Guidelines

Professional Indemnity Insurance and Public Liability Insurance for Building and Construction and Maintenance Services Consultants

November 2018 (Version 5.3)

Department of Treasury and Finance

Procurement, Risk and Contract Management Branch

These guidelines have been prepared by the Department of Treasury and Finance to assist government agencies to determine the type and level of insurance held by consultants commissioned for Government building and construction and maintenance services.

These guidelines are subject to the impact of the *Professional Standards Act 2005* and may require review in relation to any schemes administered there-under.

Enquiries
Department of Treasury and Finance
21 Murray Street
HOBART TAS 7000

Telephone (03) 6166 4221
Facsimile (03) 6233 3681

ISBN 978-0-7246-5090-3 (PDF)

Table of Contents

1 INTRODUCTION

For any contract for the provision of services to the Government there is a requirement that consideration be given to the level of insurance that a consultant must hold. The level of insurance should be appropriate to the identified risk exposure. Insurance requirements are included in contracts to ensure that the consultant has the financial resources to respond to claims where it is found liable.

The Department of Treasury and Finance maintains a Consultant Prequalification Scheme (CPS) for Government building works in Tasmania, which provides a record of consultants qualified to offer professional services for Government building works. The CPS maintains a comprehensive record of all registered consultants in specific work categories according to their expertise, experience, financial, technical capacity and past performance history on Government projects. Agencies must ensure that where a work category exists, only prequalified consultants are engaged for building and construction projects. For a list of categories, refer to the Purchasing website at www.purchasing.tas.gov.au > Buying for Government > Resource Library > FAQs.

It is a requirement for prequalification that the consultant retain minimum levels of Professional Indemnity insurance and Professional Liability insurance. While Treasury ensures that prequalified consultants have the minimum levels of insurance cover at the time of registration, agencies are responsible for ensuring that insurance is current at the time of engagement.

The current minimum acceptable levels of insurance cover required for prequalification are:

- Public Liability Insurance $5 million; and
- Professional Indemnity $1 million.

However, agencies must assess the risk associated with each project and adjust the level of cover required in the contract according to the assessed risk.

A consultant must not be commissioned for Government building works and services unless adequate PI and PL insurance are in place.

Limiting liability by sharing the risks involved in complex, high-risk projects should only be considered by agencies in exceptional cases and on a per event basis. Advice must be sought from the Crown Solicitor in relation to any negotiations to limit indemnity within a contract. It is recognised that for particular activities (eg asbestos, toxic mould and terrorism) insurance may not be available and that Government may need to accept some of the risk.

Secondary and sub-consultants should have the same insurance requirements as the consultant. It is therefore imperative that Agencies authorise commissioned consultants only to engage sub-consultants who are registered under the CPS, for projects within their level of registration and who hold appropriate levels of insurance relevant to the work being undertaken.

2 RISK ASSESSMENT

The insurance cover required for registration as an approved consultant for Government building works and services is considered to be the minimum acceptable cover.

Agencies must ensure that the level of PI insurance and PL insurance carried by a consultant is related to the assessed degree of risk associated with each project.

Each project should be subjected to a thorough risk assessment and the minimum PI insurance and PL insurance cover required in the contract adjusted, if appropriate, according to the assessed risk. Agencies are referred to *AS ISO 31000:2018 Risk Management – Principles and Guidelines* for general information on managing risk. This Standard is available from Standards Australia's distributor, SAI Global, at www.SAIGlobal.com.

For assistance in determining the appropriate level of PI insurance to include in contracts for building and construction works, as well as for design and construction, agencies are referred to the "Professional Indemnity Insurance Guidelines in the Building and Construction Industry", published by the Australian Procurement and Construction Council. This document is available at www.apcc.gov.au > publications > construction > professional indemnity insurance guidelines.

3 INSURANCE IN CONTRACTS

It is the preferred position of Government that any PI policy should name the Crown in the Right of Tasmania as an insured in respect of all work carried out on behalf of the State of Tasmania. Noting the Crown's interest is the next best position.

However, in recent times, insurers have been increasingly reluctant to add additional parties to liability policies. If it is not possible to obtain either of these provisions, due to availability or cost, then the requirement may be waived provided that:

- a proper risk assessment has been undertaken and any identified risks can be properly managed by the Crown; and
- certificates of currency are obtained prior to services commencing.

The level of insurance required, as determined by the risk assessment, should be included in the commissioning contract.

3.1 Professional Indemnity Insurance

PI insurance indemnifies the agency against the consultant's legal liability arising out of an occurrence caused in connection with its business (refer to the Glossary for further information). The level of PI insurance cover must be based on the level of risk. This risk is individual to each consulting practice and the projects being undertaken.

Agencies should assess the risk associated with each project and adjust the PI level of cover accordingly.

PI insurance is a "claims made" insurance policy. This means the claim must be made during the period of insurance. Only those claims are covered which are reported to the insurer during the policy year, regardless of when the contract was current or when the actual event took place that gave rise to the claim. PI insurance is usually taken out on an annual basis. The policy therefore needs to be continuous and retrospective, so that a claim made for an historic incident is covered by the current insurance.

Another factor which needs to be taken into consideration in determining the level of cover required is that PI insurance is an 'annual aggregate' and 'claims made' insurance. This means that each claim made in the policy year, irrespective of when the actual event took place that gave rise to the claim, will reduce the cover by the cost of the claim.

When assessing the PI risk associated with each project, agencies should consider the need for, and length of, 'run-off' cover. 'Run-off' cover provides continuing PI insurance cover for a period beyond the expiry date of the normal annual PI insurance policy.

Provided the annual PI insurance policy is renewed each year, 'run-off' cover is not necessary. However, if a consultant ceases to practice, or no longer continues his PI cover, then the consultant should be required to purchase a 'run-off' policy that will provide a retroactive cover from the date at which the annual PI policy expires.

