

Look Before You Leap!



A Contractor's Guide To Owner Controlled Insurance Programs

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Introduction

The Problem

More and more contractors are being required to work under Owner Controlled Insurance Programs (OCIPs). At one time, these programs were limited to large single-site projects. As time goes by, they are appearing on smaller single-site projects and in the form of rolling OCIPs that cover multiple projects. Though they lack experience with these programs, average AGC members are now finding it necessary to identify and deal with the many complex issues that these programs raise.

The Solution

Very early in the project delivery process, contractors and their legal and insurance advisors need to start asking questions about any OCIPs they encounter. Contractors have every right and reason to know exactly how any such program will work, including the details of the safety and other loss control programs that will be one of the keys to its success – or failure. Contractors are and should be wary of owners that are slow to provide the details of their programs, and wary of any OCIP brokers who fail to make themselves available. If the owner intends to use an OCIP, then the owner and its broker should work out all of the details well before the owner solicits any bids or proposals to perform the work. In addition, if the owner and its broker are well-organized, the interested contractors should find few gaps or discrepancies between the OCIP and the contract documents.

By asking the right questions at the right time, contractors can discourage owners and their brokers from putting off important decisions. Contractors can also help everyone avoid confusion. The recommended “solution” to the “problem” is a relatively simple and straightforward outline of the major issues that contractors need to raise and the major points that contractors need to negotiate.

The Process

In the hope of producing such an outline, the Risk Management Committee of the Associated General Contractors of America (AGC) appointed an OCIP Task Force and assigned it the following mission: to identify the issues that contractors should consider before seeking or performing work under OCIPs, and to suggest negotiating points for contractors to explore. In addition, the OCIP Task Force sought to identify issues which require contract language to address. The Chairman of this hardworking group was Bill McIntyre and the other members were Paul Becker, Jim Boone, Tom Quinn, Steve Warnick, Mike O'Neill and Ann Rudd.

How to Use This Guide

On the following pages of this guide are comments and other guidance on thirty-nine of the issues that OCIPs typically require contractors to consider. The issues themselves are in the first column on each page. The insurance coverage that each issue may affect is in the second column. A brief discussion of each issue is in the third column.

The typical contractor's "preferred position" on each issue is in fourth column. The contact and other documents where contractors should seek to address each issue is in the fifth and final column.

Contractors can use this guide to identify potential problems. Where contractors find that they are at risk, they can also use this guide to help them determine the best way to approach the project owner or other insurance program sponsor. With the aid and assistance of this guide, contractors can identify many of their potential exposures, the best way to address their exposures, and the best places to do so.

This guide cannot, however, substitute for competent legal, accounting or other professional advice. This guide is offered with the understanding that its publisher is not engaged in providing legal advice or in rendering any other professional service.

Acronyms

For convenience, this manual uses the following acronyms to refer to the various policies or coverages that a particular issue may affect:

AU/L = Automobile Liability AV/L = Aviation Liability B/R = Builders Risk CGL = Commercial General Liability E/O = Errors and Omissions	EPL = Employment Practices Liability P/L = Pollution Liability UMB = Umbrella Coverage W/C = Workers Compensation W/L = Watercraft Liability
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This manual also uses these five acronyms to refer to the various documents that may be the best place to address a particular issue:

CC = Construction Prime Contract CRIP = Contractor's Regular Insurance Program CS = Construction Subcontracts	IB = Instructions to Bidders/Request for Proposals IM = Insurance Manual
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Are Any Firms, Operations or Locations Omitted or Excluded from the OCIP?

Issue	Affected Coverage	Description	Preferred Position	Where to Address
1. Specific Firms or Operations (such as Security Guards, Suppliers or Truckers, or Blasting, Demolition or Janitorial Services)	W/C CGL UMB B/R	<p>Ideally, the OCIP will cover all work at the project site. Normally, it does not.</p> <p>OCIPs typically exclude suppliers, material vendors, haulers and truckers. It is also common for them to exclude certain high hazard operations, such as blasting and demolition. Sometimes, OCIPs also exclude all contractors or subcontractors below a certain size or tier. There are no industry standards for either including or excluding different firms or operations, and as a result, different OCIPs take different approaches.</p> <p>Under these circumstances, it is important for the contractor to receive a clear written statement of “who is in” and “who is out” of the OCIP. Among other things, this statement should define the “on site labor” that the OCIP will cover (except to the extent that the OCIP may expressly provides otherwise). Although typically excluded, suppliers, material vendors and others often perform some work on the project site.</p> <p>It is also important for all of the potentially affected firms to have all of this information in advance of the deadline for submitting bids, quotes or proposals. If that is impossible, because the final details of the insurance program are still being settled, the contractor should attempt to obtain some level of commitment to minimum parameters for the insurance program. The program sponsor should not attempt to redraw the boundaries of the insurance program – in terms of either the</p>	The contractor receives a clear written statement of which firms and operations fall under the OCIP and which do not. In addition, the program sponsor provides its written assurance that the insurance requirements for excluded firms and operations will be reasonable.	IB CC IM CS

		<p>firms or the operations that the OCIP will cover – <u>after</u> the owner has awarded the construction contract.</p>		
<p>2. “Furnish and Install” Contractors</p>	<p>W/C CGL UMB B/R</p>	<p>These contracts can be particularly troublesome. Often the insurance manual will have very specific language to the effect that the OCIP only applies “at the project site” and the insurance carrier may take this language literally.</p> <p>The problem is that a “furnish and install” contractor may subcontract the actual installation or erection of the project component that the firm is responsible for providing. Under these circumstances, the “furnish and install” contractor may not have any on site payroll exposure.</p> <p>Nevertheless, there are times when this contractor may well be on the project site. It may, for example, need to check its subcontractor’s work. In addition, even if the “furnish and install” contractor will not have any onsite payroll exposure, it is still important for this contractor, as well as its subcontractor, to be enrolled in the OCIP.</p> <p>Otherwise, the OCIP may lose its contractual integrity. While the OCIP need not (and normally will not) cover off site fabrication in a contractor’s shop, it is important for the program sponsor to preserve the contractual chain of command running from the prime contractor to any second or lower tier subcontractors. Any lawsuit involving the “furnish and install” contractor is also likely to involve its subcontractor.</p> <p>One approach is to define “on site operations” and then make it clear that the OCIP applies to all such operations, wherever they may lie in the contractual chain of command.</p>	<p>The contractor receives a clear written statement that the program sponsor will enroll any second or lower tier subcontractor that otherwise qualifies for coverage even if working for a subcontractor that does not, itself, have any on site payroll exposure.</p>	<p>IB CC IM CS</p>

