What do I need to look out for?

A contractor will undoubtedly warrant that is has certain types of insurance in place. Unless the insurance policy mirrors these those contractual obligations, a contractor can inadvertently find itself in breach of contract.

Some common traps for unwary include the following:

1. The different scope of Joint Name Policies

Insurance for the works is often taken out in the joint names of the contractor and the employer. Joint Names insurance is used to ensure that the risk is on the insurance company regardless of which party is at fault.

The intention is that each party can claim on the insurance and that the insurance company cannot claim against the jointly named insured, even if one of them is at fault.

One note of caution: an interest noted on a policy is no substitute for a Joint Names Policy. A person noted on a policy can still be pursued by an insurance company whilst it has no contractual redress itself against any such claim. For this reason, standard form contracts are often amended to name any party providing funding for the project so that they have equal rights to the other named parties.

Joint Names insurance does not automatically exclude liability for the parties for negligence. This does however depend on the wording of the specific policy. If specific or nominated subcontractors are to be included within the Joint Names insurance, they should be expressly referred to in the contact and policy.

The scope of cover in standard form contracts can vary dramatically, so you need your advisers to explain the differences to you for your particular circumstances.

The contractual obligation upon an employer may extend only to insuring existing structures which may not cover any subsequently installed equipment for a tenant fit-out. If the contractor's cover is inadequate, then the new installation may not be insured.

2. Conflicts between the policy and standard form contract wording

The general principle is that one Joint Name Insured cannot claim against the other in respect of the joint insured risk. Certain express terms in the contract can conflict with this principle, such as the existence of an indemnity clause. This means that Joint Names insurance may not provide a remedy if the contract says something else.

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It is imperative that the insurance clauses and indemnity provisions do not conflict. Most contracts contain an indemnity clause that remains unaffected by the Joint Names insurance. So, even if the insurance policy includes the negligence of one of the parties, it may still be possible for the employer to claim against the culpable contractor.

Your advisers should carefully consider the precise wording of the proposed construction contract for you, so that this conflict with these consequences does not arise.

3. Getting the correct policies for the correct period

Care is needed to ensure that the insurance policies do not overlap. One solution is to take out 'project' insurance to supplant all the other types of insurance. It is worth nothing that latent defect insurance still needs to be considered if you agree project insurance to cover hidden defects which may become apparent at a later date.

Project insurance is usually taken out by the employer with the contractor (and possibly subcontractors and consultants) as joint insured. It will be designed to cover a particular project in addition to the coverage provided by contractor's All Risks Insurance.

Advantages for employers include control over the policy terms and the extent of insured risk but the premiums can be high in the UK and the ongoing costs prohibitive for all but the largest of projects.

No matter which insurance cover is contemplated, it is all too easy to warrant that suitable insurance is in place but then fail to understand properly the detail of the underlying policy documents. This typically happens in two scenarios:

Scenario A

When considering 'each and every claim' cover which is subject to aggregation clauses within the policy documents:

- Those putting together construction contracts should raise questions as the existence of aggregation clauses in the underlying policy documentation - especially when dealing with contaminated land.

- In a typical JCT contract, the default position is on the basis of an annual aggregate level of cover rather than on an each and every claim basis. Thus, the level of insurance provided by the contractor is reduced.

Scenario B

Parties taking out certain commercially available insurance policies in lieu of other security in the mistaken belief that it will pay out for latent defects. Often the reality is that it only provides cover for catastrophic events resulting in total destruction of the building.

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4. Various exclusions to the insurance cover

Different forms of contracts may have different insurance provisions.

In ICE contracts, for example, (published by the Institute of Civil Engineers and are normally used for operations involving groundwork) the exclusions to insured risk are known as the 'expected risk'. These include 'any fault, defect, error or omission in the design of the works (other than a design provided by the contractor pursuant to his obligations under the contract)'.

The exclusions will need to be matched in the contractor's insurance policy to cover its liability. The wording of the policy then needs to match carefully the limitation of the contractor's liability. The nature of the insured event (the time, place and loss) should be carefully checked.

Where a party warrants to another party that no deleterious materials have been used, this can fall outside the insurance cover. Many policies exclude liabilities that are created by the provision of a guarantee. The use of words 'warrant or covenant ensure that no deleterious materials have been used' is the same as giving a guarantee and can have unintended and unwelcomed consequences.

5. The continuing duty of disclosure

A common problem area is the failure to disclose properly all material facts when taking out insurance. The non-disclosure of a material fact can render the insurance policy voidable. Just because the insurance policy has been signed, does not mean that the duty of disclosure has ended.

The duty of disclosure equally applies to the renewal of an insurance policy. If your contractual relationship with a third party has deteriorated, it may qualify as a material fact requiring disclosure.

Construction or engineering projects can be complex and careful wording is needed to meet your duty to disclosure. This may include an assessment and possible disclosure of all potential disputes to your insurer and you should speak to your broker about doing so.

The duty of disclosure also applies equally to Joint Names contracts. So, if one party fails to disclose something material, then it is possible that both parties may be without insurance cover and subject to a claim by the insurance company.

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