



Constructive Comments

Risk Management Perspectives for the Construction Community

Why Contractors Need Design Liability Coverage

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CNA Coverage for Contractors

The CNA/Schinnerer contractor's program covers significant design and incidental pollution risks. Coverage includes:

- Design errors and omissions
- Failure to detect or quantify the presence of pollutants (pollution coverage)
- Pollution claims arising out of job site activities
- Joint ventures
- Worldwide indemnity and defense
- Agency and at-risk construction management
- Faulty work of subcontractors

Today, many design professionals work directly for contractors. And if a design professional works for a contractor, the contractor is liable for the performance of that professional's services. The contractor can be held legally responsible if the design professional is found to be negligent. And this responsibility continues after the project is complete. Contractors remain exposed to claims alleging harm from negligent professional services through the applicable statute of repose.

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 under the same or similar circumstances. This requirement is true whether design professionals provide services directly to a client or to a contractor. And providing services to a contractor could vary from working as a licensed design professional employed by the contractor to being an independent professional consultant for whom the contractor is vicariously liable.

A contractor can also be held liable for design professional negligence if the contractor hires the 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 vicarious liability for the negligence of the design professional.

That's why when a contractor enters into a design-build agreement with a client, the contractor is usually required, either directly or through the design professional, to carry professional liability insurance to cover design exposures. In fact, certain standard form agreements require that the contractor obtain professional liability insurance.

It's also possible that the contractor will have design responsibility and liability even under the traditional design-bid-build project delivery method. Increasingly, elements of the design are delegated to the contractor. And the exposure for negligence in design exists whether the contractor creates the design in-house or subcontracts for those services. Design liability can exist on either a direct or vicarious basis even if by state law the contractor cannot provide design services. 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 are still those of the contractor.

CGL Coverage is Inadequate for Design Liability Exposures

Design exposures and losses are not covered by most commercial general liability (CGL) policies. Design exposures are the costs required to remedy negligent design and any necessary reconstruction. When contractors assume a single point of responsibility role a client through design/build project delivery, they are providing project design in addition to their construction obligations. The design exposure assumed under a design-build contract may be *direct*, in the case of a contractor's in-house design team, or it may be *indirect*, as a result of subcontracting the design to a design firm. *Most CGL policies exclude both exposures.*

CGL policies typically provide coverage only for bodily injury and property damages, as defined in the policy. The definitions of bodily injury and property damage usually *do not* include remedial design and reconstruction and other associated damages such as delay claims, loss of use, and other economic damages. In addition, some CGL carriers are not comfortable with the design exposures of design-build and design delegation and place a professional services exclusion on their CGL policies. This will then exclude all claims submitted under the CGL policy that arise out of design-related services.

CNA/Schinnerer Contractor's Program Provides Coverage

Our program is designed to meet the specific needs of contractors responsible for design services. Our program includes:

Design Liability

The policy covers contractors for direct liability arising out of the performance of professional services

Construction contractors who take on design responsibilities take on design liability exposure...And not all of this exposure to claims can be covered through a CGL policy or contractually by placing the risk on a design firm.

rendered by in-house design staff who are legally qualified architects, engineers, land surveyors, landscape architects, and construction managers. The policy also covers the contractor for indirect design exposure arising out of professional services rendered by consultant design professionals either through design-build projects or design delegation under the provisions of AIA Document A201, *General Conditions of the Contract for Construction*.

Agency and At-Risk Construction Management

The policy also provides coverage when the contractor is performing construction management services as the client's agent; an arrangement commonly referred to as Agency Construction Management. Also, when the contractor is acting as the client's construction manager and holds separate a contract for the construction of the project, this is referred to as At-Risk Construction Management. Such construction management services must be defined in a written contract with the client.

Faulty Workmanship of Subcontractors

When the contractor is providing agency or at-risk CM services or acting as a design-builder, the policy covers the failure to detect

construction not in accordance with the construction documents. There must be a contract with a fee for CM services that defines the construction management services provided. So, coverage is not provided for the failure to detect faulty workmanship of others under a client-contractor agreement when the contractor is simply providing general supervision of construction.

Pollution Coverage for Job Site Activities

Contractors pollution liability (CPL) coverage can be provided either as a stand-alone policy or under a combined contractors professional and pollution liability policy. The CPL form provides coverage for pollution claims arising out of the job site activities of the contractor or its subcontractors. A pollution incident is covered if it arises out of the policyholder's activities, or the activities of any person or entity for which the contractor is legally liable.

