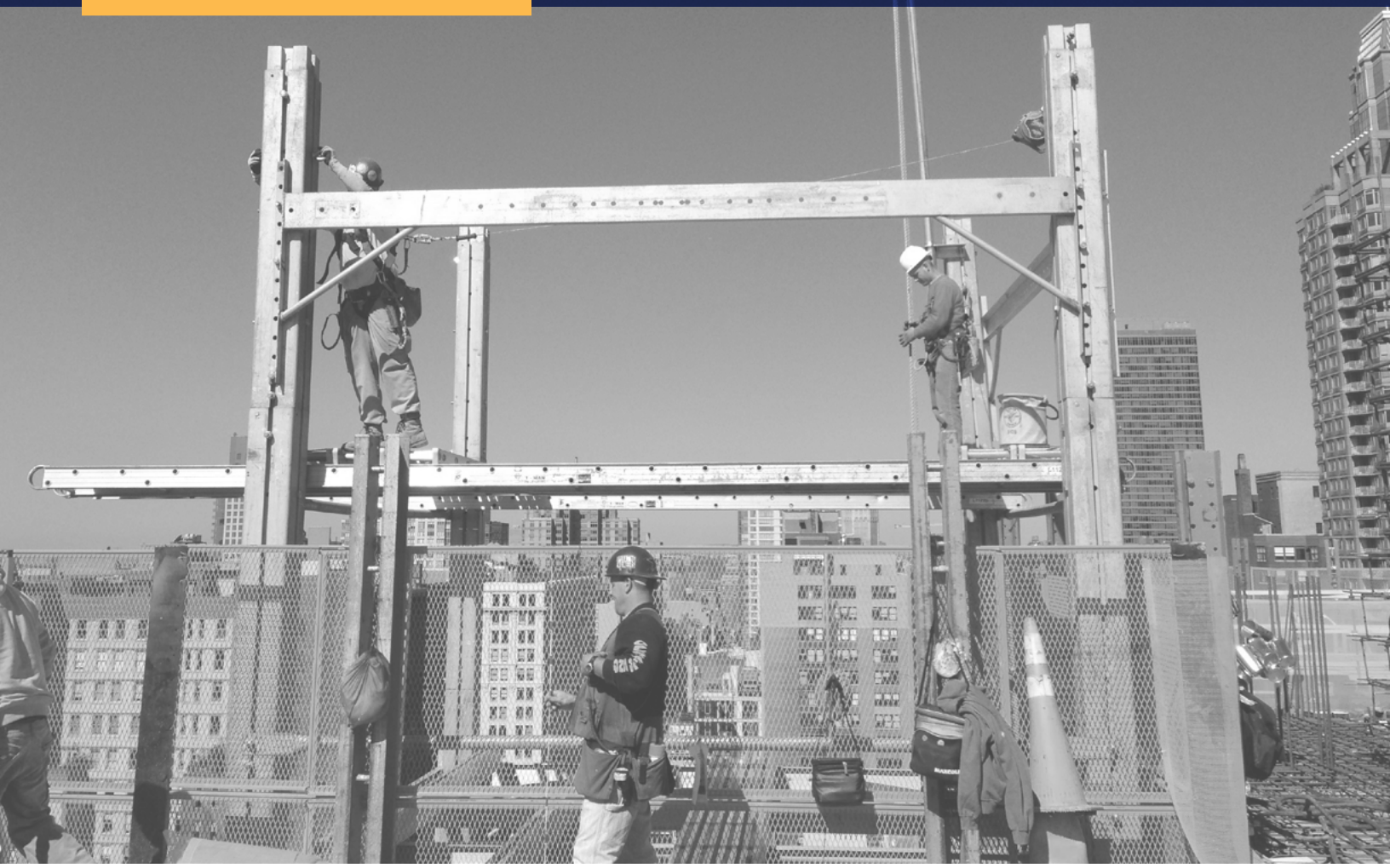
SML | CAPITAL ADVISORS

SML SERVICES

CONTRACTUAL REVIEWS

ABOUT **SML**



Risk management services supporting the insurance underwriting and claims community worldwide.

These services have one goal: promoting safety while preventing risks.

