
Insurance for Government Construction Projects Guidelines

Insurance for Government Construction Projects Guidelines

Provides guidance to agencies arranging construction related insurance involving external service providers, and information to service providers about the NSW Government approach to insurance.

This document was developed by the Construction Agency Coordination Committee (CACC).

The CACC membership includes representatives of:

- Department of Commerce
- Department of Housing
- Hunter Water Corporation
- Rail Infrastructure Corporation
- Roads and Traffic Authority
- State Rail Authority of NSW
- Sydney Catchment Authority
- Sydney Olympic Park Authority
- Sydney Water Corporation
- TransGrid
- Transport Infrastructure Development Corporation

October 2004

DC report no. 04080

NSW Department of Commerce

Cataloguing-in-Publication data

New South Wales. Construction Agency Coordination Committee.

Insurance for Government Construction Projects Guidelines.

The electronic version is available from

<http://www.construction.nsw.gov.au/cppm/>

ISBN 0 7347 4330 0 (electronic version)

ISBN 0 7310 0964 9 (set)

1. Insurance, Government risks - New South Wales. 2. Construction contracts – New South Wales. 3. Contracting out -- Government policy -- New South Wales.

I. Title. II. Series (Capital Project Procurement Manual).

352.53 (DDC 21)

© This work is copyright. Apart from any use as permitted under the Copyright Act 1968, no part may be reproduced by any process without written permission from the Construction Agency Coordination Committee.

Table of Contents

NSW Department of Commerce	2
1 Introduction	5
1.1 Purpose of Guidelines	5
1.2 Scope of Guidelines	5
2 Definitions	6
3 Insured and insurer's duties	8
3.1 Utmost good faith	8
3.2 Duty to disclose	8
3.3 Insured's duties in the event of any occurrence	9
4 Risk management	10
4.1 Risk management approach	10
4.1.1 Assessing the project risks	10
4.1.2 Establish the risks that should be covered by insurance	11
5 General insurances	13
5.1 Contract works insurance	13
5.1.1 General	13
5.1.2 Coverage of works insurance	13
5.2 Professional indemnity insurance	14
5.2.1 Generally	14
5.2.2 Professional indemnity insurance level of cover	15
5.2.3 Professional indemnity insurance policy requirements	17
5.2.4 Principal arranged professional indemnity insurance	18
5.3 Indemnity clauses in consultant agreements	18
5.4 Public liability insurance	18
5.4.1 Public liability insurance generally	18
5.4.2 Application to agencies	19
5.4.3 Scope and level of cover	19
5.5 Arrangement of contract insurance	20
5.5.1 General	20
5.5.2 Contractor arranged insurance	20
5.5.3 Principal arranged insurance	21
5.5.4 Choice between PAI and CAI	21
5.6 Workers compensation insurance	22
5.6.1 NSW workers compensation insurance generally	22
5.6.2 Liability of "principal contractors"	22

5.7	Products liability insurance	23
5.8	Motor vehicle insurance	23
6	Special insurances	24
6.1	Work over water insurance	24
6.2	Asbestos liability insurance	24
7	Obligations on completion of capital works	24
8	Evidence of service provider insurance.....	25
	Annexure 1 Certificate of Currency - Contractor Initiated Works Insurance.....	26
	Annexure 2 Certificate of Currency - Broadform Public & Products Liability Insurance.....	28
	Annexure 3 Certificate of Currency - Professional Indemnity Insurance	30
	Annexure 4 Certificate of Currency - Motor Vehicle Fleet/Mobile Plant Insurance	31
	Annexure 5 Applicable legislation.....	33

1 Introduction

1.1 Purpose of Guidelines

These Guidelines are to provide assistance to NSW Government agencies with the arrangements made for insurance for construction work involving external service providers. They support the whole-of-government approach underpinning the NSW Government Procurement Policy as part of the associated procurement framework outlined at www.treasury.nsw.gov.au.

The Guidelines may also be of assistance to contractors, consultants, insurers, insurance agents, insurance brokers and others in understanding the NSW Government approach to construction related insurance.

1.2 Scope of Guidelines

The Guidelines include consideration of the general types of risks that can be insured against together with the insurance involved, including the special arrangements required.

The Guidelines consider insurance as part of the overall risk management strategy used by agencies involved in construction with service providers external to the agency.

