



Best Practice Procurement Liability & Insurance Workshop

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Background

- » **Modern society, seeking enhanced technology and improved infrastructure, demands from us higher levels of complexity and innovation. At the same there is greater aversion to risk and failure, a growth in consumer protectionism and assumptions of “fitness for purpose”. Everything we do may be subjected to close scrutiny and clients and society at large are less forgiving of our failures.**
- » **Management and mitigation of risk, liability & insurance are key and essential skills for the Consultant operating in today’s market.**
- » **Without effective management of risk, our profitability and even commercial survival are threatened.**





Our Risk Environment

- a) **Contracts – Onerous conditions, excessive warranties or performance guarantees, unreasonable monetary levels of liability, poorly defined or limited scope, inappropriate sharing or transfer of risk, inadequate budgets and programme.**
- b) **Availability of suitable Professional Indemnity Insurance**
- c) **Legislative framework**
- d) **Cultural appetite for litigation**
- e) **Project complexity – reliance on technology, poor quality of available sites (geotech, sensitive neighbours), complex working arrangements and procurement.**





Insurable Risks - Arise from negligence

- **flaws in a technical solution, leading to stability or serviceability problems**
- **failure to meet design criteria in terms of user efficiency (e.g. yield in energy production of a power plant)**
- **erroneous quantity and cost estimates influencing the Client's decision**
- **faulty tendering documents or procedures giving rise to Contractors' claims (i.e. remuneration of the Client for extra costs)**
- **delays in producing construction plans with the consequence of late commissioning**
- **insufficient site supervision with respect to quality, environment or safety.**





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Background Continued

- Clients and third parties seek to transfer risks to us that are not insurable. These can include warranties relating to commercial success and the contractor's performance.
- Frequently we find ourselves managing not only our own risk but also our client's risk and the risks of other stakeholders with whom we work. For example, another consultant working on a project may have inadequate insurance cover and/or QA procedures.
- It is not uncommon for insurers to impose on us and on other parties risk mitigation or QA measures in order to agree to coverage
- In consortia and other JV arrangements the internal apportioning of risks works only as long as our partner stays in business.





Background Continued

- When mitigation does fail the management of the loss is frequently removed from our control. It is common for the risk holder of last resort to be an insurer, either our client's, our own or a third party's. Once an insurer is involved we find our obligation to the insurer overrides our duty to our client.
- Sometimes we get to determine appropriate limits of liability to be carried by each party at the outset of the project, but more frequently those levels are imposed upon us.
- While Partnering, Alliancing and other modern procurement methods can provide more rational and fairly proportioned risk mitigation, particularly in Public Works and in infrastructure, there are many projects and clients for which more traditional risk management must be made to work.





The New Zealand Risk Environment

- **PI premiums are around 2 - 4% of gross fee income (Within other Anglo/American countries rates vary up to 12%)**
- **All member firms of ACENZ are required to carry a minimum level of PI cover.**
- **We are facing increasing government legislation to provide more consumer protection by way of warranty. This is a common trend in a number of countries.**
- **Joint and Several” liability legislation.**
- **Constant battle with clients and their legal advisors seeking unreasonable contract conditions.**
- **ACENZ have been proactive and successful particularly with Central and Local Government clients in promoting fair conditions of engagement.**





NZ - Risk Environment Continued

- **In NZ the majority of member firms insure through a common Engineer-owned insurance company. This means that claims are managed sympathetically and there is plenty of support available when a claim is made. It also means that there is less inclination for engineers to aggressively find fault with another's performance.**
- **In NZ the cost of litigation is extremely expensive and there is little legislative support for punitive damages. Most disputes are settled outside the formal court system.**





NZ – Un-Insurable Risks

- » **Asbestos risks**
- » **Contamination or pollution risks, other than limited cover for some forms of accidental discharge.**
- » **Radiation**
- » **Punitive (exemplary) damages [Damages awarded as a punishment rather than to cover actual losses.]**
- » **H&S statutory fines**
- » **Contracts that require liabilities or indemnities beyond the common law and our normal standard contractual conditions**
- » **These are common in many parts of the world.**





Questions For This Workshop

- a) **Do we as Consultants understand enough about our risk environment? If not should FIDIC have a role in promoting greater understanding?**
- b) **Is there enough similarities between the different risk environments around the world for FIDIC to develop some common policies and guidelines?**
- c) **Is there value in tackling the issue of unlimited liability globally?**
- d) **What is the best way to engage in meaningful dialogue with the insurance industry?**
- e) **Should FIDIC/EFCA take a position on uninsurable risk?**

