Contractors Going Bare?

A recent national survey conducted by IMM of West Chester, PA revealed that most heavy construction and general building contractors with annual revenues between $25 million and $100 million are "going bare." These contractors are going bare in the sense that they are not properly insuring themselves against exposure to environmental liability. Of the contractors interviewed, more than 60 percent are not purchasing environmental insurance coverages to properly protect their company. Even more astonishing, 21 percent revealed they were not even aware their commercial general liability insurance policy contains an "absolute pollution exclusion." When asked why they are not purchasing the General Contractor's Pollution Legal Liability (GCPL) coverage, the contractors gave some common responses: "No reason"; "My company does not need it."; "Not much exposure."; "Advised not to by my insurance broker."; "We don't have an environmental exposure."; "Never considered it."; "Don't know much about it."; and "I think it's part of my liability coverage."

What You Don't Know Can Hurt You

Clearly, the construction industry and the insurance community need some education in environmental liability issues. The lack of proper education in environmental issues can have an acute impact on how a contractor and the industry in general are perceived by the general public. For years, many companies have been taking a reactive approach to environmental issues: "Don't tell me about it because if I don't know it, it can't hurt me." Whether you know about environmental issues or not, they can hurt you! Couple this with the fact that the general public continues to perceive the industry as having a negative effect on the environment, and it sets the stage for every contractor's worst environmental nightmare.

Case Examples

Unfortunately, many firms still believe that ignorance is an excuse. But it's not, according to the law. For instance, Superfund (CERCLA) is now including general contractors -- not just environmental or remedial contractors -- in the definition of Potentially Responsible Parties (PRPs). This means that if you are identified as a PRP under Superfund, you can be jointly, severally and retroactively responsible for cleanup. In other words, you could be responsible for either a portion or all of the cleanup, regardless of when the act occurred. By now, you may have heard about the Kaiser Aluminum case and the Southwestern Bell case, in which excavators were drawn into a Superfund cleanup simply because they did their job. They excavated and graded according to the specs; however, the material was contaminated. The EPA identified the current and past owners as PRPs, as well as the excavators since they exacerbated the extent of contamination. The excavators unknowingly spread contaminated soils across the site thereby contaminating virgin soils.

Superfund is not the only environmental factor of which contractors must be aware. Every day, contractors of all sorts utilize all different kinds of products. If you read the Material Safety Data Sheets (MSDS) for such products, you will find that a sizable portion of them contain volatile inorganic compounds -- carcinogenic chemicals that emit toxic fumes. These include curing compounds, sealants, finishes, adhesives and so on.

How Does General Liability Insurance Respond?

By now, you may be asking, "How does my general liability insurance respond?" Simply put, it doesn't. Although there have been many case studies that identified ambiguities in general liability policies which resulted in "covered" pollution claims, the general liability is not intended to provide pollution or environmental coverage -- not knowingly at least. Under the unmodified 1996 ISO Commercial General Liability (CGL) policy, there is an absolute pollution exclusion. This exclusion precludes coverage for cleanup costs (as in the Superfund cases) and pollutants brought to the site by the contractor or subcontractor. Therefore, claims resulting from the use of the products previously mentioned would not be covered under the CGL. The policy would cover bodily injury and property damage, including defense expense, for pollutants that were not brought onto the site.
Controlling Risk

Although I have focused on insurance, let's put things into perspective. Insurance is not always the best tool to manage risk. Although insurance may restore a contractor's financial condition, it will not restore what every contractor works so hard to develop and protect -- reputation. That's why it makes good business sense for a contractor to begin practicing "proactive environmentalism," rather than taking a reactive approach to environmental issues. There are many controls a contractor can incorporate into their overall risk management program, such as asking owners if environmental studies were completed on the project site, contract language that includes a clear and concise scope of work and, most importantly, educating field personnel to identify problems. Unfortunately, few contractors are using these controls. Those who are using controls are prepared for the future. Those who are not using controls are taking an enormous risk.