

# INSURING CONSTRUCTION PROJECTS

## Beyond General Liability

New construction and renovation projects can result in a broad range of potential professional liability insurance claims exposures for both the project owner or developer and the contractor and design professionals involved on a project. Unfortunately, many firms underestimate the need for coverage and over-estimate the extent that needed coverage may be available under a contractor's commercial general liability policy.

This article will identify the limitations in professional liability coverage that may be available and present optional ways to obtain the professional liability insurance coverage needed.

### WHAT ARE THE EXPOSURES?

Professional liability claims can arise from a broad range of construction related services:

- The general contractor or construction manager, whether at risk or simply as an agent for an owner
- Project architects and engineers
- Environmental consultants
- Zoning and land use consultants
- Acoustic consultants
- Interior designers
- Curtain wall designers
- Financing and investment related service providers
- Leasing and property management firms
- And many others

The underlying risks arise out of the provision of professional advice or consultation, as opposed to actual construction related services.



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## WHAT COVERAGE IS AVAILABLE UNDER A COMMERCIAL GENERAL LIABILITY POLICY?

The standard unendorsed commercial general liability policy provided by the Insurance Services Office (ISO), the CG 00 01 04 13, does not contain a professional liability exclusion. However, almost every insurer that covers contractors will add a professional liability exclusion to a contractor's policy. Most will include a broad exclusion of engineers, architects and surveyors exposures. Under this CG 22 43 04 13 Endorsement coverage is excluded for any claims involving bodily injury, property damage, or personal and advertising injury, arising out of the rendering of or failure to render any professional services by the insured contractor or any engineer, architect or surveyor who is either employed by the insured contractor or performing work on his behalf.

Worse yet, the definition of excluded "professional services" is very broad, including:

- The preparing, approving, or failing to approve, maps, shop drawing, opinions, reports, surveys, field orders, change orders or drawings and specifications
- Supervisory, inspection, architectural or engineering services

As such this exclusion endorsement will eliminate coverage for claims arising out of a broad range of the everyday services provided by any contractor, including the selection and oversight of any architects or engineers.

Fortunately, there is a much more limited version of this exclusion, the ISO CG 22 79 04 13 Endorsement. This exclusion narrows the definition of excluded professional services, so that they do not exclude coverage for claims from "services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor." This give back of coverage

will also extend to the preparing and approving of maps, shop drawings, opinions, surveys, etc. provided they fall under the exception described above.

Although the professional liability coverage provided under this better endorsement is significantly better, it still leaves important gaps in coverage.

The coverage provided is still limited only to professional liability claims due to "bodily injury or property damage" claims.

Accordingly, there is no coverage for claims involving pure economic loss. No coverage is provided for claims involving money-loss due to delays in completion, cost overruns, poor workmanship, work that does not meet the intended use for the project, usable square footage or layouts, etc.

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## WHAT IS THE COVERAGE SOLUTION?

The best solution for every contractor is to purchase a contractor's or construction manager's professional liability policy. This is typically done on a so-called "practice policy" where coverage is provided for all the contractor's jobs during the 12-month insurance policy period. Oftentimes, this professional liability coverage can be combined with a contractor's pollution liability coverage, either subject to an overall combined limit of coverage or preferably a separate limit for each coverage part.

Many contractor's professional liability policies only cover claims for loss arising out of construction management consulting services performed by the contractor as an agent for an owner. The best policy forms will cover both of these services and those performed as a general contractor or construction manager at risk.

Under this typical coverage approach, the limits of protection are shared over all the jobs done by the

contractor over the year. Some insurers will extend the coverage to provide a per-project limit on a job or to endorse an additional excess limit that would cover a particular job if the annual policy limit is eroded or used up from other claims.

Another option is to buy a standalone contractor's professional liability policy for each job from the contractor's existing insurer or another professional liability insurer.

It is also important that the owner and general contractor require and then verify that the project architect, engineer(s) and other project professionals all carry broad professional liability coverage with reasonable limits of liability. In some limited cases, the owner and contractor may be able to be covered as an additional insured on these consultant's professional liability policies.

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## WHAT COVERAGE LIMITATIONS MAY APPLY?

In all cases, contractor's professional liability policies are written on a claims made basis. This means there is only coverage for wrongful acts committed by the insured contractor after an agreed starting or prior acts date (usually the first date that a professional liability policy was purchased) and where the actual claim or lawsuit is filed during the current professional liability policy.

Because this coverage is written on a claims made basis, it is critical that coverage be maintained on a continuous basis, or that an extended tail period be purchased to continue protection for claims that may be brought in the future after project completion.

The best contractor's professional liability policies will also cover claims arising out of both potential bodily injury and property damage liability claims and claims alleging pure economic loss. Unfortunately, many policies still restrict their coverage to only bodily injury or property damage liability losses.



Unlike commercial general liability insurance, there is no standard contractor's professional liability policy form available. Accordingly, it is critical that broad coverage be negotiated, including coverage for claims alleging cost overruns, delays in completion, and even breach of contract, provided the underlying claim also alleges that a loss is due to the contractor's negligence.

In addition to purchasing coverage for the contractor itself, many project owners or developers will request that they be added as an additional insured on the contractor's policy. Although this is typically available on a project specific policy, many professional liability insurers are unwilling to do so under a more typical annual practice policy. If the owner can be added, it is important to be sure there is no exclusion on the contractor's policy that eliminates coverage for a claim by one insured against another insured under the policy.

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## CAN THE OWNER PURCHASE HIS OWN COVERAGE?

Over the last several years the professional liability insurance marketplace has developed an innovative new form of coverage.

The project owner can purchase its own stand-alone policy for a given construction project known as an owner's protective professional indemnity policy (OPPI). This is intended to cover any claims not covered by the contractor's professional liability policy, as well as practice policies maintained by the project architect, engineer(s) and other project consultants. Like the professional liability policies carried by these other professionals, this OPPI coverage is written on a claim made basis and applies excess of any coverage available from other firms.

In addition to coverage in excess of the coverage available under these outside firm's professional liability policies, some OPPI policies also provide coverage for possible professional liability losses the owner may incur by allowing them to file coverage for a claim directly under their own professional liability policy.

Given the broad range of potential exposures to loss that may not be covered by a contractor's commercial general liability policy, it is important that every contractor consider purchasing a stand-alone professional liability policy.

In addition, every contractor should also look towards the architects, engineers and other consultants it works with to be sure they also maintain appropriate limits and scope of professional liability coverage to cover any claims arising out of their professional services.

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