



A RISK RETENTION GROUP

RISK MANAGEMENT ADVISORY

ENGINEERS CANNOT PROVIDE “ADDITIONAL INSURED” OR “CONTRACTUAL LIABILITY” ENDORSEMENTS TO THEIR PROFESSIONAL LIABILITY INSURANCE

April 29, 2004

USE LIMITATIONS

The following pages provide an overview of an issue that frequently arises during contract negotiations and that concerns the coverage provided by professional liability insurance. This Advisory serves to help engineers and their clients better understand how to draft an agreement that stays within the coverage available under professional liability insurance and to avoid creating uninsured risks for both the engineer and its client.

If an engineer uses the following pages with its client, both client and engineer should understand that it is provided as general information and does not represent legal advice, which both parties should seek only from an attorney licensed in the jurisdiction where the parties intend to perform the agreement.

This Risk Management Advisory is not legal advice. Terra Insurance recommends that for legal questions concerning your contracts and services you should consult with a qualified attorney who practices design and construction law in your jurisdiction.

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Overview

Engineers cannot comply with requests by clients that the engineer’s professional liability (E&O) insurance cover “contractual liability” or include the client as an “additional insured.” This advisory addresses why such endorsements are not possible, and also explains why clients should prefer engineers who object to contract language that requires such endorsements.

“Additional Insured” and “Contractual Liability” And E&O Insurance

E&O insurance covers an engineer for its “legal liability,” which means the liability that a court would impose absent any contractual agreement to re-allocate liability. The following is a typical coverage provision from an E&O insurance policy (*emphasis added*):

Subject to all the provisions of the policy and within **OUR** Limit of Liability, **WE** agree to pay on **YOUR** behalf all sums in excess of the deductible *that you are legally obligated pay as **DAMAGES and EXPENSES*** caused by **YOUR PROFESSIONAL ACTS, ERRORS or OMISSIONS** for **CLAIMS** to which this policy applies.

The phrase “legally obligated to pay” does not include additional responsibilities which the insured might have contractually agreed to assume, but which it would not otherwise be responsible. Indeed, E&O policies expressly *exclude* liability assumed by contract. The following is an example of this exclusion (*emphasis added*):

WE are not obligated to pay or provide a defense for any **CLAIM** for *liability assumed by YOU under any written or verbal agreement or contract*, including but not limited to, hold harmless and indemnity provisions, warranties, guarantees, certifications, liquidated damages, or penalty clauses, *except for those **DAMAGES and EXPENSES** for which YOU would have been liable as imposed by law in the absence of such agreement of contract.*

These provisions are typical of the language contained in E&O policies from all major insurers of design professionals. Thus, E&O insurance does not cover liability that exists only because of a contractual assumption, and so cannot provide a contractual liability endorsement.

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Similarly, E&O insurance carriers do not add other parties as “additional insureds” under an engineer’s professional liability insurance. Professional Liability insurance only applies to damages caused by the insured engineer; not damages caused other parties. The insurer provides a policy to its insured based on the insured’s volume of work, its type of practice, and other significant underwriting criteria that relate to the specific engineer that help the insurer assess the risk of insuring that engineer. But the insurer has no way to assess the risks posed by extending professional liability coverage to the engineer’s unidentified future clients, which is precisely what an additional insured endorsement would cover.

Confusion with Design/Build Contractors’ Professional Liability Endorsements

The existence of “professional liability” coverage under the general liability (GL) insurance policies issued to some design/build contractors may confuse some clients regarding the availability of contractual liability and additional insured endorsements. Design/build contractors can add “professional liability coverage” to their GL policies. And those GL policies will typically cover contractual liability and allow the naming of additional insureds. Clients sometimes point to such GL policies as evidence that the engineer can, indeed, provide the requested coverage “just like any other contractor.”

The key difference is that those policies are general liability policies, and not true E&O policies intended to cover a professional practice. The language for the “professional liability” coverage under a design/ build contractor’s GL policy reveals that it applies only when the contractor hires independent designers that have their own, separate E&O insurance. The GL “professional liability” coverage specifically excludes design work performed by the insured contractor itself, or by its own employees – just as an engineer’s GL policy excludes claims regarding the engineer’s own professional services.

Thus the “professional liability” coverage under such GL insurance is not available to engineers. But even if it were available, it would not provide contractual liability coverage for the insured’s professional services, nor would it permit extending additional insured status to the engineer’s client regarding claims that concern the engineer’s own design work.

Responding to Client’s Request

Initially, in response to a client’s request for either contractual liability or additional insured endorsement under an E&O policy, an engineer should explain that such endorsements are not available. If the client insists that other parties have signed agreements that contain such language, the engineer and client should examine examples of actual insurance certificates to determine what they actually provide. In general, the client may have signed contracts that promised certificates with such endorsements, but will not have received actual certificates and endorsements that fulfill the contract requirements.

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“*Everyone Else Signs It.*” If other engineers have promised – but not provided – contractual liability and/or additional insured status under their E&O policies, it means one of the following about those other engineers:

- The other engineers *did not read* the contract, and thus did not know that the contract contained provisions contrary to its E&O insurance; or
- The other engineers read the contract, but did *not understand* that it contained promises regarding its E&O insurance that the engineer could not comply with; or
- They read the contract and understood it, but decided that they could *ignore* its requirements.

In contrast, an engineer calls these issues to the client’s attention demonstrates that it is conscientious, informed, and scrupulous.

Quality Engineering Is the Client’s Best Risk Management. A client best means to control its risk and insure a successful project is to hire the best professional talent available. By showing that it is conscientious, informed, and scrupulous, an engineer demonstrates precisely the qualities that a client should seek out. In contrast, by failing to recognize, understand, or explain problems in the contract, other engineers demonstrate behavior that a client should seek to avoid.

A Quality Engineer Is the Client’s Best Risk Management Asset. A client’s best means to control risk and insure a successful project is to hire the best professional talent available. An engineer that recognizes and raises these issues during contract negotiations displays an attention to detail. By showing that it is conscientious, informed, and scrupulous, an engineer can demonstrate precisely the qualities that a client should seek out. In contrast, by failing to recognize, understand, or explain problems in the contract, other engineers display behavior that a prudent client should seek to avoid.