

CONTRACTORS PROFESSIONAL/ POLLUTION LIABILITY



By Edward L. Sheiffele Jr.

According to the NAICS Association, there are approximately 1.3 million contractors with annual revenues of less than \$5 million in the United States. While virtually all of these contractors are currently protecting their businesses with general liability, workers compensation, business automobile, and insurance for all of their equipment, the vast majority have not even considered purchasing professional/pollution liability insurance, which are both excluded from most commercial general liability (CGL) insurance policies.

Contractors should work with their agent or broker to be sure they make an informed decision on whether or not to buy



And, while most of these contractors have some understanding of pollution risk, most do not believe or understand that they have a professional liability exposure. The good news for contractors is that they can purchase insurance policies that address both of these exposures.

The risks

Pollution risk exploded in the 1960s and 1970s with the passage of several broad federal statutes and the creation of the Environmental Protection Agency (EPA). When you add climate change to the equation, you increase the complications involved in the

design and construction of projects, and this adds to the chance of a contractor having an environmental claim made against them.

What is a pollution condition? In general, it is defined as the discharge, dispersal, release or escape of any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapors, fumes, alkalis, toxic chemicals, medical waste products into or upon the land, or any structure on land, the atmosphere, or any water-course or body of water, including groundwater, provided such conditions are not naturally present in the environment.

This is an extremely broad definition and a contractor does not need a vivid imagination to think of a situation where they could cause a pollution condition that creates exposure for them that is not covered under their CGL insurance policy. In short, procuring pollution coverage is a smart decision for a contractor of any size.

Most contractors do not believe they have any professional liability risk resulting from the performance of their work. That would be the case if:

- the contractor signed a contract with the project owner only as general contractor; and
- the project owner hired the design team separately; and
- the contractor built the job with no changes to the plans; and
- there were no issues on the project with costs being exceeded or project being delivered late.

In fact, the contractor has professional liability risk if a project owner has requested that it perform any of the following additional services:

- Value engineering or cost reduction
- Assistance with any kind of building information modeling (BIM) or 3D modeling software
- Design/assist or shop drawings
- Constructability reviews
- Scheduling or sequencing or coordinating trade subcontractors
- Green or LEED certification
- Choosing, hiring and/or scheduling subcontractors
- Construction management/project management services

There is an ever-growing number of projects utilizing design/build as a project delivery method, and this forces contractors to assume design liability, whether directly or vicariously, thereby increasing their professional liability exposure. Those who think that this trend is prevalent only for mega or large projects are mistaken; the increase in design/build as a project delivery method is changing the expectations of owners for all types and sizes of projects. More specifically,



owners are increasingly looking for a single point of responsibility on a project so that they have only one entity to approach in the event an issue arises on their project. For the most part, that entity is the contractor.

Agents and brokers should be working to better understand the changing scope of services performed by their construction clients and also the contractual arrangements for each project. This is especially true among the rising number of construction firms that have bypassed the consult of outside design professionals through the addition of their own in-house architectural and engineering services. The same can also be said for contractors who do not consult with a design professional for what can be considered small projects as it is not required by code.

Historically, many small specialty contractors—i.e., plumbers, heating and air-conditioning contractors and electricians—do not engage the services of a design professional for

clients to determine the level of exposure and whether or not it makes sense to purchase a professional/pollution liability insurance policy.

The coverages

In addition to the professional/pollution liability exposure that is addressed in a contractor's professional and pollution policy, some contractors professional/pollution policies also offer first-party coverages, such as "protective" coverage or mitigation coverage (aka rectification). The "protective" enhancement indemnifies the contractor for costs it incurs, excess of the design professional's professional liability insurance, that it is legally entitled to recover as a result of negligent acts, errors, and omissions committed by design professionals under contract with the contractor.

Mitigation coverage responds to those professional and/or pollution issues that could reasonably lead

Agents and brokers should be working to better understand the changing scope of services performed by their construction clients and also the contractual arrangements for each project.

many projects for which they are providing services. Instead, they rely on manufacturer specifications or on their own experience to design the system or component they are installing. While appearing innocuous, this expansion of services is technically "design" and there is a real risk that a CGL insurance policy would exclude those services arguing that they are considered "professional services."