3. Staging Areas and Fabrication Facilities	W/C CGL UMB B/R	<p>As noted elsewhere, the insurance manual may have very specific language to the effect that the OCIP only applies “at the project site.”</p> <p>Particularly where this is true, the contractor needs to take a hard look at the way that the construction contract and the insurance manual define or describe the “project site.” Often, the language found in the two documents is different. Even if the same, the language may be ambiguous.</p> <p>It is important for all of the potentially affected firms to get answers to any questions they may have about staging areas, fabrication facilities, warehouses or transportation operations. In addition, it is appropriate for these firms to request this information before they have to submit their bids, quotes or proposals.</p> <p>The program sponsor can normally add these locations to the OCIP if they are well defined and dedicated to the project. The biggest problem may be the permanent shop that a contractor uses to fabricate the components of many different projects. It is often impossible to separate the shop work performed for the covered project from the shop work performed for other projects.</p> <p>One option is to seek broad coverage of all losses “emanating from” the “project site,” subject to specific exclusions. In the alternative, the parties could identify any areas that may be in doubt and then provide that the OCIP applies to all work performed in those areas.</p> <p>Once the project has begun, and a loss has been incurred, the parties should resolve any doubts by determining the carrier that received the premium for the exposure. The loss should normally follow the premium.</p>	The OCIP provides broad coverage of all losses “emanating from” the “project site” subject to specific exclusions.	IB CC IM CS
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4. Incidental Travel	W/C CGL UMB B/R	<p>This can become an issue when, for example, a craft worker must drive from the project site to another location to pick up documents, equipment or materials. As noted elsewhere, the insurance manual may have language to the effect that the OCIP only applies “at the project site” and the insurance carrier or broker may take this language literally.</p> <p>The workers compensation component of the OCIP will normally cover a worker travelling from the covered project to pick up something for the same project. It may not, however, cover the employee while he or she runs to a second project – even if the employee is on his way back to covered project.</p> <p>Before the work begins, the contractor should raise the issue. If the OCIP already provides for broad coverage of all losses “emanating from” the “project site,” then the only question would be whether such incidental travel is among the specific exclusions. If not, then the question would be whether the insurance manual addresses incidental travel in any other way.</p> <p>Once the project has begun, and a loss has been incurred, the parties should resolve any doubts by determining the carrier that received the premium for relevant period of time. Once again, the loss should normally follow the premium.</p>	The OCIP provides broad coverage of all losses “emanating from” the “project site” subject to specific exclusions.	IB CC IM CS
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Are There Any Periods of Time Omitted or Excluded from the OCIP?

Issue	Affected Coverage	Description	Preferred Position	Where to Address
5. Warranty Work and Callbacks	W/C CGL UMB B/R	<p>OCIPs do not normally cover warranty work. The reason is that, in most cases, the owner calls the contractor back to the project after the OCIP has closed out. In addition, in practice, most contractors do not report their few hours of warranty work to the OCIP administrator.</p> <p>Whatever the case, it is important for the contractor to confirm that the OCIP will or will not cover warranty work or callbacks.</p> <p>If the OCIP excludes them, the contractor should continue its normal coverage for these items, even while working under the OCIP. If the OCIP covers these items but only for a limited period of time, the contractor should promptly remove any related exclusions from its regular insurance program as soon as the contractor completes its work on the project.</p> <p>It is appropriate for all of the potentially affected firms to request information about these items in advance of the deadline for submitting bids, quotes or proposals. It is also appropriate for these firms to seek written assurance that they will be able to exclude the cost of continuing their coverage for warranty work, callbacks and/or completed operations from any insurance credits that the OCIP requires the firms to give to the owner.</p>	<p>The contractor receives a clear written description of the point at which the OCIP will cease to provide coverage and (1) an opportunity to price its work accordingly and/or (2) to exclude the cost of covering warranty work, callbacks and/or completed operations from the credits that the OCIP requires the firm to give to the owner.</p>	<p>IB CC IM CRIP CS</p>

6. Extended Completed Operations	CGL UMB	<p>This is a particularly important issue for contractors to consider. Completed operations coverage under an OCIP typically continues for only three years from the date of substantial completion. A state's statute of repose and/or its common law may extend a firm's exposure to tort liability for a much longer period of time. The indemnification clause in the construction contract may also extend the firm's exposure for more than three years.</p> <p>Even if the OCIP provides coverage for completed operations, the OCIP probably does not insure the contractor against the risk of loss for the full term of its exposure to tort or contractual liability. The contractor should endorse its regular insurance program to pick up the coverage for completed operations at the point at which the OCIP coverage will expire.</p> <p>While owners may be reluctant to make any allowance for the cost of continuing this coverage, it is also appropriate for the contractor to seek the owner's approval to exclude the cost of continuing this coverage from any insurance credits that the OCIP requires the firm to give to the owner (or an agreement to reimburse the contractor for the cost of continuing this coverage, depending on other terms of the construction contract).</p> <p>At a minimum, the OCIP should provide coverage for completed operations for a period of at least five years. The contractor may well be able to justify much more, given the duration of most statutes of repose.</p>	<p>The contractor receives a clear written description of the point at which the OCIP will cease to provide coverage and an opportunity (1) to price its work accordingly or (2) to exclude the cost of coverage for extended completed operations from any insurance credits.</p>	<p>IB CC IM CRIP CS</p>
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Are There Any Other Omissions or Exclusions that You Need to Consider?