Insurance for privately financed projects, some joint ventures, and alliance contracts require further consideration with special insurance arrangements to suit the public and private sector involvement. The Guidelines do not cover these arrangements, but may assist in these cases.

For applicable construction contracts the Guidelines should be read in conjunction with the insurance provisions of the NSW Government *GC21 General Conditions of Contract*.

2 Definitions

Certificate of Currency is documentary evidence that an insurance contract exists, providing details of the extent of cover and the parties to the contract.

Contractor Arranged Insurance is insurance arranged and paid for by the service provider or contractor awarded a contract by, and to meet the requirements of, the Principal.

Construction includes all activities concerned with demolition, maintenance, building, landscaping, civil engineering, process engineering, mining and heavy engineering.

Contract works insurance is insurance cover for the constructed asset or the works, and associated temporary work and other affected property, against loss or damage resulting from defined events under a contract until handover of the works to the users/owners.

Excess is the amount of cost or loss set under a policy of insurance by the insurer for the insured to pay with any claim being paid by the insurer. This is also known as a deductible.

Government agency or agency is a NSW Government department, statutory authority, statutory corporation or business enterprise.

Insurance or policy of insurance or an insurance policy is a contract whereby one party (insurer) agrees to indemnify or guarantee another (insured) against loss caused by a specified cause or future contingency in return for the earlier payment of a premium.

Insurance broker is a registered party specialised in providing insurance advice and the placement of insurance with insurers on behalf of the insured, acting on behalf of the insured.

Limit of indemnity is the sum insured under a policy of insurance, and constitutes the insurer's maximum liability in respect of any one event or series of events insured against which usually determines the amount of the premium.

Long tail insurance is insurance covering a risk or class of business that may have claims notified or settled long after the risks have expired, where the financial outcome will not be known with certainty for several years.

Policy is the document prepared by an insurer or a broker as evidence of the existence of an insurance contract. Section 11(1) of the Insurance Contracts Act 1984 defines a "policy" as also including a document known as a cover note.

Public liability insurance is insurance for claims against the insured by members of the public and other third parties for personal injury or damage to property for which the insured is legally responsible.

Principal is the person, entity or organisation contracting with a service provider for the carrying out of construction work and/or services.

Principal Arranged Insurance (also known as Principal Controlled Insurance) is insurance arranged by an agency representing a Principal to cover the agency, Principal, contractors and subcontractors and other service providers in respect of risks under contracts let by the Principal. The premiums may be paid by the agency or by each contractor to the Principal.

Product liability insurance is insurance that covers claims by third parties against the insured for loss due to defective products.

Professional indemnity insurance is insurance covering a professional service provider's liability arising from a breach of professional duty.

Risk management is a structured way of identifying, analysing and evaluating potential risks, and devising, implementing and communicating responses that are appropriate to their impact.

Subrogation is the legal process by which an insurer seeks from a third party that may have caused a loss, recovery of the amount paid to the insured for the loss.

Service provider includes contractors, subcontractors, consultants, professional services providers, suppliers, and their agents and employers, that provide construction work and services.

Workers compensation insurance is insurance required under statute requiring all employees to be covered for work related injuries.

3 Insured and insurer's duties

3.1 Utmost good faith

The duty of utmost good faith is an implied term in every general insurance contract in Australia under Section 13 of the *Insurance Contracts Act 1984 (Cth)*. Section 13 requires both the insurer and the insured to act towards the other with the utmost good faith. The duty exists from the pre-contract stage to the post-contract stage with an insurance policy, including the making and handling of claims.

This means that agencies and service providers are required to act towards insurers with the utmost good faith. Failure to do so may result in the avoidance of an insurer's liability for a claim.

The *Insurance Contracts Act* allows damages for post-contractual breaches of the duty of good faith and the right to cancel an insurance contract following a breach.

3.2 Duty to disclose

The *Insurance Contracts Act* also creates a duty on insured to disclose all information relevant to an insurer's decision to accept the risk.

Therefore, before an agency or service provider enters into an insurance contract with an insurer there must be full disclosure to the insurer of every matter that is relevant to the insurer's decision to accept the risk of the insurance with the terms involved.

The same duty of disclosure applies before insurance is renewed, extended, varied or reinstated.

The duty, however, does not require disclosure of matters that:

- diminish the risk to be undertaken by the insurer;
- are common knowledge; and
- the insurer knows or, in the ordinary course of his business, ought to know.

