



Construction Insurance Workshop



Agenda

- Summary of Construction Insurances
- Indemnity limits and Other Issues to Consider.
- Insurance Market
- Capping Liability
- JCT and NEC Insurance Conditions

Contract Works Insurance

- To cover the Insured's contractual obligations for insurance of works.
- All Risks of physical loss of or damage to Works.
- Includes Permanent Works, Temporary Works and Free Issue Materials
- Sum Insured and/or Maximum Contract Value.
- Project Specific –v- Annual
- Contract Period = start and end date of policy cover.
- Territorial Limits.
- Defects Liability often maximum period 12 or 24 months.

ISSUES IMPACTING CONSTRUCTION INSURERS

- Water Damage Losses (new insurer requirements – CIREG risk management)
- Sustainability (Timber/Blue and Green Roofs – Solar Panels)
- Modern Methods of Construction
- Fire Safety Issues
- Lithium Batteries
- Insuring the build after completion – materials used especially insulation.

Employers Liability

- Liability for death or bodily injury to employees because of their employment
- Statutory requirement
- Minimum legal requirement £5m (introduced in 1998 !)
- Most insurers issue policies at £10M minimum.
- Should never be controversial and £10M will fit most contracts
- Risk to client from claims above indemnity limit very low

Employers Liability

This will almost always be £10M as your minimum requirement.

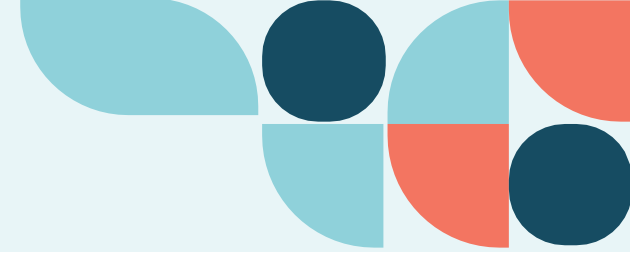
Higher limit of £25M if the work is inherently dangerous and if risk controls fail catastrophic injury likely to 1 or more employees.

This should be the least controversial of all the insurances.

Difficult for Employer to escape liability.

Death and personal injury cannot legally be capped.

Third Party Public Liability



This policy covers legal liability (negligence) arising in respect of:

- Injury, illness or death of Third-Party persons, not employees of the insured
- Loss, destruction or damage to Third Party property.
- **Rail exposures BAPA or similar agreements.**
- Generally, not expensive
- Where higher limits of indemnity (over £5M) expect to see excess layers
- Can be extended to include **Non-Negligence Liability** (JCT 6.5.1 or equivalent).



Public Liability – Indemnity Limits

Place

Where is work happening and what and who is nearby ?

Is there any interface with the Public Highway ? Restricted site access ?

People

How many members of the public could be at risk from injury at the location and from the type of works ?

Children ?

Property

Value of the property being worked upon ?

What other property could be damaged in or around the area of the works ?

Other tenants in the building or high value property neighbouring the site.

Public Liability – Indemnity Limits

£5M Minimum

No need to go lower than this

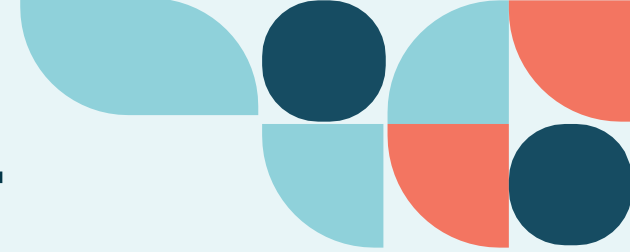
£10M Medium Risk

Hot works, water risks, work in high occupancy building, interface with public highway

£25M – £50M Higher Risks

City Centre Location, high value buildings in proximity – craning materials into location etc.

Non-Negligent Damage extension to PL



Losses arising from:

Damage to third party property in the vicinity of the works.

Damage **not** caused by the negligence of the contractor.

Claims made in nuisance against the developer – i.e. the client.

Property

What other property could be damaged in and around the area of the works ?

Other tenants in the building or high value property neighbouring the site – or connected buildings/party wall.

Scope of works

Piling, demolition, removal of support to adjoining building.