An Agency must include a requirement in the contract for the consultant to obtain appropriate 'run-off' cover should these circumstances arise.

Without 'run-off' cover, the State would need to make a civil claim against the consultant, or former consultant, in the knowledge that no PI insurance exists. Such a claim would be unsuccessful if there were no assets in the consultant's name.

The PI insurance policy must be for *Civil Liability*, indemnifying the consultant for the consultant's legal liability arising out of an occurrence caused in connection with its business. The business must be adequately described. An alternative policy for *Errors and Omissions* is not adequate because a claim need not be as a result of an error or omission.

3.2 Public Liability Insurance

PL insurance indemnifies the agency against the consultant's legal liability arising out of an occurrence caused in connection with its business (refer to the Glossary for further information).

PL insurance is event based insurance. That is, claims are based on the time of the incident, not on the time of the claim. In addition, claims are based on each and every occurrence, that is, the insured limit is available to cover each claim, no matter how many claims are made in any one year.

The recommended form of PL insurance policy is *Broad Form Liability*. This form of PL insurance indemnifies the Agency against the consultant's legal liability arising out of an occurrence caused in connection with its business, where that occurrence happens in the period of insurance. This cover includes libel, property damage, personal injury etc. *Short Form* PL insurance only covers liability for an accident and is not an acceptable form of PL insurance. PL Insurance does not cover economic loss.

Agencies must consider the level of public liability insurance relative to the risk associated with the particular project and adjust the level of insurance required in the contract accordingly.

3.3 Confirmation of Insurance

Agencies must confirm insurance by requesting the consultant to provide a Certificate of Currency from their insurer. A Certificate of Currency notes:

- type of insurance cover;
- who the insured is;
- who the insurer is;
- level of cover;
- period of insurance; and
- scope of cover.

4. EFFECTING ADDITIONAL COVER

Should it be established that additional PI or PL cover is required for the project, the consultant should effect that cover.

The agency should ensure that the cover includes the following:

- name of insurer;
- name of insurance broker;

- adequate level of insurance cover;
- adequate duration of insurance period (including cover for the defects liability period for PI);
- excess imposed by the insurer;
- suitable limit on any one claim (PI);
- for PI - Civil Liability, indemnifying the Government for the consultant's legal liability arising out of an occurrence caused in connection with the consultant's business and a list of what this covers;
- for PL - Broad Form Liability, covering the Government for the consultant's legal liability arising out of an occurrence caused in connection with the consultant's business and a list of what this covers;
- where possible, names the Crown in the Right of Tasmania as an insured in respect of all work carried out on behalf of the State of Tasmania;
- adequate 'run-off' cover (PI); and
- evidence that the full tenure of the policy has been paid for.

5 NOTIFICATION OF A CLAIM

It is important that the Office of the Director of Public Prosecutions be advised of any circumstances that could give rise to a claim. This will allow the DPP to:

- record relevant information without delay;
- appoint officers who are best able to protect Government's interest, to handle the claim; and
- provide advice and assistance on the possibility of settling the claim out of court.

No costs or expenses should be incurred in connection with the claim without the involvement of the DPP.

6 ADVICE

For further information or advice in relation to insurance in contracts or policy terms and conditions it is recommended that agencies contact the Crown Solicitor.

7 GLOSSARY

Certificate of Insurance (Certificate of Currency)

Confirmation of insurance cover provided by the insurer or broker.

Claims Made Policy

A policy which responds to claims made during the period of the insurance, regardless of when the claim was incurred. PI policies are usually claims made policies.

Excess

The first part of a loss or liability which is borne by the insured. Also called a deductible.

Exclusions

The perils, property or circumstances for which cover is excluded by the terms of the policy.

Insurance Policy

An agreement by the insurer to indemnity the insured in relation to a loss or liability arising on the occurrence of a specified event.

Liability Insurance

Provides cover against the consequences of being held legally liable for injury or damage to third parties.

Limit of Liability

Limit of cover available under a policy. With respect to liability policies, a limit may apply for each ‘claim’ or each ‘occurrence’.

Claims Occurrence Policy

A policy of insurance that responds to losses arising from occurrences happening during the period of insurance regardless of when a claim is made. For example, if a person is injured in 2000, the 2000 policy will be applicable regardless of when the claim is made by the party injured.

Professional Indemnity Insurance

Covers the insured’s liability to third parties for breach of a professional duty of care owed in contract or at general law. The cover is usually limited to claims resulting in financial loss. PI insurance also potentially covers claims alleging defamation, trade practices breaches of fair trading legislation, dishonesty on the part of contractor and misleading and deceptive conduct. Certain classes of professionals are required by law to carry PI insurance. Usually does not cover tangible property damage or personal injury.

Public Liability Insurance

Covers the insured's legal liability to the public for personal injury and/or property damage. Usually does not cover pure economic loss or loss or damage caused by professional negligence.

Retroactive Date

The indemnity provided under certain liability policies, particularly PI policies, may include a retroactive date meaning that the policy will not be applicable to claims made during the policy period where the claim is in respect of acts or omissions before the retroactive date.

Run-off Cover

All PI insurance policies are offered on a "claims made" basis, that is, the cover needs to be in place when the claim is made and not at the time of occurrence. Run-off cover provides continuing PI insurance cover for a period beyond the expiry date of the normal annual PI policy. If a consultant ceases to practice, or no longer continues his/her PI cover, then he or she should be required to purchase a run-off policy that will provide retroactive cover from the date at which the annual PI policy expires.

Schedule

The policy schedule is issued each year by the insurer setting out variable information in relation to the policy including the name of the insured, period of cover, premium, limits of indemnity and so on. The Schedule forms part of the policy.