

Better Design-Build Insurance Decision Could Have Prevented Big Liability

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Practice Area: Construction Law and Litigation

As the design-build model has become more popular, commensurate reports of unexpected losses because of inadequate insurance coverage are also on the rise. Benefits of design-build may include cost reduction and improved efficiency, communication, and accountability. However, there are risks associated with the design-build model, especially if companies do not tailor their insurance coverage to the realities of that delivery method. A New Jersey design-build firm recently learned this lesson the hard way.

When a New Jersey designer faced several lawsuits stemming from a parking garage collapse, the firm's commercial general liability (CGL) carrier refused to defend them arguing that the policies contained an exclusion for professional services. The insurance companies successfully argued they did not need to defend the architectural firm because failure to adequately perform professional services caused the collapse.

The term "professional services" is commonly defined as acts or services involving specialized knowledge, labor, or skill which is predominantly mental or intellectual rather than physical or manual. The traditional professional services exclusion in CGL policies exclude from coverage claims related to approving or preparing maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specification. Supervising, inspection, architectural or engineering activities are also excluded.

Most CGL policies have a professional service exclusion. The exception is not relevant for a contractor involved with a traditional design-bid-build project because the contractor is not obligated for professional design services. Instead, these services are typically the exclusive province of the Owner's design professional which should carry Errors and Omissions insurance intended for designers. However, there is a potential risk when a contractor accepts a designbuild role and assumes (or does not even consider whether) its standard CGL policy will cover design related losses or if it should obtain other insurance that will. Failure to consider this risk may create a serious gap in insurance coverage. This gap leaves a design-builder open to liability when injury or damage is the result of an error from a professional service. This is the gap the New Jersey firm recently found itself in, resulting in millions of dollars of uninsured liability.

The problems caused by gaps in coverage are not unique to New Jersey. Wisconsin courts have resolved the issue in a similar manner, although all cases are different. The upshot is that companies utilizing the design-build delivery method should be aware of the risks of uninsured liability, including because of the professional services exclusion in standard CGL policies. To protect yourself and your bottom line, be aware of what is in and what is not in your policies for it is risky to assume that you will always be in your insurer's good hands.

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