

Designing with Confidence in the UAE: Do you have the right insurance?

Kanishka Singh
k.singh@tamimi.com

March 2015

Introduction

Under the UAE Civil Code, there is no obligation on the designer to take out and maintain an insurance cover. Similarly, no such requirement is mandated by Law No. 6 of 1997 in relation to Contracts with Government Departments in the Emirate of Dubai.

The situation is different in Abu Dhabi where design consultants need to be conscious of the requirements of classification pursuant to Regulation No.2 of 2009 (Concerning Contractor Classification in the Emirate of Abu Dhabi) and its associated instructions under Administrative Resolution No.58 of 2010.

Pursuant to these regulations, all contractors and consultants operating in Abu Dhabi need to apply for classification before the government authority. One of the pre-requisites of classification is adducing evidence of the existing insurance policies.

Irrespective of the requirements of any law, it is in the interests of both employers and designers that appropriate insurance cover is in place that reflects, and covers, the level of the risk involved in the project.

For example, if, under the terms of an agreement, a designer indemnifies the employer for any loss, damage or injury arising as a result of the designer's performance, the employer should ensure that the designer has the type and level of insurance necessary for it to pay any claim made under the indemnity.

As a designer, it is also best to ensure that appropriate insurance is in place to protect your business.

Here are a few insurance options which employers and designers must consider, not only as matter of good practice, but also to minimise risks.

Professional Indemnity Insurance

Professional indemnity insurance is a must for any designer especially when the liability for design defects can be particularly onerous for designers in the UAE. This sentiment is echoed by Administrative Resolution No.58 of 2010 which, for the purposes of classification, requires engineering consultants operating in Abu Dhabi to maintain professional indemnity cover from an insurance company based in the UAE.

The amount of professional indemnity insurance cover the designer is required to have in place is generally determined on a case by case basis, depending on the extent and the complexity of the design works in question.

As an employer this insurance is essential, especially if you have concerns about the accessible assets of the designer in the event the design is defective.

It should be kept in mind that professional indemnity insurance might not respond to a claim made under Article 880 (dealing with decennial liability) of the Civil Code for any major design defects which threaten the safety and stability of the building.

Decennial Liability Insurance

Under the Civil Code, designers and contractors are jointly liable for any total or partial collapse of a building and for any defect affecting stability or safety of a structure for 10 years (starting from the completion of the works). Provided the designer is not also responsible for supervision of the works, the designer's liability is limited to defects caused by its design.

Managing the risk of a decennial liability claim for designers can be difficult as decennial liability falls outside the scope of the standard cover provided by Contractors' All Risks (CAR) and Professional Indemnity (PI) insurance.

CAR policies typically cover physical loss or damage to the works being executed, and will typically exclude liability for repair or replacement of property which is defective in design, specification, materials or workmanship. These policies are normally effected by the employer or the contractor.

Professional liability insurance typically covers loss caused by the negligent omissions or fault of the designer. Moreover, the coverage of professional indemnity insurance will usually be inadequate to cover for the loss of a partial or total building collapse.

One of the ways to manage decennial liability is to spread out the risk by way of collateral warranties. Contractors, architects and engineers within the first tier of the supply chain can exchange collateral warranties. Such collateral warranties enable an innocent party, caught by the decennial liability regime, to seek to recover the loss under the terms of the warranty from that party who actually is at fault.

Consultants should also be aware of the precise nature of their role, that is, whether they are operating in a supervisory-only category or are actually responsible for the full design of the structure.

The consultancy agreement should also be checked to ensure that any decennial liability clause reflects the obligation imposed by law and does not impose a wider obligation. If this wider obligation is imposed by the agreement, a consultant's insurance cover may not apply to it.

Legal Costs Cover

Designers should also consider insurance to cover legal expenses to defend an action by the employer or other claimant in relation to loss or damage covered by a faulty design.

There is a possibility that the insurance companies might refuse to provide cover for defending a claim that does not have reasonable prospects of success and they may seek to investigate this prior to providing the cover. However, this should not deter the designers from seeking such insurance cover on a case to case basis.

General Recommendation

It is recommended that both employers and designers consider the insurance and indemnity provisions of each contract.

Depending on the risk allocation resulting from negotiations, the employer/developer may take out its own all risk insurance in relation to the project and/or site of the works.

In relation to insurance cover, consideration should be given as to whether a party should be an insured under that policy (for example, a consultant being covered under a contractor's or owner's CAR policy).

The level of cover will depend on the value of, and the type of works that will be performed under the construction contract (for example the level of dangerous activities being performed and the likelihood of damage or injury resulting from the works).

If a variety of insurance policies are taken out, there is a risk of overlap of insurance. Although not specifically provided under the Code, policies invariably do not allow recovery of the same insured loss more than once. If the policies are checked to remove duplication, the insurance premiums will be kept to a minimum.

In any event, designers should always be required, and have in place, appropriate professional indemnity cover.

Final Note

It is advisable that designers maintain adequate insurance cover for their design obligations to protect against claims from employers, contractors and third parties.

Lastly, it should be ensured that the insurance cover reflects the contractually agreed insurance obligations and decennial liability.