



Insuring Progress: Project-Specific Professional Liability Insurance and Progressive Design-Build

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In modern construction, innovation often comes in the form of architectural marvels and engineering feats, but the way projects are delivered and insured also can be inventive. Among the most promising evolutions in the last two decades is [Progressive Design-Build](#) (PDB), a project delivery method blending the strengths of the design-build and construction management models. However, with innovation comes the need for tailored insurance solutions to match the progressive nature of these projects.

In recent years, PDB has garnered substantial attention and adoption within the construction industry, propelled by the quest for greater cost certainty, better risk allocation, enhanced collaboration, and streamlined project delivery. A fundamental aspect of PDB lies in its two-phase approach, offering flexibility and control to project owners as well as the design-build team. The two phases show the journey from concept to realization, with an opportunity for the owner to “off-ramp” if necessary.

Phase I involves collaborative planning and design development, with the contractor and designer working together to refine concepts and estimate costs. Phase I typically culminates in the design-builder submitting a price proposal to the owner for construction of the project. The owner retains the option to off-ramp and not proceed to Phase II if the parties are unable to reach agreement on price, while still incurring costs for the Phase I services rendered.

In the event of an off-ramp, many PDB agreements give the owner the right to use the work product produced in Phase I. Some agreements, including the standard Design-Build Institute of America (DBIA) and Engineers Joint Contract Documents Committee (EJCDC) PDB agreements, provide that the design team is not liable for such subsequent use.

Design-builders and design teams will want to request language releasing them from liability from the owner’s use of the Phase I work product, which in most cases is incomplete and certainly not “issued for construction.” However, owners often insist that they should be able to recognize a benefit from the Phase I services and may push back. Parties considering involvement in a PDB project should expect this to be subject for negotiation.

If the price proposal is agreed upon, Phase II transitions to design completion and construction, with the designer assuming responsibility for producing the final drawings and specifications that will be used in constructing the project. Accordingly, potential liability for errors and omissions by the design team fundamentally changes in Phase II. Given the large scale and potential risk exposure of many PDB projects, owners and project teams should make sure that robust insurance coverage is available to mitigate potential risks.

What is Project-Specific Professional Liability (PSPL) Insurance and Do You Need it for Your PDB Project?

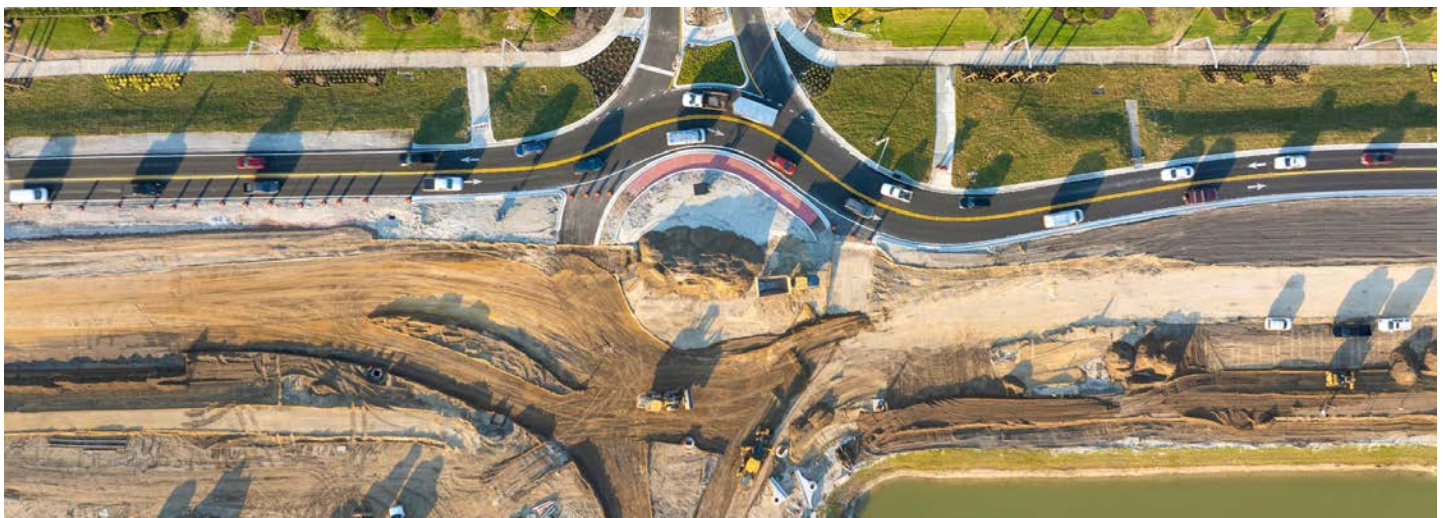
Project-specific professional liability (PSPL) policies are well-suited to the unique dynamics of large-scale PDB projects, providing security and protection throughout the project life cycle for the owner, developer, project designers and their subconsultants. PSPL insurance is distinct from errors and omissions (E&O) practice policies and offers project-specific coverage for the entire design team. This policy is tailored to encompass the duration of the project, including an extended reporting period after construction is completed, often up to 10 years from the effective date.

There are two types of primary PSPL insurance. One is purchased by the prime designer and insures the entire design team of architects, engineers and their design subconsultants, but excludes coverage for contractors. The other is purchased by the design-build contractor and includes the design team along with the contractor and its subcontractors. It protects against any professional liability exposure they have, including the contractor's vicarious liability for hiring the design team. An important distinction between the two is seen in an exclusion which both policies have, commonly referred to as the "insured vs. insured" exclusion. The contractor-purchased PSPL does not permit suits between the contractor and design team, whereas the designer-purchased PSPL would.

