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LIABILITY INSURANCE - What it really is and why it costs you what it does.

A generally accepted working definition of "Liability Insurance" is that it is a contract whereby, for a stipulated consideration (usually a paid premium), one party (the insurer) undertakes to indemnify another (an insured or policyholder) against liability occurring to a third party (a claimant). It is also referred to as "Casualty Insurance", though technically this term has a broader application, referring to insuring against any fortuitous loss, occurring by chance, accident or in some contingent manner, beyond the "third party" coverage of liability insurance (the basis for) which is imposed by law.

The particular type of insurance sought by a Contractor/Builder is known as Commercial General Liability ("CGL") insurance. It insures against third party liability arising from the Contractor's work, including "Products" and "Completed Operations" where damages caused result from bodily injury and property damage. It contemplates coverage for the particular duties and standard of care or performance of a Contractor and may specifically address contractual agreements undertaken. It may identify other parties as "Additional Insureds" within its coverage.

While Design and Consulting professionals will also purchase CGL coverage, it has limited application to their services in that it relates only to their "non-professional" activities or those for which any ordinary business would be exposed. The major coverage with which such professionals are concerned is, as one may expect, that applicable to their professional services, hence the name "Professional Liability Insurance" ("PL"). It is also commonly referred to as "Errors and Omissions" ("E&O") insurance, though technically the latter has much broader application to various trades as well, beyond the so-called "learned professions" such as medicine, law, the design professions, etc. PL insurance indemnifies its insureds against loss to third parties from the professional's failure to meet an accepted standard of care in the practice of its profession. It will generally not provide coverage for contractual undertakings, per se, except to the extent that such are essentially reiterative of the already existing professional standards and obligations legally imposed in the absence of the express contractual undertaking. Nor will the PL policy coverage name or identify Additional Insureds under its coverage, except under very limited or restricted conditions as compared with the CGL coverage, for example. PL coverage also deals more broadly with consequential loss from claims beyond the bodily injury and property damage of the CGL coverage. Both of these coverages are critical to the Contractor's and Design Professional's ability to pursue their respective business activities. Without them the firm, and in the case of the Design Professionals, the individual practitioners, are exposed to possible substantial financial loss. Recognizing this, clients will routinely insist upon receipt of evidence of these coverages for appropriate financial limits before engaging services.

These liability insurance coverages become an important financial resource brought to a project by its construction and design professional participants by insuring them against their failure to perform as reasonably expected. However, as a practical matter, in agreeing to indemnify their insureds for third party loss, an equally valuable benefit is that the insurer will provide and fund a legal defense to such claims. In fact, a substantial portion of funds paid by insurers on behalf

of their insureds are to specialized legal defense counsel and expert witnesses to determine the presence of legal liability and the extent of damages that have resulted. This defense expense alone may impose a considerable financial burden upon a firm or individual that is uninsured, perhaps even jeopardizing its viability.

It is noteworthy that in years past, some questioned the value of these insurance coverages, believing that their presence may act as a "lightning rod" for claims that may not otherwise be made against them, but for such a "deep pocket." This view has largely gone away in favor of a common expectation that it is not if a firm is insured but rather how, that is, by which insurer and for what amount. Also, as mentioned above, without evidence of insurance most firms will not be considered for available opportunities.

Lastly, it is worth pointing out that it is critical for a Contractor or Design or Consulting Professional to seek these important insurance coverages via an experienced, specialized broker from an insurer with similar demonstrated specialized expertise. The right insurance broker will best understand the firm's nature and its needs and will know the best insurers to approach for the most favorable terms of coverage. Likewise, the actual demonstrated expertise of the insurer in providing pertinent coverage with strong financial security backing it, and hands-on claims handling and risk management advice are critical. Construction and design liability are relatively highly specialized areas of the insurance industry, so as you might expect, it is provided by only a limited number of specialists. As anyone who has had a claim handled by an inexperienced or non-specialized insurer can attest, the short-term benefit of a somewhat lower premium paid may be far outweighed by the unknowledgeable service provided.

Coming Next Quarter: TORT REFORM

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