1. Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy; and

2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph 1. above.
This new ISO AI form clearly contemplates AI coverage for parties who may not be in direct privity of contract but are required by contract to be included as an AI. Where such contractual requirements exist and there is a desire to use “automatic status” endorsement terms to satisfy contractual AI obligations, this new form should be preferred over the CG 2033 04 13. Note: Both the ISO CG 2033 04 13 and ISO CG 2038 04 13 are intended to apply only to ongoing operations of the Named Insured (e.g., subcontractor), or those acting on its behalf.

CG 20 01 ED. 04 13 PRIMARY AND NON-CONTRIBUTORY – OTHER INSURANCE CONDITION

This new endorsement amends the other insurance provisions contained in the CGL coverage form and stipulates that the policy will be primary and non-contributory with other insurance available to the AI. This common contractual requirement is often misunderstood relative to what standard ISO CGL coverage terms already say with respect to the priority of coverage afforded under different policies. ISO, in its commentary on this new endorsement, states that this separate endorsement is superfluous, as application of the standard CGL coverage form terms results in the same outcome. However, ISO acknowledges the request for these terms is common and has developed this endorsement for ease of complying with contractual requirements. Note: Many contracts require similarly intended terms on Umbrella/Excess policies to the extent those policies will be used to satisfy AI insurance requirements. Unlike standard ISO CGL coverage terms, many Umbrella/Excess policies contain terms which, if left unaltered, may not align as intended by the contracted parties. We recommend a review of the “other insurance” provisions contained in Umbrella/Excess policies as part of efforts to ensure compliance with the intended priority of coverage afforded to the AI. This is critical from both and upstream and downstream perspective.

SUMMARY OF CHANGES

Many insurance carriers will adopt the 2013 ISO AI forms beginning in April. As with past ISO form changes, we anticipate some friction regarding if and how the new forms may satisfy contractual AI requirements. Time will tell if these changes create issues for construction firms, as prior changes in filings have been accompanied by court cases interpreting the application of endorsement terms. Now is a good time to review contractual insurance requirements, including AI requirements, from both an upstream and downstream perspective, to ensure that the coverage is aligned with the intent of the contracting parties.

NOTE: Hundreds of non-standard (non-ISO) AI endorsements are in use by insurance carriers. Many of these endorsements are more restrictive than ISO forms and can create significant challenges at the time of a claim, generating outcomes that are inconsistent with the intent of the contracting parties. Many construction firms realize the importance of reviewing non-standard AI forms for compliance before entering into contracts. Obviously, the administrative burden associated with this practice needs to be weighed against the risk and impact of non-compliant AI endorsements in the event of a claim.

We recommend that you track statutory activity and case law developments in states where you do business. There has been a trend over the past few years of states extending their anti-indemnity laws to apply to AI coverage (e.g., LA in 2011, TX in 2012 and CA in 2013), and we anticipate that trend to continue.

For ease of comparison, we have included in the appendix a comparison chart reflecting the evolution of a few key ISO AI endorsements and form changes from 1985 to the present.

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To find out more about how Willis can deliver solutions for you, contact your Willis Client Advocate® or:

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The observations, comments and suggestions we have made in this publication are advisory and are not intended nor should they be taken as legal advice. Please contact your own legal adviser for an analysis of your specific facts and circumstances.
### WILLIS CONSTRUCTION PRACTICE

