

# How to Prepare for Unexpected Risk

Recognize potential exposures before they occur & align proper coverage

BY PETER BROOKS

The typical formula for running a successful construction and contracting business is a mixture of vision with hard work, investment and experience. But then, there's always the unexpected — just ask the thousands of construction firms that either had projects shuttered or delayed once COVID-19 took hold in 2020. In fact, a recent survey by the Associated General Contractors of America (AGC) found that 75% of contractors had projects canceled or postponed due to the pandemic.

Unforeseen complications from the pandemic only added to the existing array of challenges, both large and small, that plague jobsites every day. A 2015 KPMG Global Construction Survey found that 60% of organizations that spent more than \$10 million on capital construction projects reported that at least one project failed or underperformed. In addition, project owners said only 31% of their projects came within 10% of budget and just 25% within 10% of original deadlines in the past 3 years.

As for the causes, they can vary depending on the project and management styles of the involved parties. For instance, a Project Management Institute (PMI) study revealed that poor communication led to one-third of construction project failures, with “failure”

defined as both cost and time overruns. And on a more general level, KPMG reported 70% of organizations suffered at least one project failure in the 12 months prior to the study. Of these, 50% of the respondents indicated that their project failed to consistently achieve its set goals. In addition, 64% of the organizations polled by PMI said they frequently conduct risk management assessments to minimize the potential problems that can negatively impact projects. This includes employing programs used to protect construction professionals from financial duress and/or

problems. With so many variables at play, it's important to understand the risks and the possible insurance policies that can protect your business.

## INSURING FOR POSSIBLE RISKS

Either by choice or required by contract or statute, commercial general liability (CGL), workers' compensation, business auto and inland marine insurance (mobile equipment) are among the most common types of insurance purchased by contractors. However, there are two coverages that are not often considered



by contractors — pollution liability and professional liability. Both can prove invaluable, due to their ability to protect owners from accidents or errors that can have potentially devastating effects on their business and its long-term viability.

That's because, if properly written, pollution liability insurance can cover the significant clean-up costs, equally large statutory penalties and professional liability generally involved in severe circumstances such as spills, chemical releases or contaminations. In addition, construction professional liability policies specifically cover the damages arising from professional service acts, errors and omissions performed by or on behalf of any construction firm. As a result, business owners should consider these two insurances coverages, often conveniently bundled into one policy to protect their firms and the livelihoods of their employees from potentially exposures.

### **POLLUTION LIABILITY**

When it comes to pollution liability conditions, the term itself calls to mind dark fumes of smoke funneling toxins into the sky or water drenched with chemicals pouring into streams and rivers. While those are definite examples of pollution, the reality is actually far more wide-ranging. Pollution conditions are generally defined as the discharge, dispersal, release, escape, migration or seepage of any solid, liquid, gaseous or thermal, material matter, irritant or contaminant, including smoke, soot, vapors, fumes, acids, alkalis, chemicals, hazardous substances, hazardous materials or waste materials on, in, into or upon land and structures thereupon, the atmosphere, surface water or groundwater. Consequently, it's easy to see how almost any type of contractor — excavation, demolition, drilling, electrical, mechanical, roofing, etc. — can be held potentially liable for the accidents, whether avoidable or not, that can occur during a project.

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### **PROFESSIONAL LIABILITY**

Contractors generally face one of two paths with respect to professional liability exposures: providing “de-facto” design services on their projects, and/or as part of a project being delivered via design-build.

The truth is, whether an owner or contractor wants to believe it or not, they will always be prone to professional liability. The question then is only, “How much?” Anytime a contractor provides their services on a project, an element of design is inherently part of the process. The difference may be subtle, but it is there. And while historically that exposure has not been admittedly high, CGL insurance carriers have increasingly begun to scrutinize the claims made against contractors to determine the level of professional liability and coverage available under their policies.

For example, a plumbing contractor who is either installing plumbing in a new house or replumbing an existing house, will likely make a professional installation decision. And, if the installation is done correctly (per the plans they themselves designed), but a problem ensues, the contractor could be subject to claims not typically covered by traditional Insurance Services Office, Inc. (ISO) CGL policies.

Whether a backup results from an incorrect installation (faulty workmanship) or the poor positioning of piping, the problem could still be considered a design error. Subsequently, the decision to respond or not respond will be based on the CGL insurers' interpretation of the contractor's actions and whether the situation is the result of a design error or faulty workmanship.

There has been an increase in design-build as a project delivery method as more project owners and developers look for a single point of contact for every project including design. And if and when something goes wrong on a design-build project, the lead contractor or a subcontractor is faced with a heightened exposure due to the potential for design risks — whether their own, or vicariously on behalf of another party for whom they are responsible. This is one reason why many owners consider professional/pollution liability insurance coverage.

It's nearly impossible to plan for every contingency and, unfortunately, there's no going back once issues arise. But sound, cost-effective solutions do exist for preparing for the unexpected.

For owners, a way to stay ahead of the new claims and litigation trends is to recognize the potential exposures before they occur and discuss pollution and professional liability coverage options with an insurance broker to determine the level of probable exposures.

This conversation will help business owners come to an educated decision as to whether these coverages should be purchased. **CBO**

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