Insurance for Dredge Operators

The Inevitable Mix of Marine & Nonmarine

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Introduction

CONSTRUCTION RISK

Much like dredging work, insurance for dredging companies requires the ability to respond to unknown conditions. Environmental dredging projects add even further complexity.

Today, we will look at base outline of coverage for a dredging operation and specifically jump into a few topics including:

- Dredge employees could have multiple jurisdictions. What are they and how can they be covered?
- Coverage for liability to third-parties also requires a patch work of policies designed to handle both the marine and non-marine elements of the work.
- Environmental coverage for dredging operations also presents unique opportunities involving both marine and non-marine exposures.

Finally, we will talk about how your insurance program can help in the marketing process and elevate you above the competition.

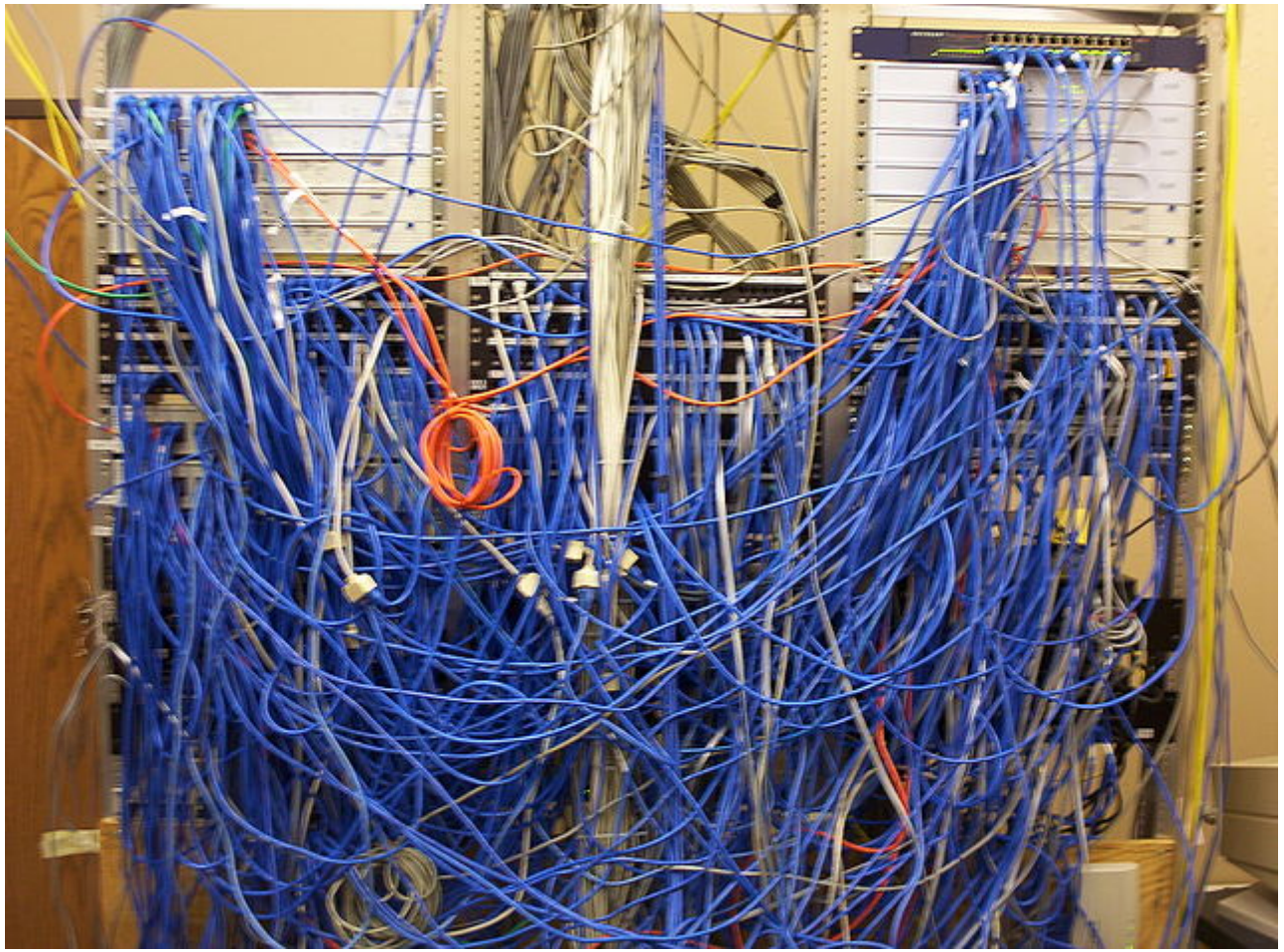
Insurance Coverage Needed

- "Typical" insurance program for a dredging operation would include:
  - Commercial or Marine General Liability
  - Automobile
  - Workers' Compensation
  - Contractor's Pollution Liability
  - Protection & Indemnity
  - Vessel Pollution
  - Excess Liability – Umbrella & Excess Marine or Bumbershoot

- Other coverage needs
  - Hull
  - Landing Owner's Liability
  - Maritime Employer's Liability (MEL)
  - Property & Contractor's Equipment
  - Professional Liability
  - Builder's Risk / Installation Floater

Employees

First let's untangle the employee situation…



What are my employees: USL&H

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Some of your job site employees are likely subject to the United States Longshore & Harbor Worker's Act (USL&H):

Definition of an *Employee* as per the USL&H act § 902.(3) – "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker

Definition of an *Employer* as per the USL&H act § 902.(3) – "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

Generally USL&H coverage is part of your Workers' Compensation program, although specialty USL&H insurers do exist.

What are my employees: Jones Act Seamen

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The Jones Act is not as precise in their definition, especially since there is no definition in the statute. This has lead the courts to develop the Jones Act test. To prove seaman status, an employee must establish his (1) "employment-related connection" (2) to a vessel in navigation. (McDermott Int'l. Inc. v. Wilander)

What's an employment related connection to the vessel you might ask?

- An employee's duties "contribute to the function of the vessel or to the accomplishment of its mission" or doing ship's work.
- the employee's connection to the vessel (or to an identifiable group of such vessels) "must be substantial in both its duration and nature."

