

# Risky Business

by Timothy J. Farrell

## DO THESE INSURANCE SPECS APPLY TO ME?

### A Look at the Professional Liability Requirement

**W**ith government stimulus money trickling down through the system, numerous civil projects have either started, are in the process of being bid or have entered planning stages. All of these projects will require an array of insurances—from general liability to auto liability coverage by the winning contractors.

However, requirements for professional liability insurance are now on the rise in nearly all construction projects even if neither design nor engineering services are involved. That's because insurance specs are often written for the widest possible audience and only occasionally tailored to address individual project aspects.

#### The Contracts

A project's bid specs are often written for the widest audience that could possibly be doing the work. Only occasionally are the insurance specifications tailored to address individual aspects of the project. The "one-size-fits-all" request for proposal (RFP), bid specs or insurance requirements are convenient for the owner. In many instances, certain aspects of these specs are simply copied over from a previous contract. The bottom line is that these documents aren't perfect and shouldn't be considered



as the final draft or non-negotiable aspects of a contract.

#### Communication

When faced with a situation where professional liability is required for strictly contracting services, a contractor should discuss this requirement and others, as necessary, with the owner. It may be found that professional liability coverage is not necessary and can be waived or removed from the insurance requirements altogether. Ultimately, this would benefit the owner since more potential bidders would likely be attracted to the project. In addition, contractors may lower their bids due to the removal of the added insurance expense.

“It may be found that professional liability coverage is not necessary and can be waived or removed from the insurance requirements altogether.”

However, if the professional liability coverage is applicable, the communication should continue so

an example, trade contractors often offer "as-built" drawings back to the project's engineer with changes incorporated and stamped into the final drawings. In these circumstances, the "as-builts" are considered normal contracting services and are typically not considered the professional exposure of the contractor. Additionally, sure of the contractor. Additionally,

contracting activities such as means, methods, sequences, scheduling, etc., are often not considered "professional" in nature. But, concerns for professional liability exposure can become valid when a contractor is deemed responsible for the design of a project, such as in design-build contracts.

contractors can fully understand the owner's concerns and the application of the insurance coverage. Another discussion point should involve the required limit. Most professional liability policies, which are typically purchased by design professionals (DPs), have limits of \$1 million for each claim and \$1 million total for all claims. It is impractical to require higher limits of contractors or DPs since the addition of the extra expense and the difficulty involved with obtaining increased limits would likely shrink the pool of potential contractors. As a result, detailed discussions with owners and/or the people who write their insurance specs should be held to identify the need for the increased limits as well as the owner's expectations for the project.

### The Professional Exposure

Nevertheless, there are several ways to determine if contractors are at risk against professional liability exposures. One way includes viewing the coverage as a horizontal scale with each end representing the extremes. For instance, at the "low" end would be contractors who provide typical specialty trade and/or general contracting services that do not include in-house design (engineers/architects on staff) or subcontracted design work. At the "high" end of the scale would be contractors who are actively involved in design-build contracts, provide engineering and/or architectural services (either by their own employees or subcontracted work) and offer construction management (either agency or at-risk) services. Based on their position on this scale, contractors can accurately determine the level of risk to professional liability exposures. Of course, the reality is that some contractors might provide all of the services mentioned above from time to time. As

# Submersible Trash Pump Model 212-2"

For Pumping Water • Trash • Oil  
• Sand • Sludge • Effluent • Silt

## Model FlexPump

A gutsy & versatile  
portable pump:

- Self priming - Starts pumping immediately.
- Choke resistant to allow the free passage of sludge and solid up to 91ft.
- High performance yet portable.
- No suction hose is necessary.
- Flexibility - Choose from gas, diesel, electric or pneumatic drive units.



**pumpbiz.com**  
800-PumpBiz

**PumpBiz, Inc.**  
www.pumpbiz.com  
sales@pumpbiz.com  
800-PumpBiz (786-7249)  
fax 847-589-3935

circle 115 on card or go to [cbotfreeinfo.com](http://cbotfreeinfo.com)

Other areas that can push a contractor's exposure toward the "high end" of the scale include:

- ▶ Providing value engineering services, constructability reviews, selection of architects and engineers and other subcontractors, supervision of work, pre-construction services, etc.
- ▶ Construction manager activities including providing advice to project owners
- ▶ Subcontracting design work or partnering in a joint effort with architects and/or engineers
- ▶ Employing the services of design professionals
- ▶ Accepting responsibility for the project's design via contract

### Between a Rock and a Hard Place

Contractors can find themselves caught between a rock and hard place when they desperately want to win a contract bid but are also deeply concerned about their potential exposures and the related expenses if the project is won. This is especially true when the winning contractor who pushes back and asks questions about the applicability of the insurance specs, or simply puts in a bid noting that they will not/cannot comply with all the specifications, will not be awarded the job. That's because they believe the work will go to any number of other contractors who won't push back. For these contractors, professional liability exposure is a challenge that will be dealt with another day, if necessary, through either negotiation or litigation.

However, all contractors should be aware of their options, which include purchasing professional liability insurance to safeguard their services and businesses. To ascertain their need of such coverage, contractors

“...all contractors should be aware of their options, which include purchasing professional liability insurance to safeguard their services and businesses.”

should thoroughly define the scope of the professional services provided to the project, determine their position on the professional liability scale mentioned previously and weigh both against the revenue to be paid for their services. Once complete, the possible insurance solutions available to these contractors include:

#### ▶ Structuring coverage that is project-specific

The few insurance companies that do offer this form of insurance often tend to insure larger projects (starting at \$50 million to \$100 million contract values). In addition, other insurers only consider extending this option if the contractor is already insured by that company.

#### ▶ Structuring a blanket policy covering all of the contractor's exposures

This is not project-specific and can satisfy the professional liability requirement, but only if dedicated limits are not required. (If dedicated limits are required, then the project-specific method is the only alternative). However, it must be noted that professional-only inclusions are difficult to receive. Although, the purchase of combined professional and pollution coverage can open the door to several more companies that provide both forms of insurance.

#### ▶ Choose an alternative method

When the insurance requirement

is for limits in excess of \$1 million, and the limits do not have to be dedicated to the project, an alternative method should be chosen. Contractors in this situation can buy the blanket policy (professional-only or professional/pollution) for the \$1 million limits and then purchase a project-excess endorsement to satisfy the limit requirement of the contract. The excess limits apply only to the specific project, but the primary layer of limits applies to the entire contractor's work. In most cases, this alternative can present the most cost-effective way to meet the increased limits.

But, in the end no contractor should make these choices alone. All should seek the competent advice of legal counsel and insurance professionals who are extremely adept in matters of professional liability exposure. Unfortunately, the stakes are often too high to do anything less. ■

*Tim Farrell is senior vice president of New Day Underwriting Managers in Bordentown, NJ. New Day is a specialty intermediary for insurance agents and brokers with expertise in environmental insurance, environmental risk management and construction related professional liability. Farrell can be reached at 609 298-3516 ext. 103 or [tim.farrell@newdayunderwriting.com](mailto:tim.farrell@newdayunderwriting.com).*