



## Contractor Professional Exposure

Risk Management is important for any business, particularly one as inherently risky as building and infrastructure construction. At Berkley Construction Professional (BCP) we advocate that contractors and construction managers of all types develop and adhere to a [Risk Management Plan](#). A key element of that Risk Management Plan is proper insurance for your direct exposures to professional acts and responsibilities in implementation of construction projects and that of your subcontractors and any design professionals that you or your subs may retain.

While most General Contractors are not directly involved with design, their professional liability exposure can come from several areas. Professional Liability insurance supplements general liability and other policies that a contractor should include in a comprehensive insurance program. Understanding professional liability risk is vital when undertaking projects with expanded design and other professional services exposures, an industry trend.

Contractors do, in fact, have professional liability exposure, particularly GCs, CMs, and Design-Builders involved in pre-construction services as well as the major trade contractors that are engaged in the planning and design phases of a project and responsible for engineering tasks delegated to contractors in A&E specifications and normal trade practice.

### Professional Liability Exposure Areas

#### Professional Liability in Pre-Construction/Design Phase Services

You may be surprised to learn that any of the following activities may create professional liability exposure for you:

- Review, refinement and understanding of Project Requirements, with owner and design team
- Review of and coordination with the design team and owner on design progress submittals
- Advice to the owner and design team in a “Design Assist” role
- Participating in constructability reviews
- Construction logistics, phasing, sequencing, and other project management activities
- Budgeting and cost estimating
- Advice on material and system selection and availability
- Value engineering and substitutions
- Input to and use of Building Information Modeling (BIM)
- Participating in LEED Certification or other sustainable goal activities
- Project management, program management, owner’s rep services

#### Professional Liability in the Construction Phase

There are also professional responsibilities in construction phase services. These can include delegated design of final engineering, which has been common in the industry for a long time. Examples are structural steel fabrication/erection, prefabricated metal stairs, exterior wall systems, and glass handrail systems. In addition, there may be other specialty construction systems and components where final design (engineering) is delegated to the contractor in a project’s contract documents.

Choosing or hiring trade or specialty sub-trade contractors can expose you to vicarious professional liability. Handling submittals and shop drawings may expose you to professional liability risk, as may scheduling, sequencing, and/or coordination of trade subcontractors.

During construction you may get involved with substitutions of materials and systems that may occur due to product availability (supply chain issues) and value engineering, as well as schedule control situations including scheduling of trade contractors and related logistics and coordination issues. Depending on how BIM and 3D modeling is used or misused to facilitate construction implementation on projects can also create professional exposure.

## Determine Your Professional Exposure

First let’s look at an objection you may have raised in the past “I don’t need professional liability because I don’t design anything.” In many instances that is true. However, it is necessary to delineate the difference between design liability assumed by an architect and/or engineer versus the professional tasks performed by a contractor or construction manager. *If* you only signed a contract with the Owner as General Contractor, and *if* the owner hired the design team separately, *if* you built the job with no changes to the plans, and *if* the project was delivered on time and on budget, then you will not likely incur professional exposure. Given the complexity of construction projects in today’s environment, that’s a lot of “*ifs*” needed for a project to be free of professional risk.

Professional exposures may vary, and are likely enhanced, depending on your contractual responsibilities such as in “non-traditional” project delivery methods including CM as Constructor (CMc) (aka CM at Risk (CMAR)), Design-Build, or Integrated Project Delivery. Roles such as Owner’s Project Manager or Owner’s Representative may also involve professional risk,

You probably have professional exposure if you have performed any of the services listed above at the request of the owner—whether or not it was in your contract—and the job was subsequently delayed or over budget. The performance of such functions may likely determine that you *have* delivered professional services. Then the owner could have grounds to sue you for a breach of those professional duties—and you may not even have known you had a professional exposure! Be sure to check the definition of “Professional Services” in your PLI policy.

## How Commercial General Liability Insurance Responds

### An unendorsed Commercial General Liability form excludes coverage for professional services

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| <p>CG 2234:<br/>Construction Management Errors and Omissions Exclusion – excludes BI/PD for all professional services on any project where the contractor is a CM</p>   | <p>CG 2243:<br/>Engineers, Architects or Surveyors Professional Liability – excludes BI/PD resultant from professional services rendered by any A&amp;E that is employed by or performing work on contractor’s behalf</p>  |
| <p>CG 2279:<br/>Contractors Professional Liability – excludes BI/PD for professional services only as they relate to providing A&amp;E services to others or from A&amp;Es you hire in connection with construction work that you perform. (Limited CM cover, but no Design-Build cover for contractor or subs)</p> | <p>CG 2280:<br/>Limited Exclusion, Contractors Professional Liability – excludes BI/PD for A&amp;E professional services provided to others in your capacity as an A&amp;E. The exclusion doesn’t apply in connection with construction work performed by or on behalf of contractor. (Design-Build extension)</p> |

So, the contractor's professional liability exposure is adequately addressed with CG 2279 or 2280, right? Wrong! Commercial General Liability (CGL) policies and endorsements only address BI/PD. But what about economic loss? Professional liability claims generally arise out of economic loss that are not BI/PD related. These include cost overruns as a result of scheduling/delays, pre-construction services provided, or owner's consequential damages such as loss of use, financing, reputation, and revenue. (In related risk management advice: It's critical to address consequential damage in both design and construction contracts. The mutual waiver of consequential damages in the AIA Documents, including the A201™- 2017 General Conditions, was driven by the construction community by a large loss in the 1990s. The waiver has been part of AIA general conditions for construction and design agreements since 1997.) In addition, CGL policies typically exclude pollution and mold losses. When claims are severe, plaintiffs will go after a contractor because of the amount of assets they can potentially access, so having the right insurance programs in place can protect your company.

### Summary

We hope we have increased your awareness and understanding of potential professional liability exposure for contractors. Be aware of your contractual obligations and expectations of the owner and other members of the project team—as claims tend to arise out of unmet expectations. Each party to a construction project should understand their roles and responsibilities and be able to manage the risk assigned to them. Finally, obtaining PL insurance to cover your intentional and unintentional professional exposures is an important aspect of construction risk management.

# About Berkley Construction Professional

At Berkley Construction Professional, we transform uncertainty into opportunity so our clients can confidently build a better tomorrow. Our experienced underwriters deliver innovative, creative professional and pollution liability solutions for contractors and project owners. We respond quickly with customized coverages that fulfill the needs of our brokers and their clients. We offer practical risk management guidance and high-quality, results-oriented claims handling provided by our dedicated in-house claims professionals. Our mission is to relentlessly protect our clients' work, reputation and dreams.

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## For more information, contact:

### Ed Sheiffele

Executive Vice President  
[esheiffele@berkeleycp.com](mailto:esheiffele@berkeleycp.com)

### Andrew D. Mendelson, FAIA

Executive Vice President,  
Chief Risk Management Officer  
[amendelson@berkeleyalliance.com](mailto:amendelson@berkeleyalliance.com)

### Diane P. Mika

Senior Vice President,  
Risk Management Officer  
[dmika@berkeleyalliance.com](mailto:dmika@berkeleyalliance.com)



412 Mt. Kemble Avenue, Suite G50  
Morristown, NJ 07960

In California:  
a division of Berkley Managers Insurance Services, LLC  
CA License #0H05115

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