

Protective E&O vs. Project-Specific Professional Liability



Berkley

Construction Professional

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Presented by

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- Over 20 years of underwriting experience in design and construction professional liability insurance
- Originator of the owners and contractor's protective insurance coverages which are now the preferred approaches to underwriting project specific design and contractor's professional liability





Berkley Construction Professional

Our mission is to be the leading provider of specialized construction professional insurance and pollution coverage for construction-related industry exposures. In addition, we offer leading edge risk management services so that our insureds continue to be best-in-class in avoidance of potential claims.

- Dedicated to the Construction Industry
- Expert Underwriters
- Expert Claims Service
- Real-world Risk Management Education

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Practice management recommendations should be carefully reviewed and adapted for the particular project requirements, firm standards and protocols established by the construction professional.



Presentation Outline

1. Overview of Protective E&O
2. Overview of Project-Specific Professional Liability
3. Shortfalls of Project-Specific PL Policies
4. Making the Decision

Section 1



Protective E&O Overview



What is Protective E&O?

Contractor's Protective Professional Indemnity (CPPI)

- Covers a broad spectrum of professional and pollution exposures
- Is a first-party coverage that indemnifies the named insured, excess of the design professional's professional liability insurance
- Indemnity policy, providing difference-in-conditions (DIC) coverage enhancing the aggregate pool of insurance proceeds available
- May become “primary” if there is no underlying insurance
- Contract is indemnity as first party to the loss is the owner/contractor seeking recovery from third-party subcontracted professionals



Getting the Most out of Your Protective Policy

Issues	Solutions
<ul style="list-style-type: none">• Design firms may seek limitation of liability if not provided dedicated project cover• This may place settlement of claims under the protective at risk if not properly addressed as policy expects underlying cover	Carefully review limitation of liability language. If improperly agreed to, such language may reduce any competitive premium advantages
<ul style="list-style-type: none">• Design firms may opt to not bid on protective projects	Seek alternative bids
<ul style="list-style-type: none">• If not properly structured, uninsured consultants may be unintentionally excluded from bidding on project work	Structure a protective program with lower insurance demands or applicable self-insured retention



Getting the Most out of Your Protective Policy

Issues

- Negligence claims can take a long time to settle
- Policy may potentially depend on multiple parties being found at fault, which can further add to a settlement's time frame for settlement
- Claim settlement may take longer if the policy does not contain a "proactive approach"

Solutions

Work with a proven team that has the dedicated claim staff, experience and time in business to fully implement proactive protective cover

Weigh significant other benefits of program with possibility of accessing higher insurance limits and cost savings (cost/benefit analysis)

Clearly document minimum insurance requirement so that your claim is not denied for non-compliance

Section 2



Project-Specific Professional Liability Overview



What is Project-Specific PL?

Project-Specific Professional Liability (PSPL)

- Covers the length of construction design liability (may replace A/E firms practice or annual insurance coverage)
- Insures design firms, usually in direct contract with prime, and offers a unified coverage approach
- Is preferred by design firms as it protects their corporate programs

Section 3



Shortfalls of Project-Specific PL Policies



Shortfalls of Project Specific PL Policies

- ✗ Inherently more expensive than protective E&O
- ✗ Coverage may be restricted to prime architect and direct subconsultants and may not apply to construction manager or other professionals in contract with owner/contractor (or any other insured entity)
- ✗ Delegated design or management liability of construction entities not insured
- ✗ May be illegal in certain states that prohibit sponsorship of insurance programs for public projects due to restraint of trade laws



Shortfalls of Project Specific PL Policies

- ✗ Ability to recover from substantial loss in excess of project E&O policy may be precluded if annual programs do not schedule policy as underlying insurance
- ✗ With practice cover exclusion, there is redundancy in costs as design firms usually do not discount fee for being provided insurance
- ✗ Pass through of deductible expense can add to cost
- ✗ Contractor/owner is not insured, so carrier does not have duty to handle claim with utmost good faith (all information retained by carrier is protected)



Shortfalls of Project Specific PL Policies

- ✗ Policy can turn into legal defense fund for A/E as limit is eroded by claim expense
- ✗ Policy may have “unified defense approach,” which may guarantee carrier defense by some entity arguing not being at fault and offering continued venue and advantageous position to negotiate reduced damages under the threat of limit erosion





Shortfalls of Project Specific PL Policies

- ✗ History of product is not favorable
- ✗ More than half the costs go toward payment of attorney or expert witness fees
- ✗ Many projects having limit spent only on expenses and zero on damages for owner/contractor's substantiated claim
- ✗ Coverage or limit may be deficient compared to the practice program (in which case owner/contractor incurs liability not present if they left A/E insurance alone)





Shortfalls of Project Specific PL Policies

- ✗ Market and capacity for A/E project insurance is unstable
 - Protective insurance has steadily increased over the years
 - Almost 100% of private owners purchase protective coverage
- ✗ PSPL reduces A/E's concerns and attention for professional liability issues (which may not be a good thing)
- ✗ Owner/contractor may not be well served by design firms concerned about undertaking the project risk and demanding PSPL protection (consider adverse selection in this instance)





Section 4



Making the Decision



No Easy Answer

- Certain projects demanding substantial and meaningful minority or disadvantaged business participation may be forced to purchase PSPL if there is not a pool of qualified design firms wanting such risk
- Certain challenging projects or work may limit pool of talent willing to work without being afforded PSPL
- Deciding who is best for your project may not be a question of insurance but capability and dedication
- PSPL may be solution for integrated design or work being done in large part by interrelated design and construction entities



Moving Forward

- The construction industry and insurance marketplace are changing
- Need to have a solid understanding of the products available and their issues or shortcomings—and what you can do to mitigate them
- Make an informed decision and create the right combination of products to serve the needs of your project at a reasonable cost
- With today's new entrants into PSPL and protective insurance, it is possible to address all of the noted shortfalls into one policy form at competitive pricing terms



Why Berkley Construction Professional?

- Most experienced underwriting professionals and originator of the protective product
- Nationwide underwriting contacts
- Dedicated and experienced outside legal and claim consulting professionals
- Flexible underwriting approach
- Solid financial standing
- Stability and leadership



A policy you won't need a magnifying glass to read!



Questions?

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