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You have insurance...But what about the Engineering Consultants?

SUMMARY:

Pro-Demnity has recently seen a number of instances where the architect's insurance has been called upon to pay damages for claims that were the responsibility of an engineer, because the engineer's own insurance was insufficient.

Architects must review the insurance of any engineering consultant they retain and establish required limits as a condition of engagement, recognizing that any shortfall in the engineer's limits can become the architect's responsibility. The following are suggested for consideration:

- . **Require engineers to carry "Per Claim" limits that match or exceed the architect's**
 - . **Require engineers to have "Aggregate" limits at least twice the "per claim" limits**
 - . **Require Defence Costs to be "in addition" to the required limits**
 - . **Require engineers to provide Evidence of each Renewal of their insurance at the agreed limits**
 - . **Risks associated with certain "owner's specialists" justify higher limits**
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DISCUSSION:

Many architects retain engineers as sub-consultants on their projects. This arrangement has the architect contractually liable for the professional services of the engineers. Should an engineer be responsible for an error or omission in its own work, it remains liable to the architect for the consequences of its error. However, should the engineer's insurance prove insufficient to pay the damages, the architect, may be responsible "in contract" to make up any shortfall.

The current standard Client / Architect Agreements, OAA Document 600 and RAIC Document 6, include a provision that engineering consultants have been employed on behalf of and for the benefit of the client, and the architect is not to be held responsible to the client for the engineer's errors. The intent is to eliminate the architect's contractual liability for the engineers' errors in disciplines where the architect has no professional expertise, making the architect less exposed to these engineering claims.

It is important to note that this particular provision in the standard agreements has not yet figured in a court decision in Canada and it remains uncertain how it would be viewed by a court. It should not be relied upon and architects are advised to require that any engineering consultants carry ample professional liability insurance, no matter who retains them.

RECOMMENDATIONS:

The following are recommendations for insurance requirements that an architect should consider as a condition of engagement for any engineering consultants it retains. Although Ontario architects participating in the mandatory insurance program provided by Pro-Demnity Insurance Company deal directly with Pro-Demnity, consulting engineers will use the services of a Registered Insurance Broker to make applications and receive quotations for their professional liability insurance. The Broker would be the entity that communicates any of their insured's requirements to the insurer.

1. "Per Claim" limits that match or exceed the Architect's:

Ensuring that each of the engineering disciplines carries insurance that is at least equal to the architect's is consistent with the limitation of liability provisions of Document 600 or Document 6 and will reduce the instances where the architect and its insurance ends up paying for an underinsured engineer's mistakes.

2. "Aggregate Limits" at least twice "per claim" limits:

Architects should also look carefully at the "aggregate" limits maintained by the engineering firms involved on their projects. Up to certain per claim limits, an engineering practice should be able to obtain an aggregate limit for all claims in an annual policy period that is twice the "per claim" limit. Although these higher aggregates may be available to them, some firms are prepared to settle for an aggregate that is also the "per claim" limit, meaning that one claim can exhaust all the available insurance for the policy period or reduce the limit available for another claim.

In contrast, Ontario architects insured under the mandatory program provided by Pro-Demnity will have an aggregate limit of twice the "per claim" limit for any one project and an aggregate limit for all claims in the policy period (annually) of four times the "per claim" limit.

Architects could ask the engineers they do business with to try to match the Pro-Demnity limits; however, an aggregate twice the "per claim" limit appears to be the maximum currently available from other insurers. The engineer and its broker may have to specifically request the higher aggregate limit on its application.

3. Defence Costs "in addition" to the required limits:

Architects are advised that any insurance required of the engineers should preferably have the defence costs "in addition" to the limits so that the costs of defence do not erode the limits available to pay damages. If this is not available to the engineer, an alternative is to require higher limits to help safeguard the funds ultimately available for eventual payment of any damages required as a result of the engineer's own negligence.

4. Evidence of Renewal for required limits:

A firm may choose to change its limits at any time, often at a renewal. As a condition of engagement, architects should require engineering consultants to automatically provide evidence of renewal of their annual practice insurance at no less than the insurance limits being required of them by the architect. Maintenance of the required limits should be a contractual obligation of the engineering consultants that is rigorously monitored by the architect.

5. Owner's Specialists need higher limits:

Architects are advised to NOT retain "Owner's" consultants such as Surveyors, Geo-technical and Hazardous Material specialists. That is considered the owner's responsibility. However, if compelled to do so, architects must ensure any of these they retain are insured with substantial per claim and aggregate limits to reduce the risk that the architect will be required to contribute compensation for the specialist's errors should the specialist's own insurance prove insufficient.

Adding to the risk, certain specialist services that are not the "usual and customary" professional role of an architect will not be covered by the architect's insurance.

As well as insurance considerations, if you agree to retain any of these specialists, you should require contract language in your Client / Architect Agreement where your client indemnifies you respecting the services provided by the specialists.

(Refer to Pro-Demnity Bulletin dated April, 2008: "Retention of Specialists to Meet Owner's Obligations")

Note: Readers are reminded that the insurance industry is subject to market forces and business decisions that may impact the insurance limits and coverage available to engineering consultants. The content of this bulletin respecting limits and coverage available for engineering consultants was based on information available to Pro-Demnity at the time of publication; however, its accuracy cannot be assured. Engineers will have to obtain specific information respecting available limits and coverage from their own Insurance Broker.

Refer to the "Recommended Checklist for Engineering Sub-consultants' Professional Liability Insurance" printed overleaf.

Recommended Checklist for Engineering Sub-consultants' Professional Liability Insurance:

The following is a checklist of suggested requirements to be met by any engineering consultant you retain as a sub-consultant:

1. Provision to the Architect of a current Certificate of Insurance issued by the consultant's insurer. The Certificate will include:
 - a) Name of Engineer's Insurer (e.g. ENCON, XL etc)
 - b) Type of Insurance (Professional Liability)
 - c) Policy No.
 - d) Policy Period start / end dates (typically one year for annual practice insurance)
 - e) Policy Limits per Claim
 - f) Policy Limits in Aggregate for the Policy Period
 - g) Deductible per Claim

2. "Per claim" limits maintained by the consultant that are no less than the architect's own insurance. E.g. if the architectural practice carries \$1,000,000 per claim, require the engineers you retain to also carry \$1,000,000 per claim as a minimum.

3. Defence Costs and expenses are to be "in addition" to the stated Limits

Note: Some insurers only provide defence costs "in addition" for policies with lower limits. They may only issue "costs included" insurance above certain limits. If the defence costs and expenses are not "in addition" to the claims limit in the policies available to the engineering consultant, consider requiring higher "per claim" and "aggregate" limits to improve the chances that the funds available to pay any damages are not eroded by defence costs.

4. Request "Aggregate" Limits twice the "per claim" limits

Note: Aggregate limits twice the per claim limits are usually available to the engineering consultant although they may have to specifically apply for them. Some insurers' application forms may not specifically list aggregates twice the per claim limits for other than low limits.

5. Where the consultant provides more than one engineering discipline, require per claim and aggregate limits that exceed your own.
6. You will need to know that your agreement about the engineer's insurance is being adhered to ...you can require:
 - a) Written undertaking from the Consultant to maintain, as a minimum, the same limits in future years
 - b) Written undertaking from the Consultant to advise the Architect of any changes in its insurance limits
 - c) Written undertaking by the Consultant to provide the Architect with a fresh Certificate of Insurance / Evidence of Insurance at each annual renewal

If you increase your insurance limits, you will need to require your consultants to keep pace.