Issue	Affected Coverage	Description	Preferred Position	Where to Address
7. Automobile Liability	AU/L	<p>OCIPs typically omit this coverage. The contractor therefore needs to continue the coverage that it already has in place.</p> <p>In addition, the contractor should seek written assurance that it will be able to exclude the cost of continuing such coverage from any insurance credits that the OCIP would otherwise require the contractor to give to the owner.</p>	The contractor receives written assurance that it will be able to exclude the cost of continuing its coverage for automobile liability from any insurance credits.	IB CC IM CS
8. Design/Build Elements of the Project	CGL E/O	<p>If the construction contract requires the contractor to assume the responsibility for the design as well as construction of any elements of the project, the contractor needs to ensure that the OCIP provides professional errors and omissions coverage for the contractor or its subcontractors.</p> <p>Commercial general liability policies normally do not provide such coverage. If certain elements of the project are design/build, but neither the owner nor the broker have focused on that fact, the OCIP may omit this key coverage.</p> <p>If so, the contractor has to determine the specific coverage requirements for the design/build elements of the project and then negotiate with the owner and broker to modify the OCIP to meet those requirements. In the alternative, the contractor should continue or to purchase its own coverage for any professional errors or omissions. In addition, the contractor should seek written assurance that it will be able to exclude the cost of continuing</p>	The owner and broker have clearly identified any design/build elements of the project, determined the coverage requirements for that work and written the OCIP to meet those requirements. In addition, the contractor receives written assurance that it will be able to exclude the cost of continuing its own coverage from any insurance credits.	IB CC IM CS

		or purchasing such coverage from any insurance credits that the OCIP would otherwise require the contractor to give to the owner.		
9. Damage to the Work	B/R CGL UMB	<p>It is important for the contractor to determine exactly how the OCIP deals with this important exposure. First, the contractor needs to examine the builders' risk policy that the owner proposes to include. The contractor needs to ensure that the policy provides broad coverage and names all parties to the project. The contractor also needs to ensure that the owner will require all parties, including the owner, to execute waivers of subrogation.</p> <p>Second, the contractor needs to examine the CGL policy, which will normally cover damage to the work <u>except</u> for damage that the contractor's work causes to its own work. The typical policy covers any damage that the contractor's work causes to a subcontractor's work, or damage that one subcontractor's work causes to another subcontractor's work. Most contractors modify their CGL policy to provide coverage for damage to their own work arising <u>out</u> of their own work. (Except for that particular part of the work that causes the loss.)</p> <p>If the OCIP does not amend the standard exclusion in the CGL policy this broader coverage, it increases the contractor's uninsured risk of liability for damage to the work. Some owners may be tempted to suggest that they have no obligation to provide coverage for any damage that may result from the contractor's own negligence. The short answer is for the contractor to purchase and carry liability insurance for the specific purpose of protecting themselves from such liability.</p> <p>This broader liability coverage is something that the contractor would normally have and something that the owner should provide.</p>	The contractor verifies that the builders risk policy OCIP provides broad coverage, that it names all parties, that the owner will require all parties to execute waivers of subrogation and that the CGL exclusion is properly amended.	IB CC IM

		<p>If the owner excludes this liability coverage from the OCIP, the contractor should seek written assurance that it will be able to exclude the cost of continuing its own coverage from any insurance credits that the OCIP would otherwise require the contractor to give to the owner.</p>		
10. Hazardous Materials and Other Pollutants	P/L	<p>Although it can be significant, OCIPs typically fail to insure the contractor against the risk of pollution liability, including but not limited to the risk of disturbing pollutants or releasing them into the environment.</p> <p>If the OCIP omits or excludes this coverage, and particularly if the construction contract requires the contractor to indemnify the owner and hold it harmless from any liability for pollution claims, the contractor may need to continue its coverage for pollution liability or to purchase such coverage.</p> <p>If the contractor needs to purchase separate coverage, it should also seek written assurance that it will be able to exclude cost of continuing or purchasing such coverage from any insurance credits that the OCIP would otherwise require the contractor to give to the owner.</p>	<p>The OCIP covers any potential liability for pollution claims or the contractor receives written assurance that it will be able to exclude the cost of purchasing such coverage from any insurance credits.</p>	<p>IB</p> <p>CC</p> <p>IM</p> <p>CS</p>
11. Aircraft or Watercraft	AV/L W/L	<p>Many contractors carry no coverage for aircraft or watercraft, and not surprisingly, OCIPs also tend to overlook the occasional need for such coverage.</p> <p>That need arises where, for example, the contractor intends to make a helicopter lift or to employ work boats, barges or floating platforms.</p> <p>At the outset, the contractor needs to ask whether this exposure exists. For example, the contractor needs to see whether the construction contract contemplates hull coverage, water borne</p>	<p>The OCIP provides all of the aviation and watercraft liability coverage that the project may require. In the alternative, the contractor receives written assurance that it will be able to exclude the cost of purchasing such coverage from any insurance credits.</p>	<p>IB</p> <p>CC</p> <p>IM</p> <p>CS</p>

		<p>property or slung cargo. The contractor should also look for any requirement that it transport materials or equipment from watercraft to the project site. If the contractor identifies any watercraft or aviation exposures, the contractor also needs to know how the contract addresses them.</p> <p>OCIPs rarely provide this coverage. If the contractor needs it, the contractor will normally have to purchase a separate policy. In that case, the contractor should also seek written assurance that it will be able to exclude the cost of purchasing such coverage from any insurance credits that the OCIP would otherwise require the contractor to give to the owner.</p>		
12. Contractor's Consequential Damages	CGL B/R UMB	<p>The contractor needs to question whether the OCIP provides coverage for any consequential losses that the contractor may suffer from any insured perils. The contractor's CGL policy normally covers any loss that meets the definition of "property damage."</p> <p>If the OCIP does not cover such losses, the contractor should continue any coverage that it already has in place or purchase additional coverage. In addition, the contractor should seek written assurance that it will be able to exclude the cost of continuing or purchasing coverage for any consequential losses from any insurance credits that the OCIP would otherwise require the contractor to give to the owner.</p>	The OCIP covers any consequential losses arising out of insured perils or the contractor receives written assurance that it will be able to exclude the cost of purchasing coverage for such losses from any insurance credits.	IB CC IM CS
13. Indemnification	W/C CGL UMB	The contractor needs to find out whether the indemnification clause in the construction contract is broader than the insurance coverage that the OCIP will provide. The contractor could well find that the indemnification clause holds the contractor liable for any losses that the owner may suffer from the pollution of the environment, professional errors or omissions, railroad	The risks that the contractor must assume should be no greater than the coverage that the OCIP provides. In the alternative, the contractor receives written assurance that it may	IB CC IM

