

# Protecting Against Environmental Risk in Today's Commercial Building Marketplace

By: Mitch Cohen, PE

The advance of building design technologies and environmentally-friendly materials have not only added another layer of efficiency to the construction process, especially in relation to green projects, they also created a sharp increase in professional liability claims among owners and builders alike.

Forty years ago, nearly all construction projects were delivered using the design/bid/build method, meaning that project plans and specifications were 100% completed and checked prior to the bidding process. Only then was the project awarded to the most valued contractor. While professional design errors still occurred, they were much less prevalent than when design/build came into prominence within the past decade.

Design/build (D/B) is a project delivery method that combines the services of designers and contractors under one contract. In many cases, it also entails construction starts that begin before design specifications are 100% complete. Owners love the D/B project delivery method because of its ability to save both time and cost. However, on the downside, D/B has also greatly increased the likelihood of design errors or omissions showing up earlier in the construction process and with far more frequency.

Computer aided design and drafting (CADD) and building information modeling (BIM) have greatly sped the time it takes to get plans from the engineer's table to the construction phase. In fact, it was both CADD and BIM that allowed D/B to really take off. Unfortunately, along with the benefits came a whole new set of unintended consequences often realized in the form of pollution liability.

Similar to the increased claims of professional liability exposure experienced over the last 40 years, environmental

liability is becoming increasingly common during today's construction efforts. Its roots closely lie with the introduction of the first stringent en-

vironmental regulations such as the Solid Waste Disposal Act of 1965 and the launch of the Environmental Protection Agency. Due to the increase

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in construction flaws, design errors and resulting pollution liability exposures, the insurance industry has since responded with the creation of a combined contractors professional and pollution liability insurance policy. Understanding the exposure and risk, many savvy contractors have sought to overcome these new industry challenges by transferring the risk and financial exposure to third-party carriers.

Constantly evolving, the insurance industry has developed many variations of this coverage, continually offering new flavors and differing policy forms. However, almost all were designed to provide the same basic protection against environmental risks.

Contractors professional liability insurance provides coverage for claims brought against the contractor for bodily injury, property damage and economic damages (e.g., loss of rents, loss of income, inflated costs, etc.) arising from faulty construction caused by professional wrongful acts. The professional wrongful acts can be design errors and omissions or decisions made in the field, such as modifications to plans, material substitution, hiring of incompetent subcontractors or even budget mismanagement.

For example, imagine a four-story office building under construction with concrete beams pre-cast at a fabrication plant, delivered onsite by truck and lifted in place. As the construction work reaches the third floor, the beams buckle at the center and crack. Construction dramatically halts with everyone attempting to identify the cause. After an intense investigation, it is determined that the beams, which were designed in error by the structural engineer, were unable to carry the weight of the structure itself. Construction is shut down while a new engineer is hired to correctly design new beams, which still have to be fabricated. In the meantime, the existing work has to be demolished and started over. During the ensuing timeframe, the project's owner sues the contractor for the economic damages suffered due to delays resulting in the building's late opening. This accompanies the termination of leases and skyrocketing construction costs.

Fortunately, the construction firm had the foresight to purchase contractor's professional liability insurance prior to the start of work. Because the faulty construction was caused by a design error, the policy then responds by defending the construction firm and paying the project owners the awarded sums.

In the pollution liability portion of the policy, coverage is provided for claims arising from bodily injury, property damage and remediation costs resulting from pollution conditions. The pollution conditions must occur as a result of the contracting activities performed at a job site. Examples of pollution conditions include the spillage of diesel fuel, paints and adhesives; fumes produced from welding rods; the excess concrete released from concrete trucks; and in some states, the silty storm water runoff from jobsites.

Another example concerns the construction of a parking lot. Asphalt concrete is laid with a hot, liquid asphalt cement sealant sprayed on top. Unfortunately, a heavy thunderstorm causes the wet cement to run off into a nearby creek. The contaminated creek water flows downriver causing a large fish kill and the contamination of sediments. In this scenario, coverage applies since the pollution conditions were directly created by contracting activities. As a result, the pollution portion of the insurance policy would defend the contractor by paying for the cleanup of the contaminated sediments as well as property damage costs and the accompanying regulatory fines.

Unlike other exposures, construction related professional and pollution liability can be catastrophic and extremely costly. Fortunately, there are ways to manage the risks. Construction firms can self-insure against the costs of professional and pollution liability, or they can strategically transfer the risk to third-party insurers. Many savvy construction firms are now turning to contractors professional and pollution insurance as the most effective alternative for ensuring against calamities and protecting the contractor's financial security and peace of mind. ■

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