A "rule of thumb" is that a worker that spends less than 30% of their time in service of a vessel in navigation does not qualify for seaman status.

Generally Jones Act coverage is either through your P&I policy or an Maritime Employer's Liability (MEL) policy.

What are my employees: Everybody Else

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If you are not USL&H and you are not Jones Act, by virtue of elimination, you must be State Act BUT:

- The law will allow for the pursuit of disparate remedy
- Common tactic is to file for USL&H benefits initially and then file Jones Act status prior to the 3-year statute running out
- There is no such thing as a being a little bit pregnant – at the time of the injury ONLY on status is applicable.

Why would an injured employee seek different remedies:

- USL&H benefits are generally higher than State Act benefits, but still prescribed in the law (i.e. there are certain caps in place)
- The Jones Act remedy is tort based – you have to sue the employer. There are no caps and a judge or jury decides the value of the injury.
- Both State Act and USL&H are no-fault remedies. Jones Act can include an element of contributory negligence, reducing the amount received.

So what do you do? Belt & Suspenders

- All three covers (State Act, USL&H and Jones Act) should be part of your program.
- Assign individuals and payroll based on best faith efforts, but recognize that things could change depending on how the claim is ultimately filed
- If there is any question regarding status or situs, report the incident to all carriers

Liability

"Not me!"

General Liability

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Commercial General Liability or Marine General Liability is the basic coverage for third-party bodily injury or property damage arising from your operations. Key Exclusions for Dredging Operations include

- **Aircraft, Auto Or Watercraft -** "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".
- **Damage to Property** - "Property damage" to: … (4) Personal property in the care, custody or control of the insured; (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
- **Your Work -** "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard". This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

A Marine General Liability (MGL) policy is just a CGL policy placed in the marine insurance market.

Protection & Indemnity

Protection & Indemnity (P&I) is coverage for liability resulting from the operation of a scheduled vessel – put another way, General Liability coverage for vessels

- Any owned or operated vessel should be scheduled – including the survey boats, work flats and vessels chartered on a bare boat basis.
- For the most part, dredges are vessels and should be insured as such
- P&I includes unique coverage aspects not included in a CGL or MGL policy such as
  - Collision/Tower's Liability
  - Cargo Legal Liability
  - Bodily Injury for pollution

So, which coverage would respond?