	<p>B/R</p> <p>P/L</p> <p>AV/L</p> <p>W/L</p> <p>E/O</p>	<p>exposures or the contractor's employment practices even though the OCIP omits or excludes coverage for such risks.</p> <p>The contractor similarly needs to question whether the construction contract would hold the contractor liable for any business interruptions or other consequential losses that the owner may suffer – and if so, whether the builders risk policy or liability policies provide coverage for such losses.</p> <p>If the contractor's duty to defend and indemnify the owner is broader than the OCIP coverage, the contractor should maintain any broader coverage that it already has in place or purchase additional coverage.</p> <p>In addition, the contractor should seek written assurance that it will be able to exclude the cost of maintaining or purchasing coverage for any gaps between the indemnification clause and the OCIP coverage from any insurance credits that the OCIP would otherwise require the contractor to give to the owner.</p>	<p>exclude the cost of maintaining or purchasing coverage for any gaps between the two from any insurance credits.</p>	CS
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Are There Adequate Limits on the Coverage that the OCIP Provides?

Issue	Affected Coverage	Description	Preferred Position	Where to Address
14. Shared Limits of OCIP Coverage	CGL UMB	<p>The contractor needs to determine the total (primary plus umbrella) limits of the coverage that the OCIP will provide. In each instance, the question is whether the limit is adequate to protect the contractor from the risk of a catastrophic event.</p> <p>Whether the limits are adequate will depend on several factors. Some are whether the limits are reinstated annually, span the entire life of the project or apply per project. In the case of a rolling-wrap-up, the contractor also needs to compare the limits with the total value of all work subject to the limits.</p> <p>Whether the limits are adequate may also depend on whether the contractor has to share the limits with the project owner, the subcontractors and any others working on the project. Normally, these limits are shared.</p> <p>In advance of the deadline for submitting bids, quotes or proposals, the contractor should seek a clear understanding of the way that the OCIP limits will work. Whether shared limits are adequate may ultimately depend on the way the OCIP prorates the coverage among the many insureds. What would happen if two or more of the insureds found themselves jointly liable for a judgment that exceeded the available limits of the OCIP coverage? In the past, owners, brokers and insurance carriers have had trouble telling contractors exactly how their OCIPs would respond to various scenarios, making it important for contractors to put its questions in writing for a written response.</p>	<p>If the limits of the OCIP coverage are shared limits, (1) the OCIP limits are on a per occurrence basis, (2) they are high enough to cover a catastrophic event and (3) they provide for automatic reinstatement for rolling OCIP limits should be provided on a per project basis. In addition, the contractor receives a clear written statement that it will be entitled to exclude the cost of maintaining its own umbrella policy from any insurance credits.</p>	<p>IB</p> <p>CC</p> <p>IM</p> <p>CS</p>

		<p>.The contractor should look for, and if necessary, seek a contractual provision that would require the project owner to purchase a reinstatement of the original limit of the umbrella policy if a catastrophic event prematurely exhausted the OCIP limits.</p> <p>If the project owner is unwilling to raise the limit of the umbrella coverage to an adequate level, or provide for the reinstatement of such coverage, the contractor may find it necessary to maintain its own umbrella policy. In that situation, the contractor should, however, be sure to make its policy secondary to the umbrella policy included in the OCIP. In addition, the contractor should seek a clear written statement that it will be entitled to exclude the cost of maintaining its own umbrella policy from any credits that the OCIP will require the firm to give to the owner.</p>		
15. Separation of Insureds	CGL UMB	<p>Most CGL policies include a provision to the effect that all of the insureds will have the same rights and coverage, except to the extent that the insureds share the limits of coverage. This provision can be very important where, for example, two more or more of the insureds dispute the responsibility for a particular loss. The provision would normally entitle each of the insureds to its own attorney. In this situation, the duty to defend can and should be broader than the duty to pay.</p> <p>Because OCIPs insure multiple entities, any restrictions on the normal separation of insureds can be a problem. The contractor needs to identify any such restrictions, and if the contractor finds any restrictions, it may have to continue at least a portion of its normal coverage for the same items.</p>	The OCIP includes the standard language on the separation of insureds. In the alternative the contractor receives a clear written statement that it will be able to exclude the cost of continuing its normal coverage for legal and other expenses from any insurance credits.	IB CC IM CS

		<p>It is appropriate for the contractor to seek this information in advance of the deadline for submitting any bids, quotes or proposals.</p> <p>In addition, it is appropriate for the contractor to seek a clear written statement that it will be able to exclude the cost of continuing its normal coverage for any legal or other expenses that the OCIP may exclude from any insurance credits that the OCIP requires the firm to give to the owner.</p>		
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How Does the OCIP Relate to Your Regular Insurance Program?

Issue	Affected Coverage	Description	Preferred Position	Where to Address
16. Primary and Excess Coverage	CGL UMB	<p>It is important to make it clear that the OCIP will provide primary coverage. The contractor does not want to run the risk that its own carriers may have to bear all or part of a loss before the OCIP has exhausted all of its limits.</p> <p>If loosely written, the insurance manual may leave an opening for the OCIP carrier to argue, for example, that the owner's umbrella coverage is excess to everything that the contractor has also put into place.</p> <p>The contractor should discuss the relationship between the OCIP and the contractor's regular insurance program with the contractor's broker or insurance carrier. Among other things, the contractor should ask the latter for an endorsement expressly declaring that the OCIP will provide primary coverage.</p> <p>The contractor should not seek to exclude OCIP exposure from its CGL and umbrella policies but should endorse those policies to provide coverage (1) in excess of the OCIP coverage and (2) where differences in conditions would apply.</p>	The OCIP provides that all of its coverage is primary and the contractor arranges its commercial general liability and umbrella policies only to provide excess coverage and to cover any differences in conditions.	IB CC CRIP CS
17. Difference in Conditions (DIC)	CGL UMB	If the contractor can identify any differences in the conditions that its insurance policies normally cover, or any differences in the limits, the contractor should seek difference in	The contractor receives a clear written statement to the effect that the owner	IB IM