Non-Negligent Damage extension to PL

Case Law:

1958 Court Case (Gold v Patman & Fotheringham) which established the legal principle that the Employer has a liability in tort for damage to third party property, where this does not flow from the negligence of the Contractor.

Scope of cover:

- Collapse
- Subsidence
- Heave
- Vibration
- Weakening or removal of support
- Lowering of groundwater

Cover is in the joint names of the employer and contractor.

BAPA – APA – Coal Board – etc...

Agreements to carry out works which could affect owners' assets.

BAPA (Basic Asset Protection Agreement) generally £25M required by contractor

APA (Asset Protection Agreement) £155M indemnity limit required – excess layer cover on PL to achieve limit)

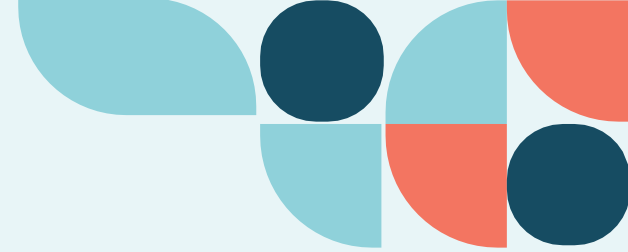
These agreements go beyond claims for negligence.

Non negligent interference with the Railway Network client required to compensate.

Own PL cover won't cover claims if no damage and no negligence – e.g. teetering crane etc. and do not cover pure economic loss.

Contractual Liabilities Policies are available to client to cover this risk (e.g. QBE)

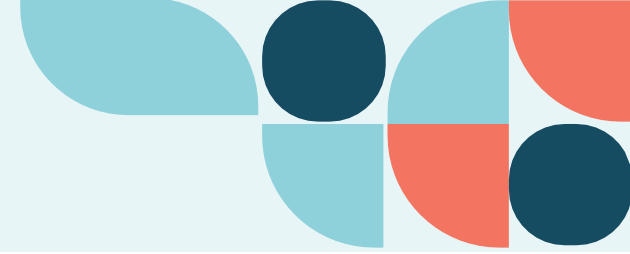
Professional Indemnity



- Liability for professional services such as design, advice and specification.
- Claims Made Basis of cover.
- Market Challenges & cost (maintain for 6/12 years post completion)
- Fire Safety Concerns & Restrictions.
- Asbestos
- Damp and Mould (residential)
- Pollution



Professional Indemnity



Focus is on financial loss and damage, not injury

What is the impact to client of the services/advice etc being defective ?

Wasted costs, increase in project value caused by delay or additional works.

Loss of funding or revenue or savings

Complexities include:

Each and Every Claim (or without limit to the number of claims)

vs

In the aggregate (total value of all claims on the policy in any one policy year)

Aggregate risk is that we won't know what is left in the pot from other claims made against the contractor as the PI will not usually be project specific.



Professional Indemnity



Inner Limits on Professional Indemnity

Fire Safety

Pollution / Contamination

Asbestos

Damp & Mould

Cladding

Where we know these are common market restrictions, we can accept these as meeting the insurance requirements.

Usually, £1M or £2M inner limit

To cap or not to cap at these inner limits ?

Inner Limit Caps



The amounts of insurance and the periods for which the *Consultant* maintains insurance are

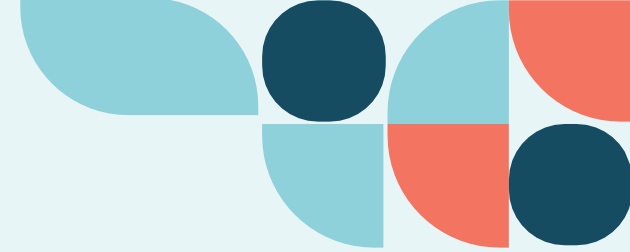
Event	Cover	period following Completion of the whole of the services or earlier termination
failure of the <i>Consultant</i> to use the skill and care normally used by professionals providing services similar to the <i>services</i>	£5,000,000 in respect of each claim without limit to the number of claims except for claims relating to pollution or contamination which are in the aggregate to a limit of £5,000,000, <i>claims related to fire safety which are limited to £2,000,000 in the aggregate</i> and claims relating to asbestos which are limited to £1,000,000 in the aggregate	6 years / 12 years