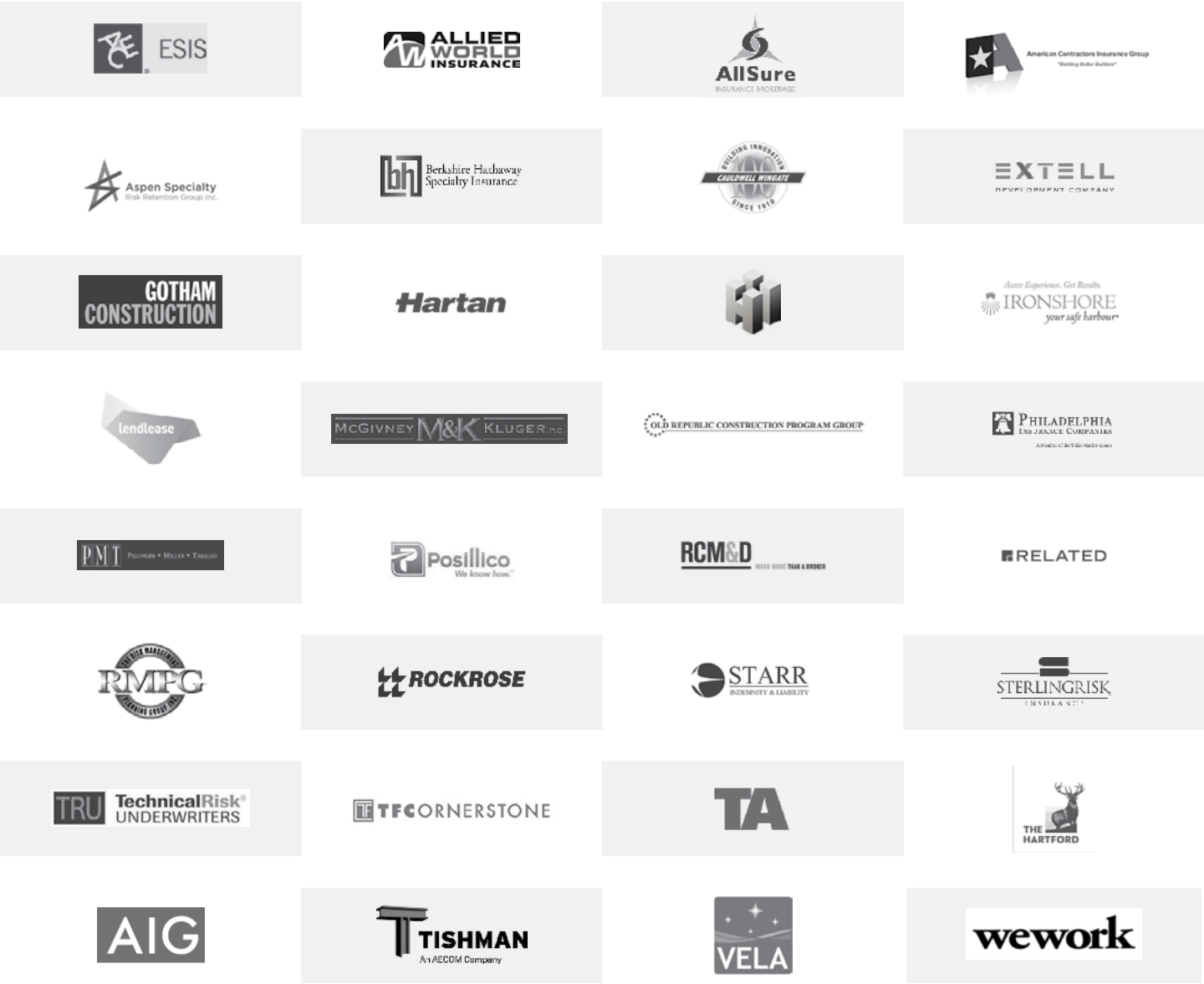
Established in April 2007, SML has constructed a team of knowledgeable individuals whose mission is to provide value added services to the insurance marketplace. SML does not sell insurance and operates with complete impartiality and independence.

SML is composed of insurance and safety professionals with decades of combined experience in the areas of underwriting, loss control, premium audits, claims management, program management, and risk analysis.

We have the talent and resources to get the job done right and in a timely manner. Our products provide meaningful information to the underwriting and claims community.

At SML, we pride ourselves on our commitment to our clients. If you are not completely confident with our services, we want to know. Our only measure of success is your satisfaction.

SML CUSTOMERS



CONTRACTUAL REVIEWS

REVIEW INDEMNITY PROVISIONS

The first line of defense in any risk transfer program will be the terms of the indemnification provided to the general contractor. Below are several issues we analyze as part of our review.

BROAD INDEMNIFICATION

It is important that the insured be provided indemnification, for both defense and indemnity costs, for any liability arising in whole or in part out of the subcontractor's operations.

