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Make Insurance Requirements a Two-Way Street

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

Almost every professional service contract contains detailed and often confusing insurance requirements. To make sense out of these requirements, design professionals need an understanding of insurance basics. They need to know the various types of policies owners ask for, what these policies cover, and what extra endorsements to the standard policies can be obtained if needed.

Highly important, design professionals must be able to spot impossible or ambiguous insurance requirements in client-written contracts and negotiate reasonable alternatives. Perhaps because clients are used to specifying insurance requirements for contractors, they think design professionals should carry the same types of coverage. But quite often, agreements drawn up by clients or their attorneys will specify insurance requirements that are impractical or impossible for design firms to meet.

Alternately, design consultants must understand what type of insurance requirements to demand of the owner. The best resource to help sort out of all of this complex information is a specialized insurance agent who is knowledgeable about and experienced in working with the design professions and the construction industry.

Contractual Insurance Requirements

When dealing with a client's insurance requirements, the best approach is to take the initiative. Offer an agreement in simple, straightforward language that says you will attempt to maintain appropriate insurance with reasonable limits of coverage. Then list current coverages on an addendum attached to your contract. For example:

INSURANCE

During the term of this Agreement, the Design Professional agrees to provide evidence of insurance coverage as shown on Addendum _____ attached hereto.

Professional Liability Insurance

Most client insurance requirements focus on professional liability coverage. Professional liability insurance protects designers from claims arising from negligent acts, errors or omissions in the

performance of professional services. Professional liability policies have several unique features that owners must be made aware of:

- Policies are written on either a *claims-made* or a *claims-made and reported* policy form. Both policies cover claims made against design firms during the policy period and require that the claims be reported to the insurance carrier in accordance with policy terms. To be covered, such claims must have arisen from acts, errors or omissions occurring after the retroactive date stated in the policy.
- To keep its *retroactive date* and have *prior acts* covered, a design firm normally must continue to renew its policy every year. In other words, if the firm doesn't renew its policy, it won't have coverage for projects designed while previously insured.
- Professional liability policies have *aggregate limits*. The policy limit purchased is the total amount the insurer would pay for both defense costs and indemnity, regardless of the number of claims made during the policy period.
- These policies are *expense within the limits* policies. This means that after a firm meets its deductible, additional defense costs paid by the insurer will decrease the policy limits available for payment of that claim or other claims.

Clients often confuse professional liability with general liability and try to specify the same coverage they require of contractors. Because of this, it is important to review and negotiate client-drawn contracts and to delete unattainable or unreasonable requirements—such as the inclusion of “additional insureds” on your professional liability policy. Instead consider offering a contractual clause similar to this:

The Design Professional agrees to attempt to maintain continuous professional liability coverage for the period of design and construction of this project, and for a period of

_____ years following substantial completion, if such coverage is reasonably available at commercially affordable premiums. For the purposes of this Agreement, “reasonably available” and “commercially affordable” shall mean that more than half the design professionals practicing in this state in this discipline are able to obtain such coverage.

Project Insurance

One solution to the limitations of professional liability practice policies is to obtain a professional liability project policy. Project insurance can cover the entire design team with a single policy and provide *extended coverage* for the design and construction period of a single project, plus a preselected *discovery period* after substantial completion of the project. What's more, these policies provide a separate project limit so that claims on other projects do not erode the limits available. And, because project policies are written on a multi-year basis and guaranteed noncancelable under most circumstances, there is less administrative burden on the design team and the client to ensure continuous coverage.

Design firms should ask their professional liability specialist to help explain the advantages of project insurance to their clients. If project insurance is appropriate, owners are often willing to pay for a substantial part if not all of the cost. Here is a sample provision that incorporates these ideas:

PROJECT INSURANCE

The Design Professional agrees to obtain professional liability project insurance specifically to cover this project. This project policy will cover the design and construction period and will include a discovery period of ___years after substantial completion. The policy will provide a project aggregate limit of \$___ and a deductible of \$___ . The cost of this coverage shall be paid by the Client as a Direct Reimbursable Cost in accordance with paragraph ___, Reimbursable Expenses, hereof.

Commercial General Liability

Another frequently required insurance is commercial general liability (also called comprehensive general liability, CGL, or public liability). This coverage insures for liability claims for bodily injury and property damage arising from *nonprofessional* activities and business operations. For example, this policy provides coverage should a visitor slip and fall while in a design firm's offices.