Failure to comply with the duty to disclose may mean that the insurer can avoid liability for a claim or cancel a policy.

In the case of construction contracts, including consultant engagements, where agencies are arranging insurance with an insurer (or through a broker) the agency must fully disclose to the insurer in writing any risks that the insurer could not be expected to know.

Agencies should also advise insurers of any special risks with a construction contract. Such risks would be exceptional as all construction related work has inherent risks. They may apply, for example, with large infrastructure projects involving unusual processes or innovative technologies. The insurer may seek to examine the expected contract documentation, including the drawings, and to undertake its own assessment of risk.

3.3 Insured's duties in the event of any occurrence

In the event of an occurrence resulting in an insurance claim, insurers generally require, as part of the insurance contract, the insured to:

- take immediate action to minimise any further damage or injury;
- cooperate with the insurer; and
- make no admission as to fault.

4 Risk management

4.1 Risk management approach

As part of an agency's development of an appropriate risk management strategy for a project an assessment needs to be made of the nature and extent of the risks involved, including those with using external service providers. Decisions then need to be made about those risks that are to be borne by the agency and those that are most appropriately transferred to the service provider. In order to protect the agency generally and in the event of a service provider not having sufficient resources to meet its liabilities, the agency can generally requires the insurable risk to be insured.

The following steps are suggested to assist agencies develop the approach required for a project.

4.1.1 Assessing the project risks

Agencies may be exposed to a range of risks because of the actions of service providers: during the contract/engagement, a post construction period, and the post contract or engagement period. The nature and extent of the risks generally and with service providers should be identified and assessed, with the approach required to manage those risks.

Consultant risk areas

The following are typical risks for an agency with consultants engaged by the agency.

The engagement period	The post engagement period
Financial loss and delay if the consultant fails to complete, such as when it goes into liquidation.	Consequences of defective documentation prepared by the consultant, such as bridge failure caused by miscalculation.
Consultant provides incorrect advice causing an accident, damage to property, and delay with consequent financial loss.	Losses resulting from a dispute with the consultant.

Contractor risk areas

The following are typical risks for an agency with contractors engaged by the agency, including the situation when the contractor has a design role.

Design and construction phase	Defects rectification phase or post construction period	Post contract phase
Injuries to workers.		Injury to workers during rectification work.
Financial loss and delay if the contractor fails to complete, such as when it goes into liquidation.		Damage to property during rectification work.
Damage to property, including the asset being constructed. Loss due to incorrect professional service. Loss due to disputes.		Consequences of defective documentation prepared by the contractor, such as bridge failure caused by miscalculation. Loss due to disputes.

Contractor risk areas (continued)

Design and construction phase	Defects rectification phase or post construction period	Post contract phase
Fire and other perils including earthquake, lightning, storms, malicious damage (including vandalism) and explosions.		
Damage from a civil dispute or terrorist attack.		
Damages caused by contractor's/subcontractor's negligence		
Incidents resulting from the use of waterborne craft.		
		Diseases resulting from asbestos decontamination.
Damage to goods in transit – both within Australia & overseas.		
Motor vehicle accidents.		
Accidents from hire equipment.		
	Injuries arising from defectively installed products.	Injuries arising from defectively installed products.
Work over water – both direct and consequential damage.		Work over water – both direct and consequential damage.
Work involving aerial craft such as helicopters.		
Works involving a high safety risk such as dams, bridgework, railwork, tunnelling, blasting, marine works and the like.		

4.1.2 Establish the risks that should be covered by insurance

Having identified the risks and the risk levels with the project, agencies should next determine which risks should be insured against and the party best able to arrange the insurance.

Insurable and other risks can be categorised as follows:

- Those to be covered by insurance required by legislation, such as workers compensation insurance that is to be taken out by the agency and service provider to cover their employees;
- Risks to all parties where the main service provider should be required to take out insurance to cover the agency and all other service providers for property damage and personal injury costs arising from claims;
- Risks that are transferred to service providers through indemnity clauses under the contract, which the service providers may in turn insure against where insurance is available and they are insurable considering market conditions;
- Those where the level and/or nature of the risk is such that the agency accepts the risk, which may or may not be covered by insurance and/or be insurable considering market conditions; and

- Those where it is prudent for the agency to arrange insurance on behalf of the agency and/or service providers or to 'top up' the service providers' insurance.