	B/R	conditions (DIC) coverage. Moreover, the contractor should make it clear to the owner that the cost of purchasing any such coverage is an expense of constructing the project and properly charged to the project.	will compensate the contractor for the expense of any DIC coverage that the contractor may require.	CC CS CRIP
18. OCIP Exclusion from the Contractor's Regular Insurance Program	CGL W/C UMB	<p>If an OCIP is in place, and the contractor has paid attention to the relationship between the OCIP and its regular insurance program, the latter plays a very limited role. The contractor's regular program merely provides excess coverage and addresses any differences in conditions.</p> <p>The question is whether the contractor's carrier will make an appropriate adjustment to the premiums that it charges the contractor for its regular program. Project owners are generally unwilling to pay their contractors for the cost of maintaining duplicate coverage.</p> <p>To coordinate coverage, and to qualify for an appropriate adjustment, the contractor should seek to ensure that its carrier will exclude any exposures that fall under the OCIP from any calculation of the cost of the contractor's regular insurance program.</p>	The contractor and its carrier agree to endorse the contractor's regular insurance policies to exclude any exposures that fall under an OCIP from any calculation of the contractor's insurance premiums. <i>(Note: NCCI and ISO have such endorsements in their forms manuals.)</i>	IB CC IM CRIP CS

How are You Supposed to Calculate Your Premium Deductions?

Issue	Affected Coverage	Description	Preferred Position	Where to Address
19. Basis for Each Deduction	W/C CGL UMB B/R	<p>The contractor needs to determine exactly how the owner will expect the contractor to calculate the insurance credits that the owner expects for each line of coverage. What discounts, credits (i.e., deductible or SIR credits) or rate variances will the owner allow or disallow? How does the owner propose to handle “flat rated” coverages?</p> <p>The appropriate deduction for umbrella coverage can be particularly difficult to determine because the contractor often pays a flat premium for such coverage and the OCIP causes no reduction in the contractor’s premium.</p>	<p>The owner provides a clear formula for calculating any insurance credits, including examples.</p> <p>Where “Flat” umbrella premiums are paid, the contractor should not include a deduction for their umbrella.</p>	IB CC IM CS
20. Deductibles and Penalties	CGL B/R W/C	<p>The contractor needs to identify any deductibles and any penalties that the OCIP may contemplate and to determine whether it will be responsible for them.</p> <p>The key question is whether the owner has any intention of passing any deductibles or penalties along to the contractor. If so, the contractor needs to ask whether any such amounts apply to “all risks,” including acts of God, without regard to the contractor’s negligence or other culpability.</p> <p>If the liability for deductibles or penalties will depend on the contractor’s negligence, the contractor also needs to determine (1) how the owner or broker will decide whether the</p>	<p>The contractor receives a clear written statement that the owner will not pass along any deductibles or penalties or, in the alternative, that the owner understands and accepts that it will only receive a partial credit -- proportionate to the coverage that the owner is providing.</p>	IB CC IM CS

		<p>contractor is at fault and (2) whether the contractor will have any opportunity to challenge any finding that it is at fault.</p> <p>The contractor may find it useful to point out that workers compensation and builders risk are intended to be “no fault” policies. Introducing negligence or any other standards of culpability into either area therefore conflicts with at least one of their central purposes.</p> <p>If the owner intends to pass along any deductibles or penalties, the contractor should also make it clear that the OCIP is not providing full coverage. Under those circumstances, the contractor may be entitled to some assurance that owner will not expect the same credit that it would get for providing full coverage.</p> <p>Most contractors will not accept a deductible of more than \$5,000 on their builders risk. At a minimum, the contractor should be entitled to exclude the cost of buying down any higher deductible from any insurance credit that the OCIP will require the contractor to give to the owner.</p>		
21. Insurance Credit Worksheet	W/C CGL UMB B/R	<p>At the time of bid or enrollment in the OCIP, the contractor will usually be required to complete a worksheet to identify the amount of insurance cost to be eliminated from its final price. <u>Beware</u>. Some of these worksheets do not provide space to incorporate schedule credits, premium discounts and the like. The unwary contractor can be lured into overstating the amount of credit due.</p> <p>The contractor and the program sponsor also need to reach an understanding on how they will handle any disputes, mistakes or changed circumstances. What happens if the contractor’s</p>	The owner or its broker prepares a worksheet that not only lists all of the obviously relevant items but also leaves space for the contractor to add and explain other items that may also bear on the amount of the credit due. The contractor has an opportunity to verify all of	IB CC IM CS

		<p>experience modifier either rises or falls? What about the regular insurance policies that are likely to come up for renewal during the life of the project?</p> <p>Contractors should also be aware that some owners decide to use OCIPs only after making or receiving some estimate of the contractors' own cost of providing insurance for the project. Contractors are rarely involved in the process and the resulting estimates may or may not be accurate. Nevertheless, if the owner's "virtual savings" fail to materialize, the contractor's relationship with the owner can suffer.</p> <p>It is possible and perhaps most appropriate to focus on the amount the contractor has put into its bid, regardless of any other factors.</p>	the identified rates and credits.	
22. Premium Overruns and Underruns	W/C CGL UMB B/R	<p>In advance of the deadline for submitting any bids, quotes or proposals, the owner should inform all of the potentially affected firms of how the owner intends to handle payroll overruns or underruns and the resulting departures from the expected insurance premiums. The owner needs to be "up front."</p> <p>If the owner is asking the contractors to include insurance in their bids or proposals (and intends to use the gross figures to award the contract), then premium overruns and underruns should cut both ways. In other words, the owner should be entitled to compensation for any overruns and the contractor should be entitled to compensation for any underruns.</p> <p>If the owner is taking bids or proposals (and intends to award the contract) net of insurance, the owner may still be entitled to compensation for any overruns but disinclined to share the savings from any premium underruns. If the bids or proposals are net of insurance, and the bidders or proposers are entitled</p>	At the very outset, all potential bidders or proposers receive a clear written statement of the basis on which the owner will award the contract, including an explanation of exactly how the owner will handle any premium overruns or underruns.	IB CC IM CS

		<p>to share the savings from any premium underruns, competitors may be tempted to manipulate the system. In that situation, they could purposely overstate their payroll and insurance premium credit in the hope of appearing to be low – and then make up the difference when the owner realized savings from the inevitable “underrun.”</p> <p>The parties also need to address how they will handle any change orders.</p>		
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How does the Owner or its Broker Intend to Administer the OCIP?

