

## ACEI Advice Note to Members

### Professional Indemnity (PI) Insurance and Contractual Liability

April 2021

The purpose of this Association of Consulting Engineers of Ireland (ACEI) document is to support member firms in their negotiations with clients on contract terms for new projects, to ensure clients are aware of the current state of the Professional Indemnity (PI) Insurance market in Ireland.

We believe it is vital for employers, solicitors and funders to appreciate what is happening in the PI insurance market and how some of the positions being adopted are threatening the viability of the consultancy sector and potentially undermining the protection afforded to all parties.

#### PI Insurance Market

The PI insurance market is suffering from a severe restriction in capacity, with insurers either reducing the volume of business they are taking on or withdrawing from the market altogether. Many firms have been unable to source insurance protection or are now struggling to achieve the indemnity limits or breadth of cover they previously held.

We, along with other representative bodies from the construction and insurance sectors, have been engaged with major procurement bodies such as the Office of Government Procurement (OGP), who recognise these difficulties and understand that many consultants and contractors are unlikely to be able to maintain the specification of cover that firms have become accustomed to. As a result, the OGP have undertaken to review PI insurance requirements with the objective of trying to deliver a fairer outcome.

We consider those in the private sector need to also follow the OGP lead and take account of the implications of unreasonable contractual demands on consultants.

#### Contractual liability: risk -v- reward balance

One area of particular concern to insurers is the imbalance of risk -v- reward under bespoke forms of contract with many consultants reporting:

- Continued pressure on professional fees;
- Increasingly onerous contractual terms, including strict liability clauses often extending to programme and costs, which are unlikely to be covered by PI insurance;
- The imposition of unlimited liability (Consultants' liability should not exceed the level of their PI cover);
- The absence of appropriate limitations on liability such as net contribution clauses;
- Unreasonable requirements relating to collateral warranties;
- Demands for higher limits of indemnity

All of this is feeding into insurers' perception of a 'risk dumping' mentality in both the public and private sector and this is having a real impact on insurer appetite.

Adopting a sensible and fair approach to managing liability under contract is the only way for members to:

- Maintain appropriate and effective insurance protection; and
- Guard against it not being available in the medium to longer-term.

It is a very simple question of being able to demonstrate a fair balance between risk and reward in terms of fees earned -v- liability exposure. It is considered that in an attempt to benchmark appropriate levels of risk, reference should be made to Industry standard Conditions of Engagement Agreements SE9101 (Structural) and ME2000 (Mechanical and Electrical) and the general contract terms therein. Significant deviations from the contract terms set out in these documents, should be considered red flags, the consequence of which can lead to an unreasonable passing of risk to the consultant. The acceptance of such onerous and unfair risks/obligations, could see them not being covered by PI Insurance and could ultimately undermine the firm's ability to secure PI cover into the future.

At this point, it is crucial that consultants do everything they can to maintain that fair risk -v- reward balance in order not to jeopardise their PI insurance arrangements. The question for employers (their solicitors) and funders is whether they want to work with firms who are prepared to take on a sensible degree of risk, backed by PI insurance, or with firms who will take on exposure they cannot possibly insure or fund, that leaves them greatly exposed and risks the future of their PI insurance arrangements.

This is not about walking away from responsibility. As a profession, we are trying to ensure that appropriate insurance cover is available now and into the future in order to protect consultants and their clients. To achieve that we need employers to adopt a more equitable approach to risk allocation and to recognise that getting the balance right will be an essential ingredient in securing the support of insurers.

Hence, we ask our member firms to share this document with your clients as part of contract negotiations, to ensure they are fully aware of the PI environment you are operating in. A healthy well funded PI market is in the best interests of all parties and a client strategy of imposing onerous contract terms on consultants runs contrary to this and it is important all can see where this strategy is leading.

**ACEI Executive Board and Risk / PII / Procurement Committee  
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