In deciding whether the service provider should be required to insure against the risk and the extent of insurance, it is recommended that the following is considered:

- the commercial availability of the insurance, including limitations on policy wording with exclusions and limits; and
- the cost of insurance premiums and excesses to the service provider.

Agencies should obtain assistance from an insurance broker or consultant with knowledge of construction industry insurance in considering the approach required.

Standards Australia Handbook 141- 2004 *Risk financing Guidelines* also provides guidance with decisions regarding risk.

5 General insurances

5.1 Contract works insurance

5.1.1 General

Insuring of the contract works enables the contracting parties and other insured to recover costs with the loss or damage to property that is at risk during the construction phase of a contract. Agencies may be exposed to loss unless the works are insured where the contractor or other negligent party does not have the financial resources to fund the rectification of their damage of the works and other property.

5.1.2 Coverage of works insurance

This insurance usually covers:

- damage to materials, goods, equipment and supplies forming a permanent part of the works;
- damage to temporary work required to construct the works, including props and slipforms;
- use of contract consumables such as oil, petrol and first aid equipment;
- associated legal defence costs;
- removal of debris;
- consultants fees in rectifying damage;
- government charges associated with rebuilding and rectification;
- preparing plans, files, records and specifications pertaining to the works rectification, including computer software; and
- damage to buildings used for construction purposes.

The insurance usually has a range of exclusions, including:

- damage to mobile plant and equipment;
- damage to leased equipment;
- damage to vehicles on site;
- damage to water borne craft exceeding 8 metres in length;
- *product liability;
- *asbestos liability;
- personal injury;
- breaches of professional duty;
- *high risk civil engineering works;
- *levee bank and coffer dam construction; and
- workers compensation.

* these risks may usually be included in the insurance for the payment of an additional premium.

The limit of liability will usually be expressed as a separate sum for particular types of occurrence. For example, property may be insured for costs up to a limit amount arising from one occurrence causing damage.

The basis for settlement of an insurance claim is usually the cost of reinstatement of the damaged property insured, including a reasonable amount for overhead and profit.

It is to be noted that the *Terrorism Insurance Act 2003*, which commenced on 1 July 2003, overrides terrorism exclusion clauses in eligible insurance contracts. The legislation compels insurance companies to provide cover for damage caused by acts of terrorism. Terrorism insurance is limited to damage to the structure and contents in the works and public liability.

5.2 Professional indemnity insurance

5.2.1 Generally

Professional indemnity insurance (PII) covers professionals, such as architects, engineers and other consultants, and claims against them arising out of the professional services they provide.

In basic terms professional indemnity insurance covers the insured's legal liability with any claim for compensation made against the insured for breach of professional duty in the conduct of the business practice carried on by or on behalf of the insured.

Typically the cover includes, and claims may arise from the services involved where they include:

- a breach of professional duty;
- negligence;
- bodily injury and property damage arising from service negligence;
- fraud/dishonesty other than a company director's dishonesty;
- infringement of intellectual property;
- breach of duty/confidentiality;
- defamation; and
- loss of documents.

It is noted that the above are not all automatically covered in a PII policy and that their inclusion should be specified when required.

Legal costs and investigation costs associated with defending an action are normally covered by PII.

Agencies have an interest in requiring consultants to have an appropriate level of PII in order to reduce the consultant's (and in turn the agency's) exposure to loss. This exposure can arise from a range of circumstances, including where a consultant has insufficient assets to meet a major claim against it.

The availability and affordability of PII fluctuates with market conditions and varies with the risk profile of the professional group and individual consultant involved. PII may be not

available for a range of high risk service areas such as asbestos auditing and other services relating to hazardous substances.

Agencies and the Principal should require consultants providing high risk subconsultant services to have an appropriate level of PII to cover the parties exposure to losses with that subconsultant.

5.2.2 Professional indemnity insurance level of cover

Agencies should identify and specify a minimal level of PII cover for each consultant agreement to suit the professional service risk to the consultant, Principal and agency.

Assistance with the evaluation of the level of cover required, including through a project risk assessment approach, is available in the Australian Procurement and Construction Council Incorporated (APCC) *Professional Indemnity Insurance Guidelines in the Building and Construction Industry* (APCC Guidelines) available at www.apcc.gov.au. This document outlines two main approaches that can be used to establish the level of cover.