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Depending on the claims scenario, CGL/MGL and P&I coverage could both come into play

- While positioning the ABC's dredge, ABC's assist boat "rubs" against a third-party spoils barge owed by XYZ, damaging XYZ's barge.
  - This is a P&I claim from XYZ against ABC's assist boat.
- ABC's dredge is pumping spoils to a collection area through a series of booster pumps. After a drying period, the spoils are loaded into a truck for off-site disposal. While coming into load, there is a problem with the line, damaging the truck and the driver.
  - This is a CGL/MGL claim from the third-party trucking company (and potentially the third-party trucker) to ABC.
- While dredging a harbor, ABC Dredging gets a little close to the marked dredging line established by the COE. As a result, the local marina in the harbor has a dock collapse and files a claim against ABC for the damage to their dock as well as the lost revenue from being unable to operate.
  - This claim has the potential of going either way, in part depending on the timing.
  - If the dock collapse happen "immediately," the P&I policy is the most likely to respond.
  - If the dock collapse happens six months after the project is completed, the CGL/MGL Completed Operations coverage is the most likely to respond.

Environmental Liability Associated with Dredging

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- Most dredge operations have environmental liability exposures in two areas
  - Water based
  - Land based

- It is important to cover both exposures in the program
  - Water based exposures are generally going to be a part of the Vessel Pollution coverage to provide coverage emanating to or from a scheduled vessel.
  - Land based exposures would a Contractor's Pollution Legal Liability policy or similar job site approach
  - Coverage would generally "flip" from one policy to the other at the first header on land.

Marketing Your Insurance Program

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- For government jobs, most job specifications are going to have very limited insurance requirements.
  - Established dredging companies with established insurance programs should “show” better than 100% subcontracted prime contractors
  - Include information about the insurance program in the bid proposal where possible to note that you not only meet but significantly exceed the minimum requirements contained in the agreement.
- For private work, use your insurance and record as a differentiator
  - When possible try to educate the Owner regarding the various exposures that exist and how your program is designed to respond to those exposures.
  - Owners want anything that goes wrong to be your problem – let them know that you have the insurance company backing those obligations.
  - Discuss the overall insurance coverage limit maintained and how that limit is available to their specific project.
  - Point to your loss record (assuming it’s good!) as a way that you are able to better manage and reduce the cost of the project.
- Review the cost structure used to insert the insurance number in your bid – does it really reflect the costs? Payroll or revenue is not always the answer. For any given job, your broker can assist in providing “real” insurance dollars applicable to a specific contract.

Surety Concerns for Dredge Operators

Federal Set-Aside Programs

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Introduction

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We continue to see an increased focus on the utilization of set-aside contract as well as a steady increase in the participation percentage requirements.

This creates a growing concern as the pool of qualified SBA contractors is limited, particularly in the subaqueous space. This concern is intensified as the government continues to crack down on firms that are not adhering to the guidelines established for SBA program work.

Recent legal precedence has been set that not only has ramifications on the contractors, but their Surety and Broker as well. This is creating increased pressure on the need to be diligent when pursing this work and maintaining an open dialogue and position of transparency with all involved.

Surety carriers are taking a much deeper dive into the underwriting process on set-aside work to fully understand the relationship between the qualified SBA contractor and anyone teaming with or mentoring that entity.

Knowledge is the key.

Overview of SBA Programs

- 8(a) Business Development Program – Minority Small Business Development (8(a) BD)
- Small Disadvantage Business (SDB)
- Women-Owned Small Business (WOSB)
- Historically Underutilized Business Zone Program (HUBZone Program)
- Service-Disabled Veteran-Owned Small Business (SDVOSB)

What are the Surety Risks?

A United States District Court ruled that there are instances where a surety and its broker could face liability for its principal's violation of the Federal Government's False Claim Act.

