FEDERATION OF PILING SPECIALISTS

CAP ON ECONOMIC LIABILITY POSITION PAPER

The FPS recommend that it is best practice to include a monetary limit to the liability of the (sub)contractor under the contract or warranty in all contractual arrangements. Without this the potential loss is left unlimited.

Whilst it may appear in the first instance that the FPS recommends this position solely for the protection of our members there are many tangible benefits for the customer and project;

- The level of liability is understood at the outset by both parties,
- Open discussions can take place between the parties on the subject, helping to reach resolution as the purpose of a liability cap is understood.
- The risks that might to lead to a liability arising are explicitly addressed and understood. Action can then be taken collaboratively to reduce overall project risk,
- The liability being taken on is real, equitable and in proportion to each member's financial standing and therefore will/can be honoured,
- The likelihood of liquidation (voluntary or otherwise) being used by a (sub)contractor as a means of avoiding an unrealistically high liability will be greatly reduced. Many customers fail to consider the consequences of this as an outcome, believing that they are protected by having an unlimited liability agreement in place.

It is of great importance that discussion take place with the customer on the foregoing points in order that we as a Federation help the industry to understand why we recommend this position for both parties.

The wording of the clause can be amended as necessary but the following is proposed for inclusion within tenders, and then updated to suit the context when used in a contract or warranty:

> To the extent permitted by law, and notwithstanding any conditions which may appear in any Order/ Contract/ Subcontract and the like arising from this offer our total liability for losses, damages or costs of any kind shall be limited to xxx times the Order/ Contract/ Subcontract value or £xxx whichever is the lower and our total liability in respect of delay shall be limited to xxx% of the Order/ Contract/ Subcontract value.

Explanation: Most standard contracts do not contain provisions to limit liability. In such circumstances the value of claims that an FPS member could be exposed to may greatly exceed their contract value.

Whilst most organisations will provide some form of insurance to cover such liabilities, there can be situations where the available cover can be exceeded by a claim, or does not cover the type of claim, in which case the organisation responsible will be left to cover the gap between insurance cover and final claim value.

Given that the value of the building under construction, or any adjacent third party property, could be more than one hundred times the value of its foundations, it is easy to envisage how large claims could arise, for example:

- Problems that appear with the building post-completion that could be due to settlement are likely causes for claims against FPS members - despite the fact there could be causes other than piling - and can range from patch repairs, to relocation of building occupants, demolition, and rebuilding costs.

- Damage to third party property adjacent to the site could be alleged to be caused by piling works, though this may not be a cause, or only one of a number of contributory causes. (NB the proposed clause would not prevent a third party claim under tort law as a result of such damage.)

- Costs arising from late completion of the project are often disproportionate to the value of the foundations, and Liquidated Damages under the Main Contract can be in excess of 10% of the piling contract value per week. It is not unusual for main contractors to seek to deduct Liquidated Damages as and when a piling contract finishes 'late', despite the fact that they have not been levied against the main contractor, and will not be unless the main contractor completes late. In addition, or as an alternative to capping delay liability, a damage/cost free period could be specified to allow for some permissible delay before a liability arises

- Economic or consequential losses could also be claimed which might not have been apparent to the piling contractor, and considerations should be given separately to whether these types of costs should be excluded in whole or part.

In such circumstances, the gap between claim and insurance cover can be sufficient to bankrupt the organisation. Seeking to cap liability should be seen as a fundamental part of an organisation's governance and risk management, just as maintenance of insurance is.

It should be noted that it is not possible to cap certain liabilities, e.g. death or personal injury resulting from negligence, and if the liability cap is within the organisation's standard written terms of business (so has not been freely negotiated) any liability limitations have to be 'reasonable'. Thus if an organisation seeks to impose liability caps that are too low, the clause could be deemed unenforceable due to breach of the Unfair Contract Terms Act 1977.

Deciding what is a 'reasonable' limit of liability is not always easy, one of the most common limits is the value of the contract; however, if a contract has a particularly high or very low value then it may be reasonable for the limit to be a fraction of the contract value, or a multiple of it.

Examples of relevant case law:

Shepherd Homes Ltd v Encia Remediation Ltd, Court of Appeal - Technology and Construction Court, January 26, 2007, [2007] BLR 135,[2007] EWHC 70 (TCC):

In this case, Encia had employed Green Piling Ltd and the judge decided that Green Piling's liability cap of 100% of their contract value was not unfair in the circumstances.

Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd, Technology and Construction Court [2012] EWHC 2137

In this case, the judgement was that Turner & Townsend's liability cap of 100% of the fees paid was unreasonable in the circumstances.