



Guide to

# Risk Mitigation Credit

This publication has been prepared as a guide to the Risk Mitigation Credit described under Item E of Section V, Limits of Liability/Deductible in the 10/05 Edition of the CNA Professional Liability and Pollution Incident Liability Insurance Policy. The intended audience for this guide includes architects, engineers, environmental consultants, landscape architects, construction managers, and interior designers as well as their insurance brokers and legal advisors.



# Background

The RMC was developed as part of a broad interdisciplinary review and update of the 7/99 edition of the CNA Professional Liability and Pollution Incident Liability Insurance Policy. From the inception of the Victor and CNA program in 1957, the primary goal has been to provide professional liability insurance that meets the ever-changing needs of design professionals. Toward this end, the CNA policy has had 13 revisions since 1957. In addition, numerous policy endorsements have been developed to tailor the policy to specific circumstances, requirements, and underwriting considerations.

Generally, credits in insurance programs are designed to encourage or reward desired policyholder practices. Once the overall objective of the credit is fulfilled, the credit may be dropped and replaced by a new credit to encourage other practices or outcomes. For example, the 7/99 edition of CNA's policy form included a mediation credit of up to \$25,000 for eligible policyholders. While not appropriate for the resolution of all claims, mediation had proven itself to be generally more cost effective in resolving claims than either arbitration or litigation. Industry inertia and resistance to the unfamiliar, however, was hindering the use of mediation in circumstances where it would have been appropriate and beneficial. The mediation credit was designed to help overcome this industry inertia and resistance. By 2005, it had served its purpose—approximately 75% of all claims within the Victor and CNA program were being resolved by mediation. As a consequence, the mediation credit was been dropped in the 10/05 policy form and replaced by the RMC.

As noted above, the RMC encourages the use of a set of best practices, long recommended throughout the design and construction industry. Receipt of the RMC is predicated on the policyholder's documented satisfaction of a baseline criterion—the timely execution of a written professional services agreement—plus any three of six best practices criteria. The policy language establishing these criteria, their rationale, and appropriate documentation demonstrating compliance are described in detail on the following pages.

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## Discussion

Experience demonstrates that a well-defined submittal process that allocates responsibilities to the appropriate parties is vital to a successful project. Claims resulting from project delays and faulty construction are the alternative. The AIA and EJCDC documents require the contractor to provide a schedule for submittals that incorporates the required time for review and resubmittal, if necessary. Since part of this schedule affects the services of the design professional, the contract requires the design professional to approve this schedule, in contrast to the construction schedule, which the design professional merely reviews. The AIA and EJCDC documents also require that the submittal schedule be prepared in conjunction with the construction schedule so that submittals are made in logical sequence and in a timely manner so they can be reviewed and approved when called for by the construction schedule.

Contractors often claim that they cannot provide the required submittal schedule because they have not yet “bought out” the job. That is a spurious argument. The contractor has contractually committed to provide coordination and superintendence of all of the work. If the contractor can contractually commit to a completion date for the project and furnish a construction schedule for the project reflecting that completion date, it is axiomatic that the contractor can and should provide allowances for submittal review and approval in that construction schedule—notwithstanding that the contractor may not have executed purchase orders or contracts for all labor, materials, and equipment necessary to complete the work.









# Compliance Document Checklist

The following checklist includes the submittals in each category. Once the “Baseline” Criterion of a written agreement is met, three of the six Performance Criteria need to be included in the application for the RMC.

## “Baseline” Criterion (Written Agreement) Documentation Submitted:

- A written agreement executed prior to the performance of the agreed-to services giving rise to the claim.

## Practice Criterion 1 (Payment Terms/Invoicing) Documentation Submitted:

- An agreement executed prior to the performance of the agreed-to services giving rise to the claim (per the “baseline” criterion) containing payment terms and a payment schedule;
- Dated invoices or a spreadsheet reflecting dated invoices; and
- Dated unpaid balance reminders or other documents reflecting the policyholder’s attempt(s) to resolve payment problems, if any.

## Practice Criterion 2 (Interprofessional Agreements/Insurance Certificates) Documentation Submitted:

- Interprofessional agreements executed prior to the performance of the agreed-to services giving rise to the claim; and
- Certificate(s) of insurance evidencing professional liability (PL) and general liability (GL) coverages (or a spreadsheet reflecting all such certificate information) obtained prior to the performance of the agreed-to services giving rise to the claim.

## Practice Criterion 3 (Pre-Project Planning) Documentation Submitted:

- Project definition document(s) addressing the applicable parameters (“a” through “c” or “a” through “e”);
- Agreements annotated to address the applicable project definition parameters; or
- Reports prepared as deliverables addressing the applicable project definition parameters.

#### **Practice Criterion 4 (Internal/External Peer Review)**

##### **Documentation Submitted:**

- Documents reflecting peer review activities, such as meeting minutes, memoranda, reports, completed checklists, and notations on design documents (at the conceptual/schematic and final design phases); and
- For external peer reviews, a peer review agreement or engagement letter and documents evidencing the completion of any such external peer review.

#### **Practice Criterion 5 (Constructability Review) Documentation Submitted:**

- Documents reflecting participation in constructability review activities by representatives of the client and the design and construction teams, such as meeting minutes, memoranda, reports, and notations on design documents, during the pre-construction phase of the project or applicable portion of the project.

#### **Practice Criterion 6 (Submittal Management) Documentation Submitted:**

- A contemporaneously documented submittal log or spreadsheet reflecting as-planned and actual receipt and response dates and actions taken.



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This document is for illustrative purposes only and is not a contract. It is intended to provide a general overview of the program described. Please remember only the insurance policy can give actual terms, coverage, amounts, conditions and exclusions. Program availability and coverage are subject to individual underwriting criteria.

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