The Consultant's total liability to the Employer for all matters arising under or in connection with this contract, other than the excluded matters, is limited to £10,000,000 per task order **except for £5,000,000 per task order relating to financial loss or losses arising from pollution or contamination £2,000,000 per task order in relation to financial loss or losses arising from fire safety and £1,000,000 per task order relating to financial loss or losses arising from asbestos**

The above is the overall total cover the Consultant is required to evidence and be able to provide but each task order will be subject to its own particular requirements to be agreed between the parties



E&E or Aggregate



Event	cover	period following Completion of the whole of the <i>services</i> or earlier termination
<p>failure of the <i>Consultant</i> to use the skill and care normally used by professionals providing services similar to the <i>services</i></p>	<p>Lots 1 to 10 and 16 £5,000,000</p> <p>Lots 11 to 15 £2,000,000</p> <p>All values above are in respect of each claim without limit to the number of claims,</p> <p>Where aggregate insurance is proposed the levels of indemnity increase i.e.</p> <p>Lots 1 to 10 and 16 £10,000,000</p> <p>Lots 11 to 15 £4,000,000</p> <p>Increasing values on “aggregate” option if each and every not available makes sense.</p>	<p>12 years</p> <p>(this relates to the policy being on a claims made basis)</p>

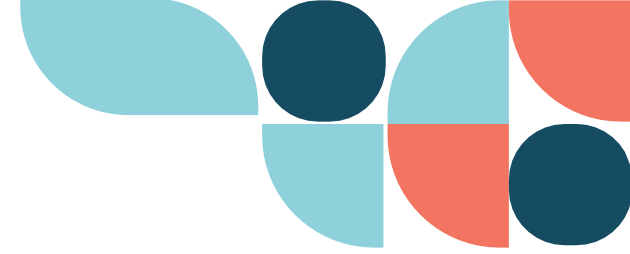


- The amounts of insurance and the periods for which the *Consultant* maintains insurance are

event	cover	period following Completion or earlier termination
failure of the <i>Consultant</i> to use the skill and care normally used by professionals providing services similar to the <i>services</i>	£2,000,000 in respect of each claim, without limit to the number of claims as a Framework Standard, however where there is a risk of interface with Coal Authority Assets SCC require a £5,000,000 indemnity for that individual Task Order	12 years
Public Liability	£10,000,000 in respect of each claim, without limit to the number of claims	
Employers Liability	£10,000,000 in respect of each claim, without limit to the number of claims	

- The *Employer* provides the following insurances **None**
- The *Consultant's* total liability to the *Employer* for all matters arising under or in connection with this contract is limited to £5,000,000 per each task Order in respect of failure of the *Consultant* to use the skill and care normally used by professionals providing services similar to the *services* and **£10,000,000 per claim or series of claims arising from the same event in respect of all other losses other than the excluded matters.**

Capping Liability



The Easy Bit:

You cannot legally cap your liability for:

Death

Personal Injury

Fraud

The Hard Bit:

What other matters are excluded from the cap:

Look at what indemnities are included in the contract e.g.

Commercial Confidentiality

GDPR

Intellectual Property

Payments

These may need to be / often are excluded matters – i.e. to which any cap does not apply. Client is unlikely to change these.



Capping Liability



The Easy Bit:

Don't cap below the required insurance limits for the things that we expect the insurances to operate for.

For skill and care never below the Professional Indemnity Limit (or multiples thereof)

For Property Damage – The Public Liability Limit on an “each and every” basis.

The Hard Bit:

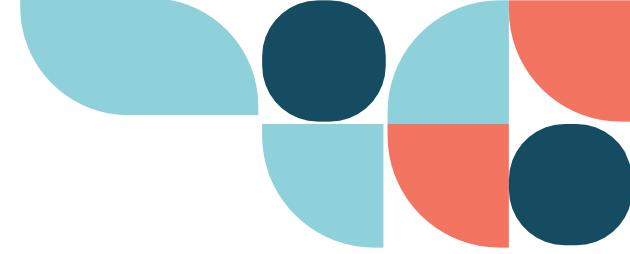
That leaves a lot you can cap:

Focus from insurance perspective is on Property Damage and Financial Loss...