CNA/Schinnerer Can Help

Construction contractors who take on design responsibilities take on design liability exposure. 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 to claims can be covered through a CGL policy or contractually by placing the risk on a design firm. As project delivery methods continue to place the construction contractor in a more prominent position for design responsibility, contractors need to address their risks through programs such as that offered by CNA and Schinnerer. ♦

Check Out Mold Reference Information

In addition to the resources provided by the CNA/Schinnerer program on our website, www.PlanetContractor.com, there are other online resources for contractors. Check out the following:

www.agc.org — The Associated General Contractors of America includes not only *Managing the Risk of Mold in the Construction of Buildings* (AGC's seminal publication on how contractors can respond to uninsurable mold risks), but also information from other industry sources. Look in the "Safety and Risk Management" category from the left menu and go to "Guidance on Mold."

www.irmi.com — The International Risk Management Institute provides "expert articles" to contractors and their insurance brokers. You can download a copy of *Seven Tips on Mold Management Programs*. It provides basic information for contractors intent on developing a mold management protocol. If you are creating or reviewing your water intrusion or mold management program, this article may be helpful. If you go to the site, click on "expert commentaries" in the left menu or go directly to www.irmi.com/expert/articles/slivka011.asp.

And for information from another perspective, check out these sites that serve law firms and their clients.

www.themoldsource.com — This Texas-based site provides "victims" with information under the categories of legal, toxicology, industrial hygiene, remediation, bulk/air testing, and laboratory. In addition to exposing the effects of mold, it guides potential plaintiffs into litigation.

www.toxic-mold-news.com — The toxic mold website is a comprehensive guide to information regarding mold, toxic mold, safety, and prevention. This site also provides "toxic mold litigation information for those who have been affected by exposure to toxic mold in their home, workplace, and elsewhere."

www.mold-help.com — This site bills itself as "the most comprehensive resource for mold-related contact information on the web." It even includes links to help parties find financing for mold litigation. One of its companion sites is www.mold-survivor.com, which includes articles pointing out the dangers of mold and suggesting testing and litigation sources. ♦

Look to Canada for Guidance on Mold

Almost two years ago, the Canadian Construction Association (CCA) created a mold task force to develop guidelines for contractors. The effort focused both on providing procedures that contractors could follow to minimize the potential for mold growth and methods for instituting effective remediation procedures.

In February, the CCA released *Mould Guidelines for the Canadian Construction Industry*. This guide (Document CCA82) was produced by the task force, which included representatives from a wide range of disciplines.

The document offers practical advice on mold-related issues ranging from legal, insurance, to health considerations. It also offers information on how to minimize the presence of mold, how to identify and measure it, and step-by-step instructions on remediation. The following topics are covered:

- Insurance considerations,
- Minimizing moisture intrusion,
- Proper building maintenance and operation,
- Mold assessment,
- Mold remediation protocols,
- Proper disposal of moldy materials, and
- Guidelines for selecting mold remediation contractors.

Recognizing the importance of this document, the CCA board of directors has made it available online and free-of-charge. You can download it from the Canadian Construction Association website at www.cca-acc.com. Hard copies of the 38-page publication are also available for purchase from affiliated Canadian construction associations. ♦

Commerce Department Announces Growth in Construction

According to information provided by the U.S. Commerce Department, December 2003 construction was at a \$933.2 billion dollar annual rate. This seasonally adjusted annual rate was 7 percent higher than the December 2002 estimate.

Residential construction again drove much of the increase. The 2003 rate was 10.5 percent above the 2002 figure. The seasonally adjusted annual rate for all private construction was 4.8 percent higher than the 2002 figure of \$650.5 billion.

The value of public construction in 2003 rose by only 2.8 percent over 2002 statistics. The increase in highway construction matched the overall growth rate for all public construction put in place.

Good News on Mold, Finally

The CNA/Schinnerer program will now consider the removal of the mold exclusion from professional liability and contractor's pollution liability policies. For construction firms with written procedures to address and mitigate water intrusion—and with acceptable claims experience—it may be possible to add coverage by removing the total mold exclusion.

The enhanced coverage is meant for firms that address mold issues in a proactive and preventative way that is focused on reducing the probability of mold losses. Firms with protocols that specifically establish procedures to prevent and remedy any water infiltration and potentially resultant mold claims are candidates for the expanded coverage. For general

contractors, an indication that project-specific mold prevention plans are being developed and implemented is vital. Company guidelines such as keeping organic building materials dry before, during and after installation, addressing wet building materials, and sequencing construction to minimize water accumulation on the site and intrusion into the building are basic requirements.

In addition, firms that prepare manuals for project clients that delineate required operation and maintenance procedures are considered good risks. While such client education materials may not prevent claims, the effort to point out that facilities need continuous performance and preservation programs is a proactive approach that

forms a strong defense in the event of water intrusion or humidity problems.

Not all general or specialty contractors are eligible for mold coverage. Applicants who have a total mold exclusion on their CGL policies and do not purchase CNA/Schinnerer CPL coverage are excluded from consideration. In addition, companies having considerable work in "mold litigation" states, a large percentage of "habitational" projects (where most mold claims are generated), or significant involvement in wood construction may not be offered the coverage.

For more information on our Contractors program and policy, visit www.PlanetContractor.com or talk with your broker. ♦

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