The first is a *Simplified Method* that applies for conventional consultancies not related to construction. The simple approach is to base the level of cover on the fee to be paid. The minimum level of PII recommended with this approach is the greater of \$1M and ten times the fee amount. Examples of consultancies where this approach could be used are those for value managers, risk advisors, community consultation facilitators, indigenous community advisers and relationship facilitators. In cases where the service to the agency involves such a low risk, the agency may choose to require minimal or no PII.

The more comprehensive approach is the *Risk Assessment Based Method* which addresses the particular risks associated with the type and nature of the professional service involved. Tables are provided in the APCC Guidelines to assist in the initial evaluation of the *Project Risk* and the *Service Risk*.

The *Project Risk* used in the APCC Guidelines is the inherent risk of the type of project with the risk descriptors 'low', 'high', 'intermediate' and 'extreme'. These risk descriptors were obtained from *AS/NZS 4360:1999 Risk management*.

The *Service Risk* used in the APCC Guidelines is the risks associated with the service provided by consultants. This may be the type of consultant or the specific consultant if the risk profile of the consultant is known.

Examples of the use of the tables for consultancies are as follows, but other PII levels may be chosen to suit particular project and service conditions:

Service	Project value	Project Risk from Addendum A of the APCC Guidelines	Service Risk using the example in Section 1.2.2 of the APCC Guidelines	Level of PII cover from Addendum B of the APCC Guidelines
Quality assurance audits of a tunnel under construction	\$4M	high	moderate	\$2M
Architectural design & documentation for a school	\$3M	moderate	moderate	\$2M

Service (continued)	Project value	Project Risk from Addendum A of the APCC Guidelines	Service Risk using the example in Section 1.2.2 of the APCC Guidelines	Level of PII cover from Addendum B of the APCC Guidelines
Design & documentation of marine works	\$6M	high	moderate	\$5M
Geotechnical study for a sewerage pipeline	\$8M	moderate	high	\$5M
Review of Environmental Factors for public housing	\$5M	moderate	low	\$2M
Traffic modelling study for a new road	\$6M	moderate	low	\$2M
Project management of the construction of a hospital ward	\$11M	moderate	moderate	\$5M
Construction management of a water pipeline	\$2M	moderate	high	\$2M
Construction management of a railway line	\$55M	moderate	high	\$10M
Preparation of services maintenance manuals	\$15M	low	low	\$2M
Asset management study for a hospital	\$0.1M	low	low	\$1M
Study on asbestos removal from a school	\$1M	extreme	low	\$2M

As indicated in the APCC Guidelines a more detailed assessment of *Service Risk* could be undertaken if the expected consultant's specific experience and resources are known, such as after an expression of interest process. A possible shorthand method of determining the level of cover to suit the risk, using the APCC Guidelines is as follows:

Consultancy type and risk	Level of PII cover
Low risk non-construction related services.	up to \$1M
Low risk design and management.	\$2M
Moderate risk design and management.	\$5M
Design and management for complex or high risk construction	\$10M

The liability of a consultant may be “capped” if the consultant is a member of an occupational association with an approved Scheme, under the *NSW Professionals Standard Act 1994*, as administered by the Professional Standards Council. The Professional Standards Council is an independent body appointed by the NSW Attorney General to improve the standards of professionals. Agencies should not exclude the use of consultants that are members of a Scheme approved by the Professional Standards Council. Refer to www.agd.nsw.gov.au for a listing of the approved Schemes.

Where the level of PII cover that can be obtained by a consultant is not considered adequate by the agency to cover the risks involved, the agency may purchase or pay for additional cover, where it is available commercially.

5.2.3 Professional indemnity insurance policy requirements

The APCC Guidelines include guidance on policy terms for PII for a consultant engagement, including the excess, duration of cover, terms of cover and exclusions.

Exclusions in a consultants PII cover that would generally be unacceptable to an agency include damages arising from:

- loss of documents and electronic data;
- dishonesty of employees;
- unintentional use of intellectual property;
- limits in the cost of a legal defence;
- territorial limits;
- bodily injury and property damage; and
- acts of subconsultants.