Issue	Affected Coverage	Description	Preferred Position	Where to Address
23. OCIP Documents	W/C CGL UMB B/R	<p>Every OCIP has its own insurance, safety and claims procedure manuals. At the outset, it is important for the contractor to ensure that the owner incorporates these manuals into the other contract documents for the project. The reason is that these documents require the insured contractors and subcontractors to accept responsibilities that the other contract documents do not even address. If these responsibilities are not made contractual obligations, the contractor could find itself in a precarious position. In particular, the contractor could find it difficult to compel lower tiers to comply with all elements of the insurance program.</p> <p>If the construction contract fails to incorporate the OCIP documents, or to impose any contractual obligation to comply with such documents, the contractor's own obligation to do so may also be in serious doubt. The contractor may or may not have an obligation to perform any functions that the OCIP documents purport to assign to the contractor.</p> <p>To avoid any confusion, and to reduce the potential for any dispute, the construction contract should clearly identify the OCIP documents and incorporate them by reference, as if they had been included in the body of the contract itself. Examples of these documents would include anything that defines the project site, explains who is and is not covered, sets forth program enrollment procedures or forms, outlines</p>	The construction contract clearly identifies all of the OCIP documents and incorporates them by reference.	IB CC IM CS

		coverage under the program or the key exclusions, establishes insurance credit calculation procedures or provides worksheets, defines audit procedures, provides key contact information, determines accident or claim reporting procedures, determines the insurance that program participants have to provide, sets payroll reporting or auditing procedures, or sets safety program requirements, such as modified duty or drug testing programs.		
24. Contractor's Responsibilities	W/C CGL UMB B/R E/O	<p>Because the costs of administering an OCIP are indirect and often hidden, owners and their brokers tend to minimize them. Nevertheless, the costs are real and someone will have to incur them.</p> <p>In advance of the deadline for any bids or proposals, the contractor should ask the owner and/or its broker clearly to identify any administrative functions that either or both of them will expect the contractor to perform. Will the contractor be responsible for setting up meetings between the OCIP administrators and the subcontractors on the project? Will the contractor be responsible for ensuring that all subcontractors (1) enroll in the program, (2) provide the required documentation, (3) furnish certificates of insurance or (4) provide timely payroll reports?</p> <p>If so, the contractor should also ask the owner how it proposes to compensate or reimburse the contractor for performing such functions.</p> <p>The contractor also needs to assess the potential for professional liability for any errors or omissions in the administration of the OCIP, and to find out whether the OCIP covers this risk. If not, the contractor has to persuade the owner or its broker to modify the OCIP.</p>	The owner or its broker clearly identifies the administrative functions that the OCIP will require the contractor to perform and the way that the owner proposes to compensate or reimburse the contractor for performing those functions. At the same time, the owner or broker assume all responsibility and potential liability for the administration of the OCIP.	IB CC IM CS

		<p>In the alternative, the contractor has to continue or to purchase its own coverage for any such errors or omissions. In that case, the contractor should also seek written assurance that it will be able to exclude the cost of continuing or purchasing such coverage from any insurance credits that the OCIP would otherwise require the contractor to give to the owner.</p>		
25. Subcontractor Deductions	W/C CGL UMB B/R	<p>The contractor needs to determine whether it will have to bear the ultimate responsibility for subcontractors' deductions. If so, the contractor also needs to seek an up-front agreement on the rates, job classifications and experience modifiers that the broker will use throughout the life of the project.</p> <p>Where the contractor has to bear this responsibility, the contractor may well find that any disagreements between the owner and the subcontractors end up straining the contractor's own relationships with the latter. At some point, the contractor may have to use its position to compel subcontractors to comply with decisions that the owner has made.</p> <p>There are, however, ways to make this responsibility easier for the contractor to bear. The contractor should, for example, seek assurance that the broker will give the contractor timely notice any problems with any subcontractor's deductions. Once a subcontractor has been fully paid, it can be very difficult to ensure compliance with the insurance program.</p> <p>The contractor should also ask whether the subcontractors' insurance deductions will be based on a sliding-scale that accounts for any differences in the limits of the coverage that the OCIP requires for smaller subcontracts.</p> <p>A third question is whether the OCIP requires deductions from literally every subcontractor, or whether, in the alternative, it</p>	<p>The contractor receives written confirmation of the rates, job classifications and experience modifiers that the broker or other program administrator will use throughout the life of the project. The contractor also receives a written assurance that the broker or other program administrator will provide timely notification of any concerns regarding subcontractor deductions.</p>	IB CC IM CS

		<p>exempts small subcontractors performing only small amounts of work. In the past, prime contractors have found that the administrative cost of pursuing deductions from small subcontractors can exceed the potential savings. Even if it is better to enroll everyone in the insurance program, it may make sense to forego deductions from any firm performing less than \$25,000 in work on the project.</p> <p>In the absence of an agreement on the rates, job classifications and experience modifiers, the contractor may find it difficult to deal with any misclassification of a subcontractor's employees, or any change in its experience modifier, during the life of the project.</p>		
26. Safety Services	W/C CGL UMB B/R E/O	<p>In advance of the deadline for any bids or proposals, the contractor should ask the owner or its broker clearly to identify any safety services that either or both of them will expect the contractor to perform. Does the owner expect the contractor to exceed OSHA standards? Will the owner provide any resources that the contractor may need to meet any higher standards that the contractor has set for itself?</p> <p>If OCIP requires the contractor to implement a drug program, or a return-to-work program, the contractor also needs to ask the owner how it proposes to compensate or reimburse the contractor for providing those services.</p> <p>The contractor also needs to assess the potential for professional liability for any errors or omissions in the performance any safety-related services, and to find out whether the OCIP covers the risk of such liability. If not, the contractor also has to encourage the owner or broker to modify the OCIP.</p>	The insurance manual clearly identifies any specific safety requirements imposed on the contractor or its subcontractors and the construction contract expressly incorporates that manual. The OCIP provide broad coverage for any errors or omissions in the performance of any safety-related services.	IB CC IM

