

# Rectification Coverage: Additional Protection to Address Design Errors

Any work performed by a contractor is inherently fraught with financial risk. Those risks are heightened when a contractor assumes the role of Design-Builder. As a Design-Builder, the contractor is additionally responsible for the design elements of the project. Professional liability insurance is the primary vehicle for risk transfer for those potential design errors.

This article focuses on how Rectification coverage can respond to the potentially significant and sometimes catastrophic financial losses that contractors face resulting from design errors. When acting as a Design-Builder, or as part of a Design-Build Joint Venture, the contractor is generally responsible for both the design and construction of a project, and for the work performed by all subcontractors and subconsultants. The contractor

cannot solely rely upon the errors and omissions insurance of their subcontracted designer. Consequently, the contractor must ensure that their professional liability policy includes a variety of coverage avenues to help protect them from such loss. Rectification or Mitigation is one such type of coverage that can be utilized by a contractor.

As a Design-Builder, the contractor often enters into a Guaranteed Maximum Price contract with the Owner for the design, construction, management, and delivery of the project and guarantees that the project will be completed on time and on budget and will be fully functional when turned over to the Owner. Assuming the role of Design-Builder, the contractor takes on substantially more responsibilities. These can include, but are not limited to the following:

#### Contractor responsibilities under a Design Build delivery model

Selection of the design and construction teams	Keeping the Owner apprised about progress of the work and reporting deviations, defects, and deficiencies
Administration of the contracts for construction	Investigating and addressing site conditions differing from those expected to be found by the contractor
Budgeting and cost estimating	Ensuring construction schedule targets and core project technical requirements are met
Inspections of the work to verify the contractors' compliance with the design requirements	Conducting value engineering, conceptual, schematic, and design development; as well as performing pre-design and design stage services

Design issues that result from unforeseen problems arising from negligent design can result in delays and increased project costs which ultimately turn into significant financial exposures to the contractor. Design risk is inherent in all construction projects and can manifest itself through unclear specifications and requirements, poor coordination, omissions, insufficient predesign investigations, and technical errors.

Rectification is first-party coverage that offers funding to help correct design errors that arise during construction that, if not corrected, would likely lead to a claim. Importantly, Rectification allows the project to move forward as opposed to waiting for an outcome from the insufficient legal or arbitration process. Unlike Protective coverage, Rectification does not require the contractor to sue its subcontracted design professional and thus

helps to maintain a working relationship with the owner and subcontracted design professional.

Although Rectification can be of significant benefit to a contractor, an Insured performing Design-Build work needs to be cognizant of the terms and conditions of their professional policy to trigger this coverage. Firstly, the Insured needs to know which services are covered under Rectification. The scope of services that may be covered under Rectification can vary widely among carriers and, failure to ensure which services are contemplated, can result in a denial of coverage. Secondly, the Insured must understand its carriers' requirements in triggering Rectification coverage. Initially the negligence must be reported to the carrier as soon as practicable. Next, the contractor must gain approval from the carrier before mitigating the errors. And, the contractor may not admit liability for the loss. Negligence in the performance of the professional services, however, must always

be established. When a design issue arises during construction, it is imperative to involve your carrier as well as your professional liability broker.

Contractors should understand and appreciate that, when they act as a Design-Builder, they are taking on substantially more risk. Additionally, they should understand that the performance of design, whether in-house or subcontracted, if negligently performed, can have significant economic consequences to them. Consequently, an array of coverages should be available to respond to the variety of risks which exist. Rectification coverage has often proven to be an effective and efficient way to remediate certain design issues that arise during the construction process. Triggering this coverage helps avoid an even more costly claim which would be brought at a later date. Rectification is another means contractors can use to protect their balance sheets through effective risk transfer.

# Contacts

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