



» Laying the Foundation of Coverage for Contractor Design Exposures



Construction-related professionals are not the only entities that need to be aware of professional and pollution liability exposures. Contractors face potentially significant liability when they act as the lead for a design-build project or assume design risk through contractual design responsibilities, liability that sureties need to know about.

For design professionals and anyone else providing design solutions, risk arises from the possibility of causing harm due to negligence in performing professional services. These negligent acts, errors, or omissions may cause damage to clients, to others involved with the design and construction process, or other third parties, and the firm may find itself liable for these damages. Not all design firms elect to purchase professional liability insurance—the cornerstone of a design professional's risk management strategy. This business decision is made as part of the firm's overall approach to managing its practices and risks. With the assistance of a broker, the coverage and cost must be evaluated even though the variety of coverages available through endorsements, exclusions, and the core policies themselves makes real cost comparisons difficult. If a design firm elects not to purchase professional liability insurance coverage—or does so in an inadequate amount or from an underperforming company—the design risk does not disappear. In many cases, it is the construction contractor who may absorb the loss.

Why Contractors Need Design Liability Coverage

When design professionals provide services, the law states that they must act in accordance with the professional standard of care. That means that they must act the same as any other design professional would in facing the same or similar facts and circumstances. This requirement to refrain from negligence holds true whether design professionals are working on their own or for a contractor. Working "for a contractor" could vary from an employed licensed design professional to an independent professional for whom the contractor is vicariously liable.

Today, many design professionals provide services directly for contractors. If a design professional works for a contractor, the contractor is liable for the performance of that design professional's services, meaning that the contractor can be held legally responsible if the design professional is found to be negligent in any way. This legal responsibility does not disappear when the project is complete. Contractors can remain exposed to claims alleging harm from negligently provided professional services at least through the period of the applicable state statute of repose.

A contractor can be held liable for design negligence when the contractor hires a design firm as a subcontractor or combines with the design firm in a joint venture. Even in situations where a contractor cannot legally hold itself out as providing design services, it retains its vicarious liability for the negligence of the subcontracted design professional or joint venture partner. That is why when a contractor enters into a design-build agreement with a client, the contractor usually is required, either directly or through its designer, to carry professional liability insurance to cover this exposure. For instance, if ConsensusDOCS 410, *Owner/Design-Builder Agreement and General Conditions*, is used as the design-build agreement, the contractor is required to obtain professional liability insurance either directly or through the subcontracted design professional.

It's also possible that the contractor may have design responsibility and liability even under the traditional design-bid-build project delivery method when elements of the design are delegated to the contractor. Design liability can exist on either a direct or vicarious basis even if state law prohibits the contractor from

providing the services of a licensed design professional. In most situations, even though the services are to be provided by a licensed design professional on behalf of the contractor, both the contractual and tort liability risks still belong to the contractor.

A typical design liability policy covers contractors for their liability arising out of the performance of professional services rendered by its in-house design staff who are legally qualified to provide such services. The policy also covers the contractor's indirect design exposure arising out of the performance of professional services rendered by subcontracted design firms, such as when design has been delegated to the contractor. When a contractor's responsibility goes beyond construction to project design in a design-build or delegated situation, or to construction management, the need for contractors to carry professional liability coverage increases.

Joint Ventures

In some contractor/design professional joint ventures, little advance planning is given to a reasonable allocation of risk. The design professional may be jointly and severally liable for exposures it can neither manage nor insure. Likewise, a contractor's risk may extend to professional liability exposures. Certainly, a contractor does not want the other joint venture member to be "going bare" when design liability is such a great exposure.

Contractors who take on design responsibilities also take on design liability exposures. Whether through their responsibility for an employed design professional or their vicarious liability for a consultant, contractors become targets for professional liability claims. And not all of this exposure can be covered through a commercial general liability (CGL) policy or by contractually assigning the risk with a design firm. As project delivery methodologies continue to place the construction contractor in a more prominent position for design responsibility, contractors need to address their risks through programs that are focused on providing comprehensive coverage.

CGL Coverage Is Inadequate for Design Liability Exposures

Design exposures and losses are not covered by most CGL policies. Design exposures are the costs required to remedy negligent design and any necessary reconstruction. With the use of design-build project delivery, project design is intrinsic in the contract in addition to construction obligations. As stated earlier, the design exposure assumed under the design-build contract may be direct, in the case of a contractor's own in-house design team, or it may be indirect as a result of subcontracting the design to a design firm. However, CGL policies exclude both exposures and endorsements rarely cover the real risk.

CGL policies typically provide coverage only for bodily injury (BI) and property damage (PD), as defined in the policy. The definitions of BI and PD usually do not include remedial design and reconstruction of negligent design and other associated damages such as delay claims, loss of use and other economic damages. In addition, many CGL carriers are not comfortable with the design exposure presented by either design-build or design delegation and, therefore, place a professional services exclusion on their CGL policies. This will then exclude all claims submitted under the CGL policy that arise from design-related services.

Most programs are designed to meet the specific needs of contractors responsible for design services. A policy can include contractors pollution liability (CPL) coverage in a combined contractors professional and pollution liability policy. The CPL form provides coverage for pollution claims arising out of job site activities of the contractor or its subcontractors. A pollution incident is covered if it arises out of the insured's activities or the activities of any person or entity for which the contractor is legally liable.

Every surety writer is concerned with design-build project delivery. If the contract has design errors and omissions coverage in place, that concern is still present, but at least there is a transfer of risk to mitigate the impact.

If you have any questions, contact Gene Todaro of Victor O. Schinnerer & Company, Inc., at 301-961-9828 or e-mail by clicking [here](#).

For information about ConsensusDOCS and how NASBP is involved as an endorsing member of ConsensusDOCS, click [here](#).

This is the sixth in a series of articles on Risk Management and Insurance coordinated by the NASBP Risk Management and Insurance Committee. The author of this article is Gene Todaro, a Maryland licensed Property and Casualty insurance agent of Victor O. Schinnerer & Company, Inc. in Chevy Chase, Maryland. To read Todaro's earlier Pipeline article, titled "Anticipating the Migration of Design Claims into the Surety Relationship," click [here](#). To visit the NASBP Risk Management & Insurance Committees resource web page, click [here](#).

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