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Architects' and Engineers' Insurance – Just What Does it Cover?

Architects and Engineers (A/Es) are often thought of as “the enemy” during contract negotiations when the discussion turns to indemnifications and required insurance coverages. This is particularly the case when the A/E is hired by the contractor rather than by another design professional.

The process doesn't have to become adversarial.

The common objective is to design and construct a project that is acceptable to the owner and that everyone can be proud of. To be fair and equitable, each party should be responsible for the consequences of their own actions and step up to the plate if something they do causes damages to another party.

The most common way to protect a business (other than through client selection and contract risk management) is through the purchase of various insurance policies. A/Es are like any other business, and many of their coverages are very similar to those in other industries.

Commercial General Liability and Property Insurance: A/E firms purchase these policies to protect their business property and premises and to cover premises liabilities while operating as a business. A/E firms provide services – not a product; and their liability arising out of the performance of their services is not covered by this policy. Additional insureds can sometimes be added to these policies, but since professional services are excluded the additional coverage would be limited, at best.

Workers' Compensation Insurance: These policies cover the A/E firm's employees pursuant to Texas Statutes in a manner identical to all other industries, with the class code identifiers unique to their profession.

Business Auto Insurance or Hired, Non-Owned Auto Coverage on the Commercial General Liability Policy: Most A/E firms do not own autos so this coverage is generally provided as a hired, non-owned auto endorsement to the commercial general liability policy. Civil Engineering, Surveying, Environmental Engineering and Construction Materials Testing firms will quite often have autos covered under a business auto policy which normally includes the hired, non-owned coverage.

Umbrella or Excess Liability Insurance: Many A/E firms have these policies; however one important fact should be noted. Umbrella policies do not provide excess coverage over professional liability policies (or E&O policies). Since an A/E firm's greatest exposure is from their professional services, purchase of these policies would not provide additional protection from that risk factor.

Professional Liability or Errors and Omissions (E&O) Insurance: This insurance provides indemnification for damages arising from the A/E's negligent acts, errors or omissions, or those for whom they are legally liable. After liability is determined (e.g. who is at fault) damages are assessed and the claimants are indemnified for their losses (which may include attorney fees).

To "indemnify" does not mean that a claimant can profit from the A/E's errors or negligence – it means that the claimant should be restored to the position they were in prior to the loss; they should be "made whole". As an example, if an A/E forgot to specify interior doors on a new office building, the owner/client would not get "free" doors as damages, but would instead be indemnified for additional expenses caused by adding the doors after the bidding process (e.g. additional shipping, extra installation charges, increased cost of the materials ordered at the later date, etc.). This involves the concept of "betterment" and a possible prohibition against unjust enrichment.

The most common misunderstanding about E&O insurance occurs when a client wishes the A/E to add them as an additional insured and to "defend" them through the E&O policy. A/E's cannot add additional insureds on their E&O policies because the other entities are not providing services on behalf of the firm. The E&O insurance companies will not provide this coverage, so a contractual obligation to comply becomes an impossible situation for the A/E. As a logical consequence, defense for a client is also impossible as the client (or any other party) cannot be a named insured. The E&O policies also have "insured versus insured" exclusions in which named insureds cannot sue each other. If a client became an insured under the E&O policy, they would not then be able to make a claim against the A/E under any circumstances.

It is worth noting here that an Architect or Engineer does not have any corporate protection (no "corporate veil") protecting them from personal liability arising out of their professional performance of services. Their E&O policies also contain a "contractual liability" exclusion which will not cover liability assumed by them under contract unless it relates to performance to a professional standard of care. When considering the severe risks they may be assuming when providing design services, it is no wonder that the Architects and Engineers take contract negotiation and insurance coverages very seriously.

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