Many coverage endorsements (amendments to a CGL policy) that cannot be added to your professional liability policy can be provided under your general liability policy. Your clients might be granted endorsements they believe will give them additional protection under your policies, such as being named an additional insured or provisions called *Waiver of Subrogation*, *Severability of Interest* or *Cross Liability*.

General liability insurance is sometimes combined with property insurance (covering furniture, fixtures and real property), in what is called an "office package policy." Such packages often include additional coverage for valuable papers and other exposures common to a professional practice and represent an economical form of coverage for smaller firms.

Workers' Compensation

Workers' compensation is a no-fault insurance that protects employers and employees when workers are injured, become ill or are killed on the job as a direct result of their employment. It is paid for by the employer and provides benefits for medical costs and lost wages. Although workers compensation insurance is required by statute in every state, client contracts usually require proof that the design firm carries such coverage.

Clients may specify endorsements they require of their contractors to be added to a design firm's workers compensation policy. Check with your professional liability insurance specialist to be sure you can meet your clients' request. Availability of endorsements like *Waiver of Subrogation* and

Additional Insureds varies from state to state and insurance carrier to carrier. Negotiate contract language to agree to provide only that coverage which is available from your insurers.

Automobile Liability

Clients often require evidence of automobile liability insurance, whether or not you are likely to use vehicles on the project. Smaller firms, in which employees drive and insure their personal automobiles, sometimes face a problem because private passenger auto insurance companies can be reluctant to issue certificates or to name a client as an additional insured. Some firms have solved the problem by having one vehicle—the company delivery truck or the president's car—owned (or leased) and insured by the firm so that there is a business automobile policy for which they can provide evidence of coverage.

Non-Owned Automobile Liability

There is a common companion contract requirement to provide evidence of *non-owned auto coverage*. This is insurance carried by the design firm for automobiles it does not own—such as employees' cars used on company business. It provides liability coverage for your firm in addition to the primary limits carried by the car owner. This coverage often is attached to a firm's owned automobile policy. But in some states, it may be possible to obtain a freestanding Non-Owned Auto Policy. Ask your insurance specialist how to meet this contract requirement.

Foreign Projects Coverage

Many insurance policies are limited to providing coverage only in the United States (and perhaps U.S. territories and Canada). If the job is in a country where coverage is not provided under existing policies, separate foreign coverage insurance may be needed for workers compensation, general liability and/or automobile liability. Professional liability policies often provide or can be endorsed to provide international or worldwide coverage. Check with your professional liability insurance specialist before undertaking any foreign project.

Owner Insurance Provisions to Contracts

Since clients require verification of insurance coverage maintained by design firms, isn't it only fair that architects and engineers receive similar verification of the insurance their clients should be maintaining as well as the coverage secured by the contractor?

Below is suggested terminology that should be reviewed by counsel prior to the inclusion in your contract. The article references are to an AIA Owner/Architect agreement (1997 B141), so they will need to be changed as necessary:

2.9 Owner's Insurance Requirements

2.9.1 Owner shall secure and maintain comprehensive general liability insurance providing coverage for bodily injury, property damage, and personal injury for the owner's liability in the amounts of \$1,000,000 per occurrence and in the aggregate. Such coverage will include contractual liability, personal injury liability, and advertising liability. Owner shall include Architect and Architects Consultants as additional insured under this policy.

2.9.2 Owner shall secure and maintain during the course of this project Owners and Contractors Protective Liability insurance in the amounts of \$1,000,000 per occurrence and in the aggregate. Owner shall include Architect and Architects Consultants as additional insured under this policy.

2.9.3 Owner shall secure and maintain on behalf of Owner and Owners employees workers compensation insurance including Employers Liability coverage. Employers Liability coverage shall be maintained with limits of at least \$100,000 per bodily injury, each accident, and \$100,000 disease each employee, \$500,000 disease policy limit.

2.9.4 Owner shall secure and maintain on behalf of Owner, Architect, and Architects Consultants and as their interest may appear Builders Risk Insurance on this project with limits in accordance with the project value and policy conditions.

2.9.5 Owner shall require of the Contractors Comprehensive General Liability Insurance that Owner, Architect, and Architects Consultants shall all be named as additional insured. Owner shall require the Contractor to forward certificates of insurance confirming this to all parties.

Conclusion

It is crucial to review and negotiate the insurance terms of any contract offered by a client. And in return, design firms should specify the coverages they expect the client, contractors and other parties to secure in order to provide proper protection. An insurance specialist well versed in the design and construction industry is a valuable business partner when negotiating contracts and for obtaining needed coverage.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.