

Property & Casualty Newsletter

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Is Your Insurance Program Ready for Your Next Design-Build Project?

Design-build is no longer an alternative delivery method. According to a recent study* by the Falls Management Institute sponsored by Design-Build Institute of America, use of the design-build delivery method has steadily increased year over year and is predicted to represent 44% of construction spending across many nonresident market segments by 2021. And this expansion is not limited to large projects; design-build is progressively being used on projects under \$25 million as owners continue to realize the benefits offered by this delivery method.

Given this continued utilization, now is the time to review your insurance program to ensure it is designed to protect you on your next design-build project.

Unlike the traditional design-bid-build construction process, the design-build contractor performs the design and construction and assumes the liability for the design. Contractors without in-house capabilities must subcontract project design to a design professional. In so doing, many contractors rely solely on this design professional's contractual indemnity obligation and insurance to account for and mitigate their own increased risk. While these items will mitigate the risk to a certain point, trusting on them solely to protect the design-build contractor leads to an exposure gap that could have disastrous consequences. To close this gap and transfer risk, design-build contractors should seek to remove or limit any professional liability exclusion on their commercial general liability (CGL) policy and obtain a professional liability policy.

Design-build is no longer an alternative delivery method.

The basic Insurance Services Office (ISO) CGL occurrence form does not exclude coverage for claims or suits arising out of professional services. However, most CGL insurers, as a matter of course, include an endorsement on a contractor's policy that excludes liability resulting from the rendering of or failure to render professional services. The three standard CGL endorsements that address professional liability exposures are:

- **CG 22 43 Exclusion**—Engineers, Architects or Surveyors Professional Liability
- **CG 22 79 Exclusion** – Contractors – Professional Liability
- **CG 22 80 Limited Exclusion** – Contractors – Professional Liability

All three of these endorsements exclude coverage for liability arising from professional services. However, CG 22 79 and CG 22 80 contain different exemptions that give back limited coverage. CG 22 79 contains an exception that makes the exclusion not applicable to the contractor's "means, methods, sequences and techniques . . .", which is not a defined term in the CGL policy. As such, there is high probability of coverage disputes over the application of this exemption.

Further, this endorsement could be problematic for a design-build contractor, since it accepts responsibility for design in addition to construction means and methods.

CG 22 80 is a less restrictive endorsement and is better suited to design-build contractors. CG 22 80 still excludes liability arising out of professional services provided to others as an engineer, architect, or surveyor. However, it does include an exemption for the liability of a contractor who designs and builds a project for others, whether the design services are performed in-house or subcontracted to another design professional.



Pure economic damage poses a significant risk to design-build contractors.

Design-build contractors should ensure that endorsements CG 22 43 or CG 22 79 are not part of their CGL policy and should instead push for form CG 20 80 or a similar form, as it provides the broadest professional liability coverage of the standard endorsements.

Even when endorsement CG 20 80 is obtained, a design-build contractor should seek to cover their professional liability exposure with its own professional liability policy. CGL policies respond to claims for property damage and bodily injury. A design-build contractor's CGL policy will not respond to pure economic loss, such as acceleration costs, delay damages, cost for remedial design, and diminution in value arising out of professional services performed by or on behalf of the contractor. These types of economic damage pose a significant additional risk to a design-build contractor.

Contractors professional liability (CPrL) insurance was designed to provide coverage to a contractor for direct and vicarious liability for design errors or omissions. CPrL insurance is not limited to specific types of damage, like bodily injury or property damage. Instead, these policies will pay "damages" or "amounts" for which the contractor is liable. A CPrL policy can serve as viable enhancement to a design-build contractor's insurance program.

CPrL insurance policies should be reviewed to ensure all design-build exposure is properly covered and determine whether the coverage could be improved through additional coverages, such as rectification coverage. Protective indemnity coverage can also improve CPrL policies. This coverage serves as excess over the design professional's E&O insurance.

Contact your trusted Moreton & Company insurance advisor to discuss how you can better ensure you have the proper coverage for your next design-build contract.

*<https://dbia.org/wp-content/uploads/2018/06/Design-Build-Market-Research-FMI-2018.pdf>



Colin Chipman is a Surety Claims Advocate who assists our clients with risk management through contract review and developing risk transfer strategies. He also provides assistance with surety matters, including surety bond claims.

Please contact your Moreton & Company consultant with any questions.

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