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		<p>In its discussions with the owner or its broker, the contractor should point out that it does not have the same legal protection that an insurance carrier would normally have for any safety-related services that the carrier may provide. Nor do most state statutes on workers compensation protect contractors from third-party-over actions.</p> <p>In the alternative, the contractor has to continue to purchase its own coverage for any such errors or omissions. In that case, the contractor should also seek written assurance that it will be able to exclude the cost of continuing or purchasing such coverage from any insurance credits that the OCIP would otherwise require the contractor to give to the owner.</p>		
27. Certificates of Insurance	W/C CGL UMB B/R	<p>Contractors need to track their subcontractors' certificates of insurance and most have developed a set of specific procedures for doing so.</p> <p>The problem is that an OCIP will typically require the contractor to modify those procedures. While the contractor still has to request, validate and file certificates of insurance for all exposures that fall outside the OCIP (such as automobile liability and offsite exposure for workers compensation), most of the OCIP manuals call for all subcontractors to submit their certificates of insurance to the broker or other OCIP administrator.</p> <p>To avoid confusion and still meet its own requirements, the contractor needs to ensure that the administrator will promptly forward copies of all subcontractors' certificates of insurance to the contractor. Unfortunately, owners and their brokers are typically slow to get this done.</p>	<p>The construction contract and the insurance manual expressly provide that the OCIP administrator will promptly forward copies of all subcontractors' certificates of insurance to the contractor and that the administrator will support and cooperate with the general's contractors effort to ensure that all subcontractors are properly enrolled in the OCIP.</p>	IB CC IM CS

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28. Premium Audits	W/C CGL UMB B/R	<p>Contractors need timely and accurate premium audits. Otherwise, they cannot ensure the accuracy of experience rating data. They may also have trouble either collecting or paying retainage. Nevertheless, the contract and insurance documents frequently omit any reference to such premium audits, and when working under OCIPs, contractors have often found that such audits are neither timely nor accurate.</p> <p>It is important for the contractor to find out how the program manager intends to handle such audits, and if possible, to seek some way of triggering a timely audit. It is difficult to get premium data from a subcontractor once that firm leaves the job site.</p> <p>The contractor is an insured and the insurance carrier therefore owes the contractor a duty to perform the premium audits in a timely and accurate manner.</p>	The contractor has the right to trigger an audit, and to have it completed, before a subcontractor's retainage is due. The insurance manual establishes a procedure for the premium audit, and the construction contract expressly incorporates that manual.	IB IM CC CS
29. Loss Runs and Loss Data	W/C CGL UMB B/R	<p>Losses suffered under an OCIP can be just as detrimental as losses suffered elsewhere. Both affect a construction firm's future experience rating. As a result, the contractor needs to be involved in the claims management process and to review its loss data for any work performed under an OCIP. It is important for the construction firm to review all such data before it is filed.</p> <p>Before starting to work under an OCIP, the contractor should seek assurance that it will receive at least quarterly loss runs. Contractors who take an aggressive approach to claims management need this information.</p> <p>Some brokers may insist that they can provide loss runs only with the approval of "their client," meaning the owner. If that should occur, the contractor should remind the broker and the owner that contractor <u>is</u> the broker's client.</p>	The contractor receives an up-front commitment from the program sponsor that the contractor will be involved in the claims management process and that the carrier will provide loss runs at least quarterly. The contractor can count on having an opportunity to review and approve all loss data before it is filed with the applicable rating bureaus.	CC IM

30. Experience Modifier Filings	W/C	<p>While the contractor should try to exclude any exposures that fall under the OCIP from any calculation of the premiums for its regular insurance program, the contractor needs to ensure that its workers compensation carrier includes its experience under the OCIP in any future calculation of its experience modification rate (EMR).</p> <p>Several things can delay the filing of the unit statistical information that the workers compensation carrier needs. Sometimes, the problem is the administrative process. Other times, the contractor causes the delay. It may be slow to provide its payroll records. Brokers and carriers complain that they cannot get data from a contractor once it has completed its work and left the jobsite.</p> <p>All too often, however, the OCIP broker and carrier pay too little attention to the contractor and its subcontractors, on the false premise that they are only working for the owner. If that should occur, the construction firm should remind the broker and carrier that the contractor and its subcontractors are also insureds.</p> <p>At the outset, the contractor should ask the project owner for some kind of assurance that the owner will cause the broker and carrier to make timely filings, once the contractor has provided all of its payroll records.</p> <p>The contractor should also note that the insurance carrier is required by the rating bureau to provide the unit statistical cards (payroll by class and losses) information to the applicable rating bureau 18 months from the inception of coverage.</p>	<p>The owner agrees to require the OCIP carrier to make timely filings and the insurance manual covers all of the related details.</p>	<p>IB</p> <p>CC</p> <p>IM</p>
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31. Claims Management	W/C	Contractors who take an aggressive approach to managing claims can be very disappointed at the lack of such an approach found in some OCIPs. In most jurisdictions, the worker compensation experience under wrap-up programs follows the contractor and will impact the contractor's EMR. This is why it is imperative to take an active role in the claims management process, to receive loss runs, and to be involved in periodic claim reviews with the carrier and broker.	The relevant documents specify the level of activity expected of the carrier, the broker and the contractor.	IB CC IM
32. Alternative Dispute Resolution	W/C CGL UMB B/R	<p>Many if not most construction contracts have some kind of provision on dispute resolution. The problem is that neither the broker nor the insurance carrier is a party to that contract. The construction contract only binds the owner and the contractor and does not provide a means of resolving disputes with either the broker or the carrier over coverage, claims, services, premiums or the like.</p> <p>The contractor should therefore ask whether the owner, broker or carrier have incorporated any procedures for resolving such disputes into the OCIP. If not, the contractor should seek an alternative dispute resolution provision for resolving any service, claim, coverage, premium or other issues that may arise.</p>	The insurance manual predetermines a procedure for resolving any and all disputes that may arise out of the OCIP.	IB CC IM CS
33. Broker/Carrier Service Agreements	W/C CGL UMB B/R	<p>As noted above, neither the broker nor the insurance carrier is a party to the construction contract. Nevertheless, their service agreements with the owner, and how they actually implement those agreements, have great implications for the contractor working under an OCIP.</p> <p>The contractor can therefore make a case for some kind of contractual tool that it can use to hold the broker and the carrier accountable for their performance. While the owner</p>	The contractor receives a strong written commitment that the owner will support the contractor's efforts to hold the broker and insurance carrier accountable for any failure to live up to their service agreements.	IB CC IM CS

		<p>may be unlikely to do so, the owner could, for example,</p> <p>require the broker to enter into a separate service agreement with the contractor. The owner could also make the contractor an intended third party beneficiary of its own service agreements.</p> <p>Without going that far, the owner could also make a strong moral commitment to represent the contractor's interests.</p>		
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What Are Some of the Other Issues that You May Need to Address?

