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DESIGN PROFESSIONAL'S INSURANCE UNDER DESIGN-BUILD

Most professional policies issued to design professionals contain a provision that provides coverage for claims arising out of design-build projects when the design professional retains an unrelated contractor. Most policies can be modified to provide coverage for design-build contracts in which both design and construction is performed either directly or through a related company.

Coverage will not be extended, however, for claims arising out of faulty workmanship or materials unless they are due to an error in the field services or inspections of the design professional. The policy also stipulates that coverage is excluded for claims arising out of deficiencies in materials, equipment or products supplied or manufactured by or on behalf of the design professional, unless the procurement is carried out by the design professional as agent of the client. Design professionals who are contemplating a design-build contract should contact their insurance broker to determine if they have appropriate coverage for the role they intend to assume.

Liability

Depending on the contract, the design professional may be liable for both construction and design deficiencies. There may also be a liability exposure to other members of the design-build team. As noted, there is the possibility of liability in the contractor's preparation of bids based on information supplied by the design professional.

Exposure to environmental risks

The design-build agreement should contain effective provisions to deal with exposures relating to the existence of pollutants on the site, whether known or unforeseeable. Given the nature of current legislation, the design-builder assumes tremendous risk with respect to environmental risks by virtue of the design-builder's presence on and control over the site. The transfer of risk back to the client is recommended and must be in the contract. Contractors Pollution Liability coverage is essential, and is available as part of the CNA coverage for design professionals.

Warranty of fitness

The design-build contract should separate responsibility for design from responsibility for construction workmanship and materials. Otherwise, design professionals may be deemed to have provided an implied warranty of fitness for the entire project. The standard of care defense might not be available in this situation, and the liability would not be insurable under the professional liability insurance policy.

Guarantees and warranties

As noted earlier, the design-build contract may create an implied warranty by the design professional. Clients may seek additional comfort and demand that an express performance guarantee be written into the agreement. Warranties pertaining to workmanship and materials are customary in the construction industry and probably cannot be avoided. They should not, however, be extended to apply to professional services. Design professionals should bear in mind that any claim arising out of an express warranty or guarantee pertaining to their design would be excluded under the terms of the professional liability insurance policy. Design professionals may warrant that they are qualified to carry out the work or that the project design will be capable of meeting a performance target. They should not guarantee that a project will produce a certain output or generate a specified income

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as they do not control the manner in which the project is constructed or operated and cannot be responsible for performance deficiencies due to the acts of others.