In an increasingly litigious society, do contractors want to take on this additional exposure? Agents and brokers should be discussing these issues with their specialty contractor

to a third-party claim against the contractor. The goal of this coverage is to drive a quicker response to professional and/or pollution exposures. A fast response aids the contractor in maintaining the project's schedule and/or budget. Also, it helps to keep a solid relationship between the contractor and project owner.

Several carriers have even gone a step further with the introduction of faulty workmanship liability coverage forms written to address the CGL coverage gap for "your work" claims triggered by third parties against policyholders. While many specialty

contractors believe CGL policies essentially cover faulty workmanship claims, the truth is that most do not cover rectification of problems and they often exclude the damages incurred as a result of the job's defective workmanship, as well as the funds, time and efforts needed to correct, repair or replace the mistake.

Offered as a separate insuring agreement subject to its own set of insurable limits and attached via endorsement to professional liability/pollution products, the faulty workmanship liability policies offered by reputable carriers were specifically designed to cover the amount contractors are legally obligated to pay for the property damage arising out of "your work" workmanship, the use of defective materials and/or products, and breach of contract or warranty issues. Other benefits surround the ability of third parties to trigger faulty workmanship claims as defined by the policy without allegations or the proof of negligence.

As discussed earlier, every contractor has potential professional and pollution liability exposure. The questions then become: "How great is that exposure" and "Should a contractor purchase a professional/pollution liability insurance policy to address that exposure?"

Insurance purchasing decisions are usually driven by two main factors: contractual obligations, and appetite for risk. In the case of professional and pollution liability, very few contracts—especially those for small projects—require that a contractor purchase either of these coverages. Regarding appetite for risk, that is, very simply, a business decision that each contractor must make.

When conducting the analysis of whether or not to purchase a professional/pollution liability insurance policy, the following questions should be asked by a contractor's insurance agent or broker:

1. How many projects is the contractor working directly with the project owner for which there is no design professional involved?
2. For those projects, how broad is the scope of services in the contract and can design services be inferred?

If a decision is made to purchase a professional/pollution liability insurance policy, then the next decision is to decide on the policy and the limits of liability for that policy. Those are questions that a broker can discuss with an underwriter to gain information about how to advise their contractor clients so that they can make an informed decision.

In the end, the decision of whether

or not to purchase a professional/pollution liability insurance policy is one that each contractor must make after consultation with their insurance agent or broker. There is no right decision for a contractor. It is the responsibility of the agent or broker to be sure that it is an informed decision. ■



The author

Edward L. Sheiffele Jr. is executive vice president at Berkley Construction Professional, a Berkley Company. Sheiffele has more than two decades of insurance industry experience acquired within the construction and environmental business units of leading worldwide insurance carriers. Contact Ed at ESheiffele@berkleycp.com.

100 YEARS
JM WILSON
MGA AND E&S BROKER | EST. 1920

EVERY RISK IS AN OPPORTUNITY

BAREBOAT | BED & BREAKFAST | BOAT CLUB | OWNER/OPERATOR RENTAL | BOAT SCHOOLS | CHARTER/GUIDE | COMMERCIAL FISH

<p>MARINE PROGRAM COVERAGE:</p> <p><small>EXCLUDING FLORIDA</small></p>	<p>HULL COVERAGE TO \$1.5M</p> <p>AGREED VALUE SETTLEMENT PROTECT & RECOVER WINDSTORM EXTRA EXPENSE EMERGENCY TOWING & ASSISTANCE</p>	<p>LIABILITY COVERAGE TO \$1M</p> <p>WRECK REMOVAL CREW LIABILITY (PREFERRED CHARTER RISKS ONLY) BUSINESS INTERRUPTION</p>	
--	--	---	--

JIM WALSH, MARINE MGR. | (800) 666-5692 | JMWILSON.COM/MARINE