

A/E RISK REVIEW

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Negotiating Insurance Requirements In Client Contracts

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.

Contracts drafted by your clients typically contain detailed and oftentimes confusing insurance requirements. Specifications regarding the types and limits of coverage you must carry, as well as special amendments and conditions, can be extensive. To make sense of and meet these requirements, you'll need a basic understanding of the various types of policies and coverages your clients are likely to ask for. You'll also need to know what each standard policy insures and what extra coverages can be obtained through amendments – known as “endorsements” – if needed.

As a design professional, you must be prepared to protest impossible or ambiguous insurance requirements in client-written contracts. Often, a client will ask you to provide the types of coverages they routinely get from their contractors. These coverages can be difficult or impossible for a design firm to obtain and may not provide the protection your client is looking for. As an A/E/E insurance specialist, we can assist you in educating your clients regarding appropriate insurance coverages for design firms and negotiating reasonable coverages and rates on your behalf.

You also need to consider the types of insurance coverages you should demand from your clients. Again, we can help you identify the types of insurance +

coverages you should require before accepting a new project.

Contractual Insurance Requirements

Take the initiative when dealing with insurance requirements of a new client or project. Offer your client an insurance agreement in simple, straightforward language that says you will attempt to maintain appropriate insurance with adequate limits of coverage and provide evidence of such insurance. A certificate of insurance is a short form document that informs your client or other parties of the coverages you have in place. You might also list your current coverages on an addendum attached to your contract.

Notice we recommended a qualifying statement in your contract that states you will *attempt* to maintain insurance coverage throughout the time of your. It is not recommended that you promise to obtain and maintain certain coverages and limits since you may not be able to keep that promise.

Now let's examine some specific insurance coverages. The coverages and limits you'll need will vary depending upon your unique situation and client demands.

Professional Liability Insurance

Most client insurance requirements begin with professional liability coverage. Professional liability insurance protects designers from claims arising from negligent acts, errors or omissions allegedly 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 period and require that the claims be reported to the insurance carrier in accordance with policy terms. To be covered, such claims must have arisen from acts, errors or omissions occurring after the *retroactive date* stated in the policy.
- The retroactive date is the earliest date for which coverage is in effect under your current PL policy. This date typically corresponds to the date from which you have maintained continuous PL coverage, regardless of whether you have changed insurance companies over that period. It is important to note that if you go uninsured for a period of time and then get a new PL policy, you could lose coverage for all of 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. Some policies have a per-claim or occurrence limit as well.
- 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.

Be aware that clients often confuse professional liability insurance with general liability insurance. Thus, they may try to 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, including the fact that the client is not a licensed design professional.

What is the best course of action if your client insists that you guarantee to maintain a certain level of

professional liability coverage for an extended time? As stated earlier, because of the volatility of the insurance market, it is best not to provide such guarantees. Instead consider offering a contractual clause wherein you agree to attempt to maintain professional liability coverage for the period of design and construction of the project, and for a short period following substantial completion, if such coverage is reasonably available at commercially affordable premiums. You might want to go further and define "reasonably available" and "commercially affordable" to mean that more than half the consultants practicing the same professional discipline in the state where the project is located obtain such coverage.

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 business operations, including personal and advertising injury and medical payments. For example, this policy provides coverage should a visitor slip and fall while visiting your offices.

Many coverage amendments, or 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 (such as a "waiver of subrogation" or "named additional insureds") they believe will give them additional protection under your policies,

General liability insurance is sometimes combined with property insurance (covering furniture, fixtures and real property) in what is called an "office package policy." Such packages often include additional coverage for valuable papers and other exposures common to a professional practice. An office package policy often represents 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 named insureds” 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, you may face a problem. Private passenger auto insurance companies will not likely issue certificates of insurance or name a client as an additional insured.

Non-Owned Automobile Liability

A client may impose a contract requirement to 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, you may be required to obtain a freestanding non-owned auto policy.

Foreign Projects Coverage

Many insurance policies provide coverage only in the United States (and perhaps U.S. territories, Puerto Rico and Canada). If a project is in a foreign country where coverage is not provided under your existing policies, separate foreign coverage insurance may be needed for workers compensation, general liability and/or automobile liability. Professional liability policies often provide or can be endorsed to provide international or worldwide coverage.

Projects in countries with decennial liability, a form of strict liability originating from the French Civil Code that doesn’t require proof of negligence, are uniquely challenging. Check with us before undertaking any foreign project.

Owner Insurance Provisions to Contracts

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 are maintaining, as well as the coverage secured by the contractor. Work with your attorney to develop a list of insurance coverages such as the following:

- The client should maintain comprehensive general liability insurance providing coverage for bodily injury, property damage and personal injury for the owner’s liability. Such coverage should include contractual liability, personal injury liability and advertising liability. The client should include you and your subconsultants as additional insureds under this GL policy.
- The client should maintain owners and contractors protective liability insurance during the course of the project. The client should include you and your subconsultants as additional insureds under this policy.
- The client should maintain workers compensation insurance for its employees, including employers’ liability coverage.
- The client should maintain builders risk insurance on the project with limits adequate for the project value.
- The contractor should be required to maintain contractor’s comprehensive general liability insurance with the client and all design professionals named as additional insureds. The contractor should also be required to provide certificates of insurance to all parties.

Conclusion

It is crucial to review and negotiate the insurance terms of any contract entered into with a client. Don't hesitate to specify the coverages you expect the client, contractors and other parties to secure in order to provide all parties with 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.