The APCC Guidelines suggest that consultant agreements should nominate a period following completion of the engagement for the maintenance of PII. Agencies should decide on one of the following courses when PII is specified for an engagement:

- a) That the risks do not justify the cost to the project of the consultant maintaining PII cover after the engagement (that is no run-off cover); or
- b) That the risks require the consultant to maintain run-off cover for a specified number of years (up to 6 years) after the engagement, although it does not warrant the agency assigning resources to monitor the consultant to ensure the cover is maintained; or
- c) As for b), except that the risks to the agency are sufficiently high for the agency to assign resources to monitoring the consultant to ensure the policy is maintained; or
- d) That the risk is sufficiently high to justify the agency taking out PII run-off cover on behalf of the consultant, if it is available commercially.

It is to be noted that a PII policy must be held continuously from the time of the consultant service, from which the incident arose, to the time of the incident to allow a claim against the policy.

PII policies should normally allow for one automatic reinstatement of the policy limit, as the level of cover in the policy year reduces, by the amount of each claim paid under the policy, until the cover is reduced to zero, after which further claims are no longer covered except to the extent reinstatement is allowed.

The agency may require a PII policy to include the Principal as a named insured in order to obtain further protection for the Principal and agency. However, the agency should confirm if this cover is currently available before it is specified. Where it is available, the policy should also contain a “cross-liabilities” clause to retain the right of the insurer and insured to sue each other. This right may be excluded under an insurer’s standard policy.

5.2.4 Principal arranged professional indemnity insurance

The APCC Guidelines also include guidance for agencies considering setting up principal arranged professional indemnity insurance (Also see Section 5.5).

5.3 Indemnity clauses in consultant agreements

Indemnity clauses in agency consultant agreements are the means generally used for allocating risk to consultants for loss, personal injury and property damage.

Indemnity clauses may require consultants to take out additional professional indemnity insurance, where it is available, to cover some of the indemnity areas.

In drafting an indemnity clause agencies should ensure that the:

- Consultants are not made responsible for risks beyond their normal liability for omissions, negligence and breach of contract, such as the Principal’s negligence, breach of contract and acts or omissions.
- Liability of the consultant is reasonable, and in key areas is insurable, to ensure the consultant is able to cover and accept the liability; allowing that liability which is unlikely to be insurable, or insurable for a reasonable cost (and therefore is only coverable to the limit of the consultant’s assets), includes the consultant indemnifying the Principal for loss arising from:
 - the Principal’s negligence;
 - breach of contract by the Principal;
 - acts or omissions of the Principal;
 - fitness for purpose without qualification;
 - loss or damage to a third party not caused by actions of the consultant; and
 - delays of third parties out of the control of the consultant.

In all cases a consultant’s liability would be reduced by law to the extent of any contributory negligence by the Principal or other parties.

5.4 Public liability insurance

5.4.1 Public liability insurance generally

Public liability insurance covers the insured’s legal liability to third parties for bodily injury or property damage resulting from the negligence of the insured.

Legal liability could arise in the case of consultants and contractors if an injury was caused on a work site, such as an injury caused by a surveyor’s pegs or contractor’s equipment. In the case of contractors the liability can also arise during the maintenance/defects liability or post completion construction period of the contract. Liability may also involve operations after construction is completed and be covered by such insurance where this is arranged.

Public liability insurance does not cover liability in relation to:

- property damage or bodily injury caused by a motor vehicle where the motor vehicle is insured, as bodily injury in this case is covered by compulsory motor vehicle (CTP) third party insurance;
- injury to the insured's employees which, is to be covered by workers compensation insurance;
- loss arising from the professional services provided by the insured;
- risks associated with asbestos;
- product liability (however, product liability and public liability insurance are often sold together).

Each policy has the financial limit of indemnity selected by the insured arranging the policy. The limit is to the cover for each claim, no matter how many claims are made in one year. The eligibility of claims is based on the time of the incident, not on the time of the claim, with incidents during the period of the insurance being covered. Claims are also subject to an excess.

In the case of bodily injury claims, the time from the claim to its finalisation is often several years to allow for the injured recovery period, investigations, negotiations and legal processes. Because of this potential time period the insurance is categorised as long tail insurance.

5.4.2 Application to agencies

Agencies reduce their exposure to loss by requiring consultants and contractors to have an appropriate level of public liability insurance during the course of a contract with the agency. This protects the agency in the event the agency is joined in a legal action with the consultant or contractor, and the service providers do not have the capacity to meet the liability involved.

Agencies may require consultants and contractors to arrange public liability insurance. Alternatively, agencies may purchase public liability insurance on behalf of the service provider on either a single contract basis or as part of a Principal Arranged Insurance policy as noted under Section 5.5. Consultants usually hold annual public liability insurance to cover on their services.