#### ADDITIONAL INSURED FORM COMPARISONS

<table>
<thead>
<tr>
<th>CG 20 10 ED 11 85</th>
<th>CG 20 10 ED 10 01</th>
<th>CG 20 37 ED 10 01</th>
<th>CG 20 10 ED 07 04</th>
<th>CG 20 37 ED 07 04</th>
<th>CG 20 10 ED 04 13</th>
<th>CG 20 37 ED 04 13</th>
<th>CG 20 33 ED 04 13</th>
<th>CG 20 38 ED 04 13</th>
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<tbody>
<tr>
<td><strong>Ties Additional Insured status to liability arising out of “your work”</strong> - i.e., the named insured’s work - for the additional insured.</td>
<td><strong>Grants coverage only with respect to the named insured’s ongoing operations (i.e., there is no coverage for completed operations)</strong></td>
<td><strong>Provides additional insured status with respect to the products-completed operations hazard in connection with the named insured’s work</strong></td>
<td><strong>Only applies to ongoing operations.</strong></td>
<td><strong>Only applies to completed operations.</strong></td>
<td><strong>Only applies to ongoing operations.</strong></td>
<td><strong>Only applies to completed operations.</strong></td>
<td><strong>Covers ongoing operations only</strong></td>
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<tr>
<td><strong>Applying the coverage to “your work” encompasses liability incurred while the named insured’s work is in progress and also the named insured’s completed operations.</strong></td>
<td><strong>Limits the term of additional insured coverage to the time period in which operations are actually being performed by the named insured. This language is a concern because coverage could potentially be eliminated if operations are still in progress but a claim arises against the additional insured after their operations are completed. ISO adopted the CG 20 37, which can be used in conjunction with CG 10 to fill this gap (see next column)</strong></td>
<td><strong>By applying the CG 20 10 ED 10 01 endorsement to provide both ongoing and completed operations coverage for the Additional Insured.</strong></td>
<td><strong>Coverage applies only for completed operations claims there is no coverage for premises and operations which can be included by applying CG 20 10 ED 10 01</strong></td>
<td><strong>Goal is to narrow the grant of coverage to the additional insured to true vicarious liability and liability arising out of the insureds (policy holders) operations for the additional insured.</strong></td>
<td><strong>Restricts coverage to that required by contract</strong></td>
<td><strong>Restricts coverage to AI (“.. arises in whole or in part”)</strong></td>
<td><strong>Must be a written contract</strong></td>
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<td><strong>Addresses a coverage requirement that is frequently imposed by project owners on contractors doing work for them - “the contractor will provide the owner with additional insured status for claims against the owner arising out of completed work.”</strong></td>
<td><strong>Later versions of CG 20 10 were revised to take away completed operations coverage, but the 11/85 version continued to be used regularly until the mid 2000’s.</strong></td>
<td><strong>The endorsement also contains a design professional liability exclusion.</strong></td>
<td><strong>Only covers BI, PD and Personal Advertising Injury caused in whole or in part by: “Your acts and omissions or the acts or omissions of others acting on your behalf”</strong></td>
<td><strong>Typically used in conjunction with CG 20 10 endorsement to provide both ongoing and completed operations coverage for the Additional Insured</strong></td>
<td><strong>Restricts limits of liability to those specified in the contract</strong></td>
<td><strong>Same wording as CG 20 10 ed 04 13 for coverage applicability to AI (“.. arises in whole or in part”)</strong></td>
<td><strong>Same limitations on coverage and limits “to the extent required by contract and also must be permissible by law.</strong></td>
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<td>ISO will file most of the 2013 revisions in April 2013. Some states and carriers will begin using these at various times so check with the appropriate carrier to determine usage.</td>
<td>This summary is for convenience only and does not attempt to capture all aspects of the various forms noted. Refer to the endorsements themselves for complete wording.</td>
<td>Any review of contractual requirements and compliance should only be done with the assistance of a qualified attorney.</td>
<td><strong>Grants additional insured status for claims against the owner arising out of “your operations.”</strong></td>
<td><strong>Grant of coverage only to that required by contract.</strong></td>
<td><strong>Restricts limits of liability to those specified in the contract</strong></td>
<td><strong>There is no requirement that a written contract be in place, just that the AI is listed on the endorsement</strong></td>
<td><strong>Additional exclusions apply to professional liability as the automatic feature could allow professional firms to be considered AI’s</strong></td>
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