

Insurance: inadequate bandage to hemorrhage of unlimited liability

Antonios Dimitracopoulos, partner – construction, Bin Shabib & Associates, looks at whether brushing liabilities under an insurance cover can give peace of mind to contractors and consultants



As lump sum contracts become more popular in the UAE, contractors and consultants are constantly asked by project developers to take out insurance, since UAE law provisions do not render this compulsory.

Project developers often insist on being named as assured parties, so that they can activate any insurance payment mechanisms. Consequently, contractual provisions on extensive insurance requirements are now a local standard. They are factored in to any price assessment and are steadily giving way to the relatively dated requirement of parent company guarantees.

However, it is difficult to insure against, and impossible to contract out of, mandatory UAE law provisions imposing unlimited liability. Nevertheless, obtaining the right insurance is vital to the preparation of a well-weighted bid. The question is how to calculate the value of risks that insurance policies should cover, so that one makes an informed and well-calculated bid; does not overprice the works as a result of over-insuring;

and does not become exposed to uninsured risks whilst trying to produce a competitive price.

The answer lies in familiarity with local legal risks and – if they are triggered – with the amounts that may need to be paid out.

Project developers usually demand taking out the following insurance policies:

Professional Indemnity (PI) is a fundamental type of insurance that consultants particularly are expected to take out. This

cover is normally in place and renewed on a yearly basis, usually from non-UAE based insurers. Hence, it is often calculated on the basis of legal risks that non-UAE insurers are familiar with. In instances when either the assured or the insurer seek local legal advice to accurately assess the risk covered, it becomes clear just how arduous liability provisions under UAE law can be for contractors and consultants. Gen-

erally, under UAE law, liability for defects affecting the safety or stability is unlimited for at least 10 years from the date of taking over, and joint for both consultant and contractor. However, if the consultant's scope does not involve supervision of the works, its liability will be limited only to any serious design errors.

Design liability is not always quantifiable in advance. "Fit for purpose" design can make assessing the levels of required insurance complex and expensive to calculate.

Unlimited liability in the UAE means that a PI policy providing sufficient cover for all eventualities can be illusory. This is so, even if the project developer

agrees that the maximum amount of the PI cover will set a full and final limit on all claims.

Another commonly encountered requirement is that of insuring the contractor's own plant and equipment. However, UAE law also provides for the contractor

performing the works and the employer providing the equipment and materials used. It would then be prudent to insure against risks for works taking place close to other structures.

Typically, adequate insurance cover is provided by insurers only if applicable health and safety regulations are abided to, and with UAE green projects increasing, obtaining environmental insurance also becomes topical.

UAE environmental laws usually impose strict liability on polluters, so premiums payable for this type of insurance may vary substantially, depending on the likelihood of environmental damage occurring.

If insurance is locally obtained or if the policy provides for UAE law and jurisdiction, some local requirements are added in:

- There is a three-year time bar for insurance related claims from the moment the risk occurred.
- Arbitration clauses in insurance policies will be upheld only if they form part of a separate arbitration agreement.

If different insurance policies are taken out on the same project, there is a risk of an insurance overlap. Insurers will usually only consider paying out what they perceive to be their share of the insured loss. Calculation of this can be a cumbersome process, so it is cost-effective to avoid duplication in policies. Ideally, a mechanism should be in place that maps out an insurance claim process on a risk-by-risk basis.

With insurance cover in place and relevant contractual provisions complied with, one can be lulled into a sense of false security that liability exposure has been covered for, albeit at a cost. However, the fact remains that under UAE law, regardless of any insurance obtained, one can find oneself under a Damocles' sword worrying that if serious defects occur, causing actual (or – if not expressly excluded – consequential) damage, this may prove to be well in excess of all insured amounts.

It is difficult to insure against, and impossible to contract out of, mandatory UAE law provisions imposing unlimited liability