BROAD, BUT NOT TOO BROAD

General Obligations Law §322.1 (applicable in New York) precludes owners and general contractors from receiving per-indemnification i.e., indemnification arising out of their own negligence, from their sub-contractors. Case law in New York is unsettled as to whether agreements containing overly broad indemnification are enforceable in part, or completely void, where the indemnities is actively (as opposed to vicariously or as an owner) negligent. As such, any indemnification language should be "to the fullest extent allowed by law." We will consider whether an explicit reference to §322.1 (with respect to projects in New York) is appropriate.

CONTRACTUAL REVIEWS

INDEMNIFICATION FOR COVERAGE FEES

We propose including language shifting the cost of pursuing coverage (or indemnification) to the sub-contractor, irrespective of any insurance coverage. This type of language would encourage sub-contractors to ensure the insured is properly named as an additional insured under their policies.

UPSTREAM INDEMNIFICATION

We ensure that the contract does not call for reciprocal indemnification, whereby each party (general contractor and sub-contractor) indemnifies the other for liability arising out of the other's negligence. This is important because reciprocal indemnification can significantly limit the protection provided by even the broadest indemnity. Namely, if the parties have to litigate out of whose negligence the liability arose, this would render the indemnification worthless, at least as respects the duty to defend.

SOLVENCY OF INDEMNITIES

An indemnification is only as strong as the party offering it. To the extent a sub-contractor's solvency is in doubt, confirming appropriate additional insured status (by more than a mere insurance certificate) is particularly important.

WAIVERS OF SUBROGATION

An agreement by sub-contractor to waive subrogation against the insured and other sub-contractors would decrease the need for litigation between the parties, and focus attention on minimizing liability (the prime concern of the insured).

OWNER INDEMNIFICATION

We propose having the sub-contractor indemnify the owner (as well as the general contractor). A claim for indemnification by the owner (particularly where violations of NY Labor Law 200, et. seq. are alleged, raising the possibility of strict liability) can often significantly impact the general contractor's carrier.

WAIVER OF WORKERS COMPENSATION §11

Under Workers Compensation Law §11, common law (as opposed to contractual) indemnity is precluded, except in the case of a "grave injury". Seeking a waiver of this provision may allow for coverage for contribution claims arising employee injuries under the sub-contractor's WC/EL 1.B. coverage (which is typically provided without policy limits). Obtaining such a waiver would potentially create coverage for the sub-contractor under two separate policies: General Liability (based upon the insured contract exception to the employee injury exclusion) subject to the policy limit and Workers Compensation/Employee Liability (based upon a common law indemnification claim, citing to the waiver) with potentially unlimited coverage.

CONTRACTUAL REVIEWS

REVIEW INSURANCE PROCUREMENT PROVISIONS

Many agreements put a sub-contractor in breach of contract when they fail to procure the proper insurance. Below are several issues we review in regard to the insurance procurement requirements.

INSURED/CARRIER NAMED AS INTERESTED PARTY

We propose having the Agreement require sub-contractors to name the insured and carrier as interested parties on their insurance, requiring notification of any changes to their coverage (cancellation, reduction in limits, non-renewal).

ADDITIONAL INSURED ENDORSEMENT

There are several approved additional insured endorsements ranging from broad ("arising out of, or in any way relating to, your work") to narrow ("to the extent the additional insured may be held liable for your negligence"). The scope of additional insured status is often a key issue in whether a subcontractors carrier agrees to defend an additional insured in the first instance, or instead awaits resolution of the underlying litigation.

ENDORSEMENTS LIMITING COVERAGE

We require confirmation that the policies procured by sub-contractors do not contain endorsements that potentially limit coverage, including:

- Designated Project Limitation.
- Classification Limitation (i.e., covering only particular types of work).
- Amendments to the Pollution Exclusion (broadening from the "at or from" pollution exclusion to a "total" pollution exclusion.
- Other Insurance Provisions (Primary v. Excess) - In light of evolving law on this issue, we would seek to require that the sub-contractor's policy specifically provide that it is primary to any insurance issued to any additional insured. Conversely, we would advise that the policy issued to the general contractor provide that it is excess of any insurance naming the general contractor as an additional insured (by endorsement or otherwise).
- Tightly worded "other insurance language" can avoid the need for unnecessary and costly coverage litigation.
- Review Insurance Claim Notification Provisions - As you may be aware Ins. Code §3420(d) was recently amended to prevent "no prejudice" disclaimers based upon late notice, effective January ,17 2009 (i.e., for all policies issued in New York after that date). However, we would propose that the Agreement require sub-contractors to copy the insured (and potentially, the carrier) on all claim correspondence with their carriers.

Request a Contractual Review

Click Here

SML | CAPITAL ADVISORS

SML CAPITAL ADVISORS
PO Box 606
Centerport, New York 11721
(631) 651 - 9334

www.smlcapitaladvisors.com