

Strategically preparing for construction professional liability risk

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By **Walter J. Adams, Jr.** | February 11, 2019



All contractors and subcontractors should be involved in mitigating risk. (Photo: Shutterstock)

Risk is inherent with any commercial building project. From design and specification through construction, there are many moving parts capable of creating any number of problems.

In the past, roles were clearly defined under the design/bid/build project delivery methodology. Responsibilities had a beginning and end. There was little guesswork — if any at all.

That's all changed in recent years with the increased growth of the design/build project delivery model. Under this method, the project owner commonly contracts with a design-builder, who accepts full responsibility and control of each step in the design and construction process. There are many benefits, but the risks are increased for everyone involved, especially the general contractor or prime design consultant. This applies even when the design work is performed by professionals holding their own professional liability insurance. Most often, the prime consultants are not only liable for their own services, but also the services of sub-consultants and the [additional exposures](#) pertaining to data breaches, cost overruns, cyber intrusions, drone use and related errors and omissions. But, the good news is that there are ways to minimize these risks.

Start with a cooperative approach

First, every project should encourage a cooperative approach that emphasizes the symbiotic relationships between the contracting and design teams. This includes well-defined, fairly-drafted agreements developed with unambiguous terms and clear scopes of services for each entity. Effective project team communication and documentation protocols need to be implemented at the project's initial stages. The performance of all entities involved should also be actively monitored to detect early trouble signs.

Next, proper risk management tools are mandatory. This includes the confirmation of the appropriate coverage for each entity: professional liability, commercial general liability, excess liability, [commercial auto](#) and [workers' compensation](#) to ensure that minor mishaps don't cause significant and costly delays.

There should also be an agreement as to the appropriate limits of insurance for higher-risk design disciplines or subcontractors and the period for which those limits need to be maintained. In addition, if the owner demands [cyber liability coverage](#), the design/builder should require everyone else on the team to have the same coverage.

Furthermore, there must always be a formal plan of action complete with a full set of procedures outlining the steps necessary for dealing with liability issues. This entails the proper documentation of every project phase so backup is available [if claims arise](#).

Once a claim is made, it's extremely important to work with legal counsel to develop a strategy for either settling the claim or winning at trial. The client and the client's attorney should reach out to insurers as soon as practicable. In fact, claims, both big and small, have been denied over the years due to the violation of policy terms that often specifically detail the timing and processes for alerting insurers to errors and omissions.

It's the coverup

Mistakes happen and can often range from the mismanagement of files and records to the late reporting of exposures. Once uncovered, such errors should be reported immediately to both the legal team and the insurance carrier.

Never try to hide mistakes. More importantly, don't lie. Purposely trying to deceive insurers and the court will often lead to disastrous consequences. In most cases, the coverup can prove far more damaging than the underlying liability.

In addition, don't wait to deal with problems. Insurers want to know of incidents as soon as they occur. Many times, carriers will work with insureds to fix the problem in an attempt to eliminate costly delays. The proper course of action is often the difference between quick claim settlements and years of litigation. Plus, professional credibility is seldom fully restored once lost.

So, always remember that errors and omissions are a fact of life, no matter the jobsite. The key to their resolution is preparation and the willingness to deal with problems as soon as they're revealed. Identify the problem, report the issue and then work to rectify the challenge with the consult of your legal team and carrier.

Time is *not* an ally. Waiting and hoping for the best will almost never work. It often results in exacerbating the claims process and the ability to overcome issues on time and within budget.

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