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Design-Builder Contractors and the need for Professional Liability Insurance

by Nolan Heuchert, Wylie-Crump Limited

There was a time when there was a clear distinction between the contractors who performed the “work” and the architects and engineers who performed the “professional services.” Their respective roles and responsibilities were relatively clear and separated by distinct contractual arrangements. Today, more often than not, the general contractor of the past is today’s construction manager or design-builder. The owner’s project architects and engineers may now be the contractor’s design consultant or joint venture partner.

Collaboration is the way forward supported by ever changing technologies, project delivery methods and contract documents. On budget and on time remain the overriding objectives which, along with quality, represent the key benchmarks for a successful project.

These challenges and changing landscape create the need to review and re-assess the professional liability risk faced by contractors in the current project environment.

Professional Liability Exposure:

Professionals are individuals who through specific training, education and experience are recognized as experts in their field. Certain professionals, such as architects, engineers, land surveyors and landscape architects are required to be licensed or registered in order to practice their profession. However, not all fields require registration or licensing for one to be recognized as a professional. Anyone or any firm that holds itself out as an expert in a particular field and is paid for their services can be held responsible for the work, advice and counsel provided to others in a professional capacity.

A professional is expected to perform their services with the degree of knowledge, care and skill of an average professional peer in good standing and under similar circumstances. This is frequently referred to as the “standard of care.” A failure to perform to this standard constitutes negligence. Any damages incurred by the professional’s client and potentially others that result from such negligence may be deemed to arise from professional liability.



Professional Liability Insurance:

Professional liability insurance is a form of protection for both the firm (the “professional”) and their client. This specialized coverage considers the potential risks of a given profession, situation or activity.

This insurance coverage, which is also commonly known as errors and omissions (“E&O”) insurance, is designed to provide coverage for claims for damages alleged to be the result of the negligent performance of professional services for others as defined in the policy. These “claims made” policies can provide extremely broad coverage that may be triggered simply by a demand for money or services as the result of an alleged negligent act, error or omission in the performance of professional services.

Professional Liability policies are usually designed to provide coverage to the insured for both the cost of defending the claim as well as the damages. Claims for professional liability frequently involve an “economic loss” without the existence of any accident or occurrence causing injury or physical damage. The policy will also defend against any frivolous allegations of negligence or wrong doing, and in doing so, assists in protecting the assets of the individuals or company.

Commercial General Liability (CGL) versus Professional Liability (E&O):

General Liability insurance is designed to provide coverage for the insured’s legal liability for third party bodily injury and property damage. Such claims are usually the result of accidents or other event that could not be foreseen. These are commonly referred to as “occurrences.” Coverage under these general liability policies are triggered at the time the “occurrence” takes place. Any resulting claim from the “occurrence” for bodily injury and property damage will likely be subject to coverage under the policy that is in force at the time of the “occurrence.”

In contrast, the Professional Liability policies generally do not require the existence of an “occurrence” and frequently respond to claims for “economic damages” where there has been neither bodily injury nor property damage. The policy is triggered by the reporting of a claim, which is the common reference to “claims-made” nature of professional liability insurance.

General Liability policies usually have exclusions for any bodily injury or property damage that arise from specific activities and services which the insurers may view as being professional in nature. These exclusions can vary from policy to policy depending on the insurer. However, the broadest exclusions often eliminate coverage for not only engineering, architectural and land surveying as a service for others but can also exclude specifically the preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications, which many would view as a professional service. The most frequent exception to this exclusion are services that fall within construction means, methods, techniques, sequences and procedures employed by the insured in connection with the insured’s operations in their capacity as a construction contractor.

In addition, there is often exclusion in the general liability insurance policy which applies to claims arising from inspections, supervision and quality control services when the construction work is performed by someone other than the insured or one of their subcontractors (construction management services).



The original development of Professional Liability insurance policies was in response to these types of professional liability exclusions in General Liability policies. Therefore, as is commonly the case, the gap in exposure is addressed by a separate insurance policy.

Do you need Professional Liability Insurance?

To answer this question, you need to clearly understand your responsibilities as represented in all of your firm's contracts and even those activities that may be outside the scope of your contract. Examples include:

- Construction Management, Program Management, and Project Management

Any time that you enter into a contract that specifically identifies your scope of service/work to include a "management" service to the direct benefit of an Owner (or your client), it is likely that you have represented yourself as being a "professional" resulting in exposure to professional liability claims which may not be covered under the CGL policy.

- Design-Build

Any time you enter into a contract in which you have agreed to perform design services (design-build contracts) whether using your own employed architects or engineers or by subcontract to consultants, or subcontractors you likely have a professional liability exposure. While you may have transferred a large portion of the risk in your subcontracted design services (most common arrangement), the responsibility for design errors still remains with your firm as the principal contracted party to an Owner.

These design responsibilities may not be for the entire project. They may involve only specific systems such as HVAC, electrical, fire protection, security or other areas that represent a portion of your overall project or contract responsibilities.

- Delegated Design

Under certain contracts, the project architect or engineer of record may delegate the design of specific systems, component materials, or equipment to the contractor through a design criteria and performance specification. This is common practice with connections involving structural steel, concrete, building curtain walls and the design of fire protection systems. Although the actual design of these connections or systems may be performed by subcontractors, suppliers or manufacturers, the contractor may be vicariously liable for the design thus creating a professional liability exposure to the contractor.

- Design Assist

From time to time, the contractor may be called upon to assist the project architect or engineer in reducing the cost of the project through value engineering or constructability evaluations. Although any changes that are adopted should be accepted and approved by the project's designers, the fact that the contractor is providing input from their own staff who may often be licensed professionals, may expose the firm to allegations of professional liability if the adopted changes prove to be unsatisfactory.



- Other Miscellaneous Services

An error or omission involving services performed by land surveyors, geotechnical engineers or scientists retained by the contractor can result in significant claims against the contractor from subcontractors who relied upon these services and now seek recovery for economic damages.

Claims that arise from the negligent performance of environmental scientists or other specialty consultants may trigger exclusions under the general liability policy leaving the contractor exposed to professional liability.

Unfulfilled customer expectations such as a failure to meet LEED building standards and finalized ratings could allegedly be attributed to poor advice provided by specialty consultants retained by the contractor.

These are just a few examples of the potential exposures and the list could go on and on. A key point that must be emphasized is to ensure there is an understanding of the liabilities and risks being assumed in your contracts, as well as the secondary, or vicarious liabilities, which may arise from the nature of your projects and operations.

Conclusion

The liabilities facing today's contractors are ever changing with new and evolving project delivery methods, technologies, regulations and customer needs and expectations. Owners today are more informed of their legal and contractual rights and are quick to assign blame and initiate legal action, particularly when final project results are not as expected. It is difficult for a contractor to anticipate all of the potential exposures to professional liability that may or may not arise.

There are solutions to these risk exposures, such as ensuring that proper contract language is utilized, as well as a number of readily available general and professional liability insurance products which can be structured to best protect the firm's operations. The insurance solutions are often tailored to align with the operations, and when required, designed or crafted for unique aspects which can arise on an individual project. In this regard, it is important that a contractor seek quality advice from legal, risk management and insurance professionals who are construction and design industry specialists.

Nolan Heuchert, CAIB, CRM, Director, Wylie-Crump Limited

Nolan Heuchert is a director with Wylie-Crump Limited, and has been focused on providing risk and insurance advisory services to contractors, trade contractors, developers and designers over the last 15 years. Nolan has been involved in a wide variety of domestic and international projects, including a number of significant public, private, partnership (P3) projects throughout Canada.

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