



SPECIAL REPORT/CONSTRUCTION

Covering the contractual chain

Making sure construction insurance extends to contractors and subcontractors is a common challenge in the construction sector



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One of the perennial problems for contractors in the construction sector – and one that can cause headaches for their brokers and underwriters alike – is poor supply chain management, particularly relating to the appointment of subcontractors and subcontractors below them.

With major projects there have always been owner-controlled insurance programmes (OCIPs) that are designed to cover the employer, the main contractor and all subcontractors. However, it is sometimes the case the main contractor or a principal subcontractor's procurement team contract contracts that do not pass the benefits of the OCIP down to the subcontractors. Subcontract documents are instead produced requiring the subcontractor to be responsible for insurance of the subcontract works, and the subcontractor may or may not have the adequate cover for such eventualities. Indeed, it is surprising

how many contractors do not look at their contract insurance clauses until a claim needs to be issued.

Contractual risks

With this in mind, contractors – and indeed their brokers – should make sure they know everything about the insurance and risk involved in any construction contract. These can vary significantly, depending on the contract. Even for subcontractors under a Joint Contracts Tribunal (JCT) form of contract, which generally provides more certainty as it offers the benefit of the main contractor's insurances in respect of JCT-specified perils, the list of specified perils often does not cover all aspects and in particular perils such as theft, malicious damage and impact. For more bespoke contracts, the potential insurance pitfalls are even greater (see box).

When standard forms of contract, such as JCT and NEC, are used up and down the contractual chain, meaning back-to-back agreements are in place, there are generally fewer problems. Contractors tend to be good at including terms and conditions in the subcontract relating to employer's liability, public and profes-

Potential pitfalls for contractors

The following points are just some examples of the issues that can arise:

- some policies will specifically cover construction work undertaken by the insured in the course of the business, but excluding any work that involves an original estimated contract price or contract period in excess of the maximum shown in the schedule. This type of approach by insurers can mean if, for example, a contractor has a maximum estimated contract price or maximum contract period on their policy that is below the levels of the contract they are working on, the insurer can declare any claims arising out of that contract as outside the scope of the policy cover;
- bespoke policies can also create difficulties around the approach to "free issue materials". These are materials the employer will have taken the benefit of bulk-buying from suppliers and providing to contractors for incorporation into the works, for which the contractors are responsible, but which will have not been included in the final valuation of the work. There is a proviso in most policies that the value of the free issue materials shall be included in any declaration made under premium adjustment conditions at the end of the policy year, thus it is incumbent on contractors to declare the value of free issue materials to the broker at the end of the policy year so any appropriate premium adjustments can be made. However, a recent claim being dealt with by McLarens involves damage to free issue materials supplied to the subcontractor who was to install them. Following damage to the free issue materials, the main contractor is pursuing a claim and expecting the subcontractor to claim on his insurance for the damaged free issue materials; however, the bespoke contract prepared by the contractor does not make the subcontractor responsible for the free issue materials, stating the subcontractor should be responsible only for his installation works; and
- another area of confusion involves scaffolding contractors and whether subcontractors should be responsible for their own plant and materials, such as scaffolding, while on site. There are numerous arrangements that can be made between parties regarding scaffolding but it is often the case that contractors and scaffolding contractors do not always know and agree who is responsible for what in the event of an incident. Particular care is needed when making sure the contractor and the scaffolding contractor both have adequate cover in place.

s liability, and professional indemnity insurance.

That said, we often see a lack of appropriate terms to deal with the material damage of the contract/subcontract works. Primary contractors often require the subcontractor to insure the subcontract works and sometimes equipment, with most policies including some sort of "indemnity

to principals" clause, which covers that aspect where required to do so by contract. However, there are insurance policies around that do not automatically include such an additional clause.

For example, where a specialist supplier is asked to carry out installation works, they may have a cargo policy with an extension to cover installation works. It is rare, however, for such extensions to automatically have a principals' indemnity clause involved, with the onus generally being on the supplier (or indeed their broker) to ensure that it is included if required.

On contracts involving existing structures/existing property on site, it is important to recognise the standard JCT approach is for the employer to take out the insurance for both the contract works and for the existing structures. These existing structures are not always buildings for refurbishment but may involve structures such as retaining walls, which may or may not be worked on during the contract. In such cases the employer should be advised to take out any cover they wish to in connection with such exist-

ing structures. They will not be covered by the insurance of the contractor or their subcontractors unless they are damaged as a result of negligence.

Lessons

So what is the lesson from all of this? It goes without saying construction is an area where specialist brokers have a key role to play. Indeed, it is crucial that brokers and their contractor clients make sure that appropriate cover is in place to cover all eventualities and that all contracts are reviewed with the correct limits in place. This should even include factors such as deciding who pays for the excess on an owner-controlled insurance programme. It is not unknown for the main contractors to blame everything on the subcontractors and it is therefore important that these organisations make sure that they have the correct and appropriate insurances in place. Failure to do so could result in serious problems and difficulties for that contractor. ■

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