There is a third type of PSPL insurance that can be purchased by the owner and is meant to sit excess of the practice insurance of the design team. Historically, the design community did not favor this solution because of the belief that the owner would try to trigger as much insurance available to them as possible. However, an appropriate limitation of liability (LOL) cap, along with design team-purchased PSPL up to the LOL and owner-procured insurance as excess, can be a more cost-effective way to purchase higher limits.

There are three primary benefits of PSPL that aid in project delivery and protection for the owner:

1. PSPL limits are dedicated to the project and cannot be eroded by claims on other projects, unlike practice policies that are subject to claims arising from multiple projects in a given policy year.
2. The insureds under a PSPL enter into a joint defense agreement. This not only potentially saves on defense costs, but aligns the design team and avoids conflicts between multiple defense lawyers.
3. The PSPL policy typically comes with a program manager, who is usually an experienced construction attorney and can help the insureds navigate the project. Their guidance can help prevent design issues from turning into larger claims.



Obtaining PSPL insurance is advisable for complex and large-scale projects. Historically, these projects were phased or let in packages so that they were more manageable. However, we are seeing less use of these packages as owners look to construction teaming arrangements to solve the puzzle of larger projects.

Firms engaged in large PDB projects may be underinsured or potentially exposed if there is no project-level insurance program sitting primary to their individual practice policies. While project owners typically pay the premium — and often are the ones who ask for a PSPL — design firms should proactively advocate for PSPL coverage to safeguard against potential costly liabilities.

Misconceptions surrounding PSPL insurance include viewing it as a contingency fund rather than a proactive risk mitigation tool. This can be seen by the recent push of insurers to set higher retentions on policies, which is meant to make project participants think twice about the cost impact if a claim is filed. Greyling has helped its clients navigate how the retention payment is structured between the design team, or even paid for by the owner.

From a cost perspective, a good rule of thumb to determine if PSPL is a viable option is to use approximately 20% of the policy limit for the premium, with self-insured retentions ranging from \$500,000 to \$5 million for a \$10 million to \$50 million policy.



Project Insurance and Progressive Design-Build

PDB projects present a unique issue for pricing professional liability insurance policies: *How should an insurer set the premium given the possibility that the owner will invoke the off-ramp and the Phase II design services will not be performed?*

In response, professional liability insurers have developed various approaches to underwriting and setting premiums.

A common approach is to place and bill for the coverage for both phases at the outset of the project, with underwriting and premium based on the project owner's program and budget for the project. Under this approach, the entire premium is earned and billed at the beginning of the project. If the owner off-ramps, the insured may receive back a proportional "return premium" due to the fact that the full range of design services will not be performed.

Another approach is to have coverage and premium broken down by phase. In this scenario, the entire premium is calculated at the outset based on the estimated scope and project value, but a portion of premium (for example, 60%) is billed at the start of Phase I. If the parties proceed to Phase II, the remaining premium is billed.

Importantly, the insurer will do separate underwriting for Phase II, including review of the Phase I design to confirm that it is consistent with the project scope presented at the outset of the project and the insurer's original underwriting assumptions. Adjustments in premium may need to be made if the scope and character of the project (and the design team's services) have changed. Coverage for Phase II is then added by endorsement to reflect the Phase II professional services covered by the policy.

Where we have not seen a change in approach with the newer PDB delivery method is with the procurement of "wrap-up" or Owner or Contractor-Controlled Insurance Programs (OCIP/CCIP), which provide commercial general liability and/or workers' compensation for enrolled participants. Since construction starts in Phase II, after the risk of the off-ramp is behind the design-build team, this project insurance does not require any special endorsements to navigate the potential for off-ramp.



PSPL Policy in Action

A compelling illustration of the benefit of PSPL policies was clearly demonstrated on a large-scale, complex, multiple-package Design-Bid-Build transit hub project that was fraught with unexpected challenges. Monitors on a building adjacent to the construction site detected movement, indicating potential structural instability. Further investigation revealed that the building's foundation was designed to roll, unbeknownst to the construction team. The situation was so severe that construction was brought to a halt.

A claim on the PSPL policy proved invaluable in facilitating the hiring of additional experts and mitigating potential adverse outcomes. This was crucial because the situation was not attributable to any specific discipline's fault but rather stemmed from project-related challenges, necessitating collective resolution from the entire team. Collaborative efforts involving various experts were employed to assess the situation and devise a solution.

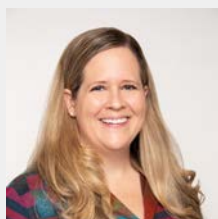
Relying on a traditional professional liability policy would have presented challenges as the issue required collaboration and expertise across disciplines. The PSPL policy's response was instrumental in covering the costs associated with additional consultants and the services expended by the entire design team to navigate the complexities of the underlying problem, mitigate risks effectively, and develop a solution.

We're here to guide you.

Greyling's team of insurance and consulting experts is adept at providing guidance to a wide array of stakeholders, including owners/developers, design-builders, contractors, and design professionals, regarding the risks associated with progressive design-build projects and project-specific insurance placements. When the time comes to secure insurance coverage for a project or advise on risk mitigation strategies, our dedicated team is equipped to help. Learn more about us.

Let's Talk

Greyling Insurance Brokerage & Risk Consulting, a division of EPIC, is a specialty national brokerage and risk management consultant representing professional services firms in the construction and legal industries.



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