Issue	Affected Coverage	Description	Preferred Position	Where to Address
34. Mutual Waiver of Subrogation	W/C CGL UMB B/R	<p>The construction contract and the OCIP should include mutual waivers of subrogation for all claims that fall under the OCIP. The contractor should not rely entirely on being a named insured.</p> <p>At the same time, the owner or contractor should require waivers of subrogation from every firm that the OCIP does not cover.</p>	The construction contract and the OCIP provide for mutual waivers of subrogation from all policies at the jobsite regardless of enrollment in the OCIP.	IB CC IM CS
35. Safety Incentives	W/C CGL	Most OCIPs provide no financial incentives to maintain safe working conditions. It would, however, be appropriate for the contractor to seek such incentives from the owner. Because the contractor is in a unique position to oversee the	The contractor will receive a safety bonus for achieving the desired results.	IB CC
	UMB B/R	<p>subcontractors and other firms working on the jobsite, it may well deserve such incentives.</p> <p>There is no standard form or other contract language that the contractor would need to use. It should be enough to put any agreement into “plain English.” It would be important to define the results that would trigger a payment in clear and unambiguous terms. However written, the language should give the contractor a clear incentive to maximize the “OCIP savings.”</p>		IM CS

36. Substance Abuse Programs	W/C CGL UMB B/R	<p>The contractor needs to look for any requirement for a substance abuse program. If the contractor finds such a requirement, it also needs to ask the owner or its broker (in advance of the deadline for submitting bids or proposals) whether the contractor will bear any of the responsibility for administering the program.</p> <p>If so, the contractor also needs to take several more steps. It needs to needs to ask the owner how the owner proposes to compensate or reimburse the contractor for cost of accepting this responsibility. It needs to find out whether the personal injury component of the CGL policy will cover this activity. And it needs to identify and resolve any conflicts between required programs and any other programs that the contractor has already put into effect.</p>	The contractor receives a clear written assurance that either the owner or the broker will assume all the responsibility for administering the substance abuse program or the owner clearly identifies the functions that it will expect the contractor to perform and how it proposes to compensate or reimburse the contractor for doing so.	IB CC IM CS
37. Return-to-Work Programs	W/C	<p>The contractor needs to look for any requirement for a light duty return-to-work program.</p> <p>If the contractor finds such a requirement, it also needs to ask the owner – in advance of the deadline for submitting bids or proposals – how it proposes to compensate or reimburse the contractor for the productivity that the program will cause the contractor to lose.</p> <p>The benefits of reducing the indemnity payments to an injured worker normally offset the costs of implementing such a program. Where an OCIP is in place, the situation is, however, very different. The benefits accrue exclusively to the owner, and the contractor is left with only the cost, unless the owner makes some kind of adjustment.</p>	The contractor receives a clear written explanation of the way that the owner proposes to share the benefits of implementing any light duty program that the owner will require.	IB CC IM CS

38. Subcontracts and Letters of Intent	W/C	The contractor needs to be aware that its involvement in an OCIP will require it to amend its standard the insurance requirements that it normally incorporates into its subcontracts. The latter needs to provide that the subcontractor will be required to participate in the OCIP and to identify the coverage that the program will provide to the subcontractor. In addition, the subcontracts should incorporate the automobile liability and offsite insurance requirements outlined in the OCIP insurance manual.	The contractors amends its subcontracts to incorporate the OCIP provisions of the construction contract into the subcontracts, by reference.	IB CC IM CS
	CGL			
	UMB			
	B/R			
	P/L			
	AV/L			
	W/L			
	E/O			
39. Changes in Program Policies	W/C	Because the construction project may run for several years, the contractor runs a risk that the insurance carrier may, at some point, cancel, refuse to renew or make a material change in one or more of the policies that make up the owner controlled insurance program.	The contractor receives written assurance that the owner or its broker has required the insurance carrier to directly notify all	
	CGL			
	UMB			

	B/R	As a threshold matter, the contractors needs to ensure that the carrier has an obligation to notify all of the insureds, and not just the project owner, of any such action. Otherwise, the contractor may find itself with an uninsured exposure of which it was completely unaware.	of the insureds of any decision to cancel, refuse to renew or make any material change in any one or more of the OCIP policies.	
	P/L			
	AV/L			
	W/L			
	E/O			

Appendix

Nonexclusive Checklist of “Things to Ask For”		
Item	Comments	Status
Firms Included and Excluded		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Operations Included and Excluded		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Definition of Covered Location(s)		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Coverages Being Provided		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Duration (Warranty Work and Completed Operations)		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Gaps in Coverage		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Limits and Whether Shared or Reinstated		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Specific Inclusions in Coverage		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Specific Exclusions from Coverage		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Deductibles		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Penalties		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Contractor Furnished Coverages and Whether Compensable		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Safety Program Responsibilities		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable

Drug Test Program Responsibilities		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Back-to-Work Program Responsibilities		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
How Premium Audits Will Be Handled		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
How Other Program Components Will Be Administered		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
How Credits Will be Handled		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
How Claims Will be Handled		<input type="checkbox"/> Acceptable <input type="checkbox"/> Not Acceptable
Necessary Endorsements of Contractors Policies		<input type="checkbox"/> Implemented <input type="checkbox"/> Not Implemented
Necessary Amendments of Contract and Subcontracts		<input type="checkbox"/> Implemented <input type="checkbox"/> Not Implemented