Consider any other **excluded matters** that shouldn't be in the cap.



Capping Liability – Case Law



Ampleforth Abbey Trust v Turner & Townsend

The liability clause said:

'Liability for any negligent failure by Us to carry out Our duties under these Terms shall be limited to such liability as is covered by Our Professional Indemnity Insurance Policy terms... and in no event shall Our liability exceed the fees paid to Us or £1 million whichever is the less'

The insurance clause said:

'We shall take out a policy of Professional Indemnity Insurance with a limit of indemnity of £10 million for any one occurrence or series of occurrences arising out of any one event'



Capping Liability – Case Law



Professional Indemnity Claim Made Against T&T and valued at **£226,661**.

Wording would have capped recoverable amount by Ampleforth to **£111,321** (100% of fees)

Judgement:

Liability cap was unreasonable because the client had stipulated (and therefore in some ways paid for or contributed to) £10M Professional Indemnity Insurance.

Insurance rendered illusory (i.e. is pointless) if cap is allowed to apply

Net effect is the cap no longer applies and liability is **unlimited**.



JCT and NEC Standard Insurance Requirements



JCT v NEC

JCT

- CAR insurance in **joint names** for new builds arranged by contractor
- CAR insurance and existing buildings insurance on refurbishment/extension by **Employer in joint names.**
- Needs to be redrafted where the Employer **isn't** insuring the building.

NEC

- CAR insurance in joint names usually arranged by the contractor – irrespective of new build or otherwise.
- Sum Insured as per the contract data.
- Client insurances most commonly “none” in the contract.
- Client will still need own Public Liability to cover its liability under the contract.

JCT Existing Buildings Re Draft

- **Common scenarios:**
- Tenant is employer under JCT but landlord is insurer of the building.
- Where Local Authority is Employer under JCT but work being carried out at an Academy School.
- Academy School is the Employer and the School is insured by the DfE's Risk Protection Arrangement.

- Use a replacement schedule. As Employer cannot comply with usual JCT options.
- Be clear that existing buildings are not insured by the Employer and there is no waiver of subrogation to the contractor.
- Contractor to carry risk of negligent damage to the existing buildings on its Public Liability policy.
- Disclose to existing building insurer the scope of works.

NEC - Existing Buildings

- **Contractor Liabilities:**

- Include loss of or damage to property owned or occupied by the Client arising from the Contractor Providing the Works; and
- Contractor will carry this risk on the Public Liability Insurance
- Indemnity Limit needs to reflect the value of the building being worked on.

- Possible compromise:

- X18 may be used to limit the Contractors Liability to the value of the Public Liability Insurance for damage to client property.
- This may be appropriate for a high value building (over £25M) where risk of uninsured loss or cost of additional insurance is prohibitive.
- It may also help to disclose the approximate reinstatement value of the existing building for context.

NEC – Common requests

- **Add to client Risks:**

- Sonic Boom
- War
- Radiation

Standard insurance exclusions & risk should be accepted by client.

- Terrorism

This is insurable risk and need a pragmatic approach.

If client doesn't insure terrorism on the existing building may be logical to not require on the works.

- **Limitation of Liability:**

- As a Percentage of fee

Shouldn't really be used to cap any of the insurance covers, so not for damage to property or financial loss.

- Consequential Loss and Indirect Loss

Usually acceptable to accept exclusions

- Consider the projects where this might not be appropriate (where savings or income are par o the results expected.)

Takeaways

Indemnity Limits

- Should be realistic and take account of the nature and location of the project.
- Can be adapted to have inner limits linked to the availability of insurance for certain activities.
- Public Liability is relatively cheap, but Professional Indemnity is more volatile.
- Need to be cross referenced against any requests to cap liability.

Takeaways



- **Limitation of Liability:**
- Caps on liability are a commercial reality
- They are not a substitute for insurance and shouldn't interfere with the indemnity limits
- Don't push your luck
Client can't have unlimited liability on everything (It's an illusion)
Contractor can't just give fees back on everything (It's an illusion).



Questions