In United States ex rel. Scollick v. Narula, 2017 WL 3268857 (July 31, 2017), an individual whistleblower brought an action under the False Claims Act alleging that construction companies, their principals, sureties, and others participated in fraudulent schemes to obtain set-aside government contracts. The principals had obtained the government contracts in question by submitting performance and payment bonds issued by various sureties.

At least in part, the whistleblower relied on a theory of "indirect presentment" and alleged that the sureties' and broker's actions led to the submission of false claims, and continued to do so upon becoming aware of the principals' fraudulent activity.

The principals' sureties and their broker sought to dismiss the case at an early stage, but the Court found that there were sufficient allegations that the sureties and broker knew or should have known the principals were fraudulently asserting their status as a service-disable veteran-owned small business. Whether the allegations against the sureties and the broker are ultimately proven remains to be seen, as the case is still ongoing in the United States District Court of Columbia.

However, the sureties and the broker continue to face significant exposure in the form of three times the damages sustained, which could include the economic benefit obtained by the allegedly fraudulent conduct.

It should also be pointed out that the individual whistleblower is seeking to recover anywhere between 15% – 30% of the proceeds awarded to the government. Kegler Brown + Ritter – Mike Madigan

Federal Set-Aside Contracts – Contractor & Surety Risks

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What are the Surety Risks?

- Indirect (Non-Small Business Contractor Account Impact)
  - SBC default/failed performance
  - Federal Debarment
  - Civil/criminal penalties

- Direct
  - Default termination on bonded set-aside work
  - Potential False Claims Act (FCA) exposure (Narula)

What are the Contractor Criminal Risks?

- Award to a Dis-qualified Entity = Fraud
  - Government deprived of its right to contract as intended (harm)
  - Burden of Proof – intentionally avoided confirming the facts; inference of conscious avoidance is enough (ostrich instruction)
- Possible Charges (Corporate & Individual)
  - Mail Fraud/Wire Fraud
  - Conspiracy/Violation of the RICO Act
  - Violation of the False Claims Act (FCA)

Affiliation is the Key

- Affiliation Defined
  - An affiliation exists when an entity controls or has the power to control the other, or a third party or parties controls or has the power to control both.

- Totality of the Circumstances Analysis

  (Weighted average of several factors/Web Analysis)

- Particularly fact-intensive and may produce different results on a case-by-case basis

Factors for Consideration When Making an Affiliation Finding

- The SBA Weighs
  - Ownership interest
  - Management Control (Newly Organized Concern Rule)
  - Employee and Family Ties (rebuttable presumption)
  - Contractual Agreements (i.e. Teaming Agreements, Joint Venture Agreements)
    - Ostensible subcontractor rule

[See, 13 CFR 121.103]

Consequences of an Affiliation Finding

- At the time of bidding, contractors must represent their status as an eligible small business or a participant in an SBA program

- Obtaining a small business set-aside by fraud or misrepresentation may result in Inspector General investigations, fines, termination, debarment, suspension, criminal or civil penalties [See, e.g., 15 U.S.C 645]

Enhanced Surety Risk – Narula & False Claims Act (FCA)

- Bad Facts make Bad Law
  - Three individuals, one contractor and three shell companies
  - SVOSB, HUBZone & 8(a) contracts over 6 years
  - One pool of offices, resources, indemnitors, etc.

- Whistleblower action using prominent whistleblower firm – whistleblower seeking 15%-30% of proceeds so a financial incentive exists

- FCA counts v. Surety
  - Indirect presentment/indirect false statements
  - Reverse false claims

Enhanced Surety Risk – Narula & FCA

- The Bond form itself is the indirect presentment, false statement or basis for the reverse false claim
- Knowledge is the critical aspect
  - Knew or should have known (underwriting due diligence)
  - Continuing business after knew or should have known
  - No ostrich defense
- FCA damages
  - Denied the opportunity to contract with set-aside entity
  - Every dollar paid, not just failed performance damages
  - Treble damages potential for sureties against the penal sum

Federal Set-Aside Contracts – Contractor & Surety Risks

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Summary

- Increased focus from Sureties surrounding SBA program work
- Passing the Affiliation smell test now an underwriting focus
- Some Sureties are requiring disclosure letters to the contracting officer on all SBA works
- Teaming agreements and disclosure documentation is a must
- Know your risks

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