Where the agency elects to require contractors and consultants to arrange the insurance the agency should ensure direct access to the policy by requiring the Principal and the agency to be an additional named insured in the policy.

5.4.3 Scope and level of cover

The extent of public liability insurance cover required should be established for each contract. Minimal cover policies are restricted to accidents involving on site bodily injury and property damage. More extensive cover, further limiting an agency's exposure, is generally required and covers all the contract activities, including off site fabrication and other activities.

The cover should include 'worker to worker' liability to cover the agency and Principal when joined in any claims arising from injuries to workers, not employees of the agency, injured during construction activities. Whilst injured workers can claim workers compensation benefits from their employer, actions may also be brought against the agency or Principal, particularly if it has an on-site role. Public liability insurance purchased by the Principal on

behalf of a contractor or consultant may be extended to cover the liability of the contractor with 'worker to worker' claims.

The minimum acceptable public liability insurance cover limits should be established as part of the policy with the insurer. For consultants, it is recommended that a minimum cover level in the range \$10M and \$20M should be used. Factors increasing the cover level required include site related work, contract value and size, the risks of the activity to others, contractor size, and type of firm. A minimum cover level of \$20M is recommended for contractors. This could be increased to \$50M, or more, where justified by the risks with a particular contract.

Where contractors and consultants are required by the agency to arrange public liability insurance, they should submit a Certificate of Currency form completed by their insurance broker and insurer to confirm the cover is in place. A proforma Certificate of Currency is included as Appendix A.

5.5 Arrangement of contract insurance

5.5.1 General

An agency may elect to require contractors to purchase and maintain a policy to cover those at risk under a contract, as Contractor Arranged Insurance (CAI).

Alternatively, an agency may contract with an insurance broker to arrange insurance to cover the contracting parties, together with subcontractors and others, for the agency's contracts for a period, as Principal Arranged Insurance (PAI).

PAI can be a suitable arrangement for agencies with a forward plan of a large number of contracts where the cost of the arrangement can be justified. PAI usually applies for higher value contracts from, say \$0.5M, up to a maximum value in the range of \$20M to \$50M, to suit the agency work plan.

5.5.2 Contractor arranged insurance

The following are typical features with Contractor Arranged Insurance.

- The agency specifies the policy coverage and level of cover required in the contract documents.
- The contractor selects the insurer and arranges a policy that are subject to the Principal's approval. Agencies must have justifiable reasons for refusing the contractor's policy or insurer. Agency personnel or an agency arranged insurance broker would normally review and interpret the policy to ensure it is adequate and that the coverage and conditions remain current during the course of a contract. Acceptable insurers include those registered with the Australian Prudential Regulatory Authority or Lloyds Underwriters, as listed at www.apra.gov.au.
- The contractor must pay the excesses and other costs not covered by the insurer with each occurrence and claim.
- Policies must be in the name of the contractor with the Principal and agency as additional named insured, and must cover the contractor, Principal, agency and usually all subcontractors. Alternatively, subcontractors may be required to purchase their own insurance.
- The policies must include a cross-liability clause in which the insurer agrees to waive all rights of subrogation against all of the insured.

5.5.3 Principal arranged insurance

A Principal Arranged Insurance policy is typically arranged by an agency through a service agreement set up with an insurance broker after a competitive tendering process for the service. The following are typical features of such an agreement.

- The broker is responsible for the arrangement of policies and the management and processing of agency and other claims, giving advice to the agency on risk mitigation strategies relating to insurance, the ongoing reporting of claims statistics, and providing advice on the action needed to avoid the sources of claims.
- For contracts outside the contract value limits of the PAI, the agreement allows for special insurance arrangements to be added to suit the PAI policy with what can be negotiated by the broker, with the agreement of the agency.
- The agreement is for three years with an option to extend for a further period if required and advised by the agency, though the agreement may be terminated by giving one month's notice.
- The PAI must be placed with an insurer acceptable to the agency, which is registered with the Australian Prudential Regulatory Authority or Lloyds Underwriters.
- The insurance broker indemnifies the agency for losses resulting from its professional services, and is covered by professional indemnity insurance for this risk.
- In setting up the PAI the agency determines whether the agency or the contractors are to pay the premium.
- The agency may