

# Professional Liability Update



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## A/E Risk Review

### Insurance Requirements Go Both Ways

*The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*

Experienced clients often present a list of insurance requirements for their architects and engineers. Sometimes, these are presented in the form of mandatory, take-it-or-leave-it minimums. Either you agree to secure and maintain their minimum limits of coverage for one or more types of insurance or you won't be hired for the job.

Most clients focus their insurance requirements on professional liability insurance limits -- often called errors and omissions (E&O) insurance -- when hiring an A/E firm. Some present a laundry list of all types of mandatory coverages with confusing requirements. Design professionals must be prepared to address unrealistic or ambiguous insurance requirements in client-drafted contracts.

For example, unsophisticated clients may ask a design firm to provide the types of coverages they routinely demand of their contractors. These coverages can be difficult or even impossible for you to obtain and likely would not provide the protection your client is looking for. As an A/E insurance specialist, we can assist you in educating your clients regarding appropriate insurance policies for design firms and negotiating reasonable coverages and rates on your behalf.

## Insurance 101

Specifications regarding types and limits of coverage can be mind-boggling. To make sense of and meet these requirements, you'll need a basic understanding of the various types of policies and coverages clients typically ask for. You'll also need to know what each standard policy insures and what extra coverages can be obtained through added "endorsements" if needed.

### Insurance 101 continued

Design firms also need to understand the types of insurance coverage they should demand from their clients. Insurance requirements are a two-way street, and you'll want to know your client and its project are properly covered. Again, we can help you identify the types of insurance coverage you should require of your clients before accepting a new project. It is often best to take the initiative when dealing with insurance requirements for new clients, particularly if they are novices in construction project management. You and your attorney should offer your client an insurance agreement in simple, straightforward language that says you will attempt to maintain appropriate insurance with reasonable limits of coverage during the term of the agreement and that you will provide the client evidence of that coverage.

Never guarantee to maintain a given level of insurance coverage for an extended time. Because of the volatility of the insurance market, you may be making a promise you might not be able to keep. In that vein, it is wise to include an addendum to the contract that includes a qualifying statement such as:

***“In accordance with the terms of this agreement, the consultant shall attempt to obtain and maintain for the period of design and construction of the project the following insurance policies with coverages and limits as indicated.”***

Then list the individual coverages and limits, which will likely include the following:

### Professional Liability Insurance

Most client insurance requirements begin with professional liability (PL) insurance, also called errors and omissions (E&O) coverage. PL insurance covers design consultants from claims arising from alleged negligent acts, errors or omissions committed in the performance of their professional services. Professional liability policies have several unique features that both you and your clients should be aware of:

- Policies are written on a *claims-made* or a *claims-made and reported* policy form. Both of these policies cover claims made against a design firm during the policy term, and require that the claims be reported to the insurance carrier in accordance with policy terms.
- To be covered, PL claims must have arisen from acts, errors or omissions occurring after the *retroactive date* stated in the policy. For instance, if your current policy has a retroactive date of 2010, it would typically not cover a claim for an incident that occurred in 2009 or earlier.
- The retroactive date is typically the date on which you originally obtained your professional liability insurance coverage. To keep its retroactive date in force and have *prior acts* coverage, a design firm normally must maintain continuous coverage. In other words, if you go uninsured for a period of time and then get a

new PL policy, you could lose coverage for your acts prior to the new policy's inception date.

- Professional liability policies have annual *aggregate limits*. That means the yearly policy limit purchased is the *total* amount the insurer will pay for all defense costs and indemnity payments regardless of the number of claims made during the policy period.
- In most states, professional liability policies are *expense within the limits* policies. This means that after you meet your deductible, any additional defense costs paid by your insurer will decrease the policy limits available for payment of that claim or other claims. Check your state laws.

Be aware that clients may confuse professional liability insurance with general liability insurance. Thus, they may insist that you have the same coverage and stipulations they require of their contractors. For example a client may demand that they be included as an "additional insured" on your professional liability policy. This cannot be done for a number of reasons, and including such a stipulation could actually weaken your client's protection. If they were a named insured, they may not be able to file a claim against the policy since they would essentially be making a claim against themselves.

## Commercial General Liability

Another frequently required type of insurance is commercial general liability -- also called comprehensive general liability, CGL, or public liability. This coverage insures your firm against liability claims for bodily injury and property damage arising out of your nonprofessional activities and business operations. For example, this policy provides coverage should a person slip and fall while visiting your offices.

Many coverage endorsements that cannot be added to your professional liability policy can be provided under your general liability policy. You might be able to provide your clients with endorsements they believe will give them additional protection under your policies, such as waiver of subrogation or being named an additional insured.

General liability insurance is sometimes combined with property insurance (covering furniture, fixtures and real property) in what is called an "office package policy." Also, business owner policies (BOPs) can provide added protection beyond that offered by standard property policies, including coverage for electronic data losses and interruption of computer operations. Package policies often represent an economical form of coverage for smaller firms with standard insurance needs.

## Workers Compensation

Workers compensation is a no-fault insurance that protects employers and employees when workers are injured become ill or are killed on the job as a direct result of their employment. Workers compensation insurance is paid for by the employer and provides benefits for medical costs and lost wages. Although workers compensation insurance is required by statute in every state, client contracts often require proof that the design firm carries such coverage.

Clients may ask that endorsements they typically require of their contractors be added to your workers compensation policy. Availability of endorsements such as waiver of subrogation and additional insured varies from state to state and insurance carrier to carrier. We can help you educate your client regarding such endorsements and negotiate contract language that provides appropriate coverages that are available from your insurer.

## Automobile Liability

Clients often require evidence of automobile liability insurance, whether or not you are likely to use vehicles on the project. If you have a business automobile insurance policy, this requirement can be met by providing certificates of insurance. However, if employees drive and insure their personal automobiles, private passenger auto insurance companies will not likely issue certificates of insurance or name a client as an additional insured.

Because of this, a client may impose a contract requirement that you provide evidence of *non-owned and hired auto coverage*. This is insurance you would carry for automobiles your firm does not own -- such as employees' cars used on company business. This type of insurance provides liability coverage for your firm above and beyond the primary limits carried by the car owner. This coverage often is attached to a firm's owned automobile policy or its office package policy. In some states, it may be required to obtain a freestanding non-owned auto policy.

## The Client's Insurance Requirements

Since clients require verification of insurance coverage maintained by design firms, it's only fair that architects and engineers receive similar verification of the insurance their clients maintain, as well as the coverage secured by the contractor. Consider having your attorney add to your contract language that requires the client to secure and maintain appropriate limits of the following insurance:

**General Liability Insurance:** This insurance provides coverage for bodily injury, property damage, and personal injury and should include contractual liability, personal injury liability, and advertising liability. Ask the owner to include you and your sub-consultants as additional insured under their GL policy.

**Owner and Contractors Protective (OCP) Liability Insurance:** This type of insurance covers the named insured's liability for bodily injury and property damage caused by an independent contractor's work for the insured. Typically, the contractor purchases the policy to provide coverage for vicarious liability their clients incur as a result of the contractor's acts or omissions on the project. The OCP policy also covers liability arising out of the insured's own acts or omissions in connection with its supervision of the contractor's operations. Request that the client include you and your sub-consultants as additional insureds under this policy.

**Workers Compensation Insurance:** Make sure the client's workers compensation policy includes employer's liability coverage, secured and maintained on behalf of the client and its employees.

**Builders Risk Insurance:** This is a special type of property insurance that indemnifies against damage to buildings while they are under construction. Ask that the client secure and maintain coverage on behalf of the client, you and your sub-consultants as their interest may appear on this project with limits in accordance with the project value and policy conditions.

**Contractors Comprehensive General Liability Insurance:** Ask the owner to require that the contractor maintain ample comprehensive general liability insurance and that the client, you and your sub-consultants all be named as additional insureds. Have the client require the contractor to forward certificates of insurance confirming this coverage to all appropriate parties.

## Conclusion

It is crucial to review and negotiate the insurance terms of any contract entered into with a client. Design firms should not hesitate to specify the coverages they expect of the client, contractors and other parties in order to provide proper protection. We can be a valuable business partner when negotiating contracts and obtaining needed coverage.

### Can We Be of Assistance?

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.*

***STUCKEY INSURANCE** is the leading provider of Professional Liability to design professionals in Arizona. Please call us if you like to schedule a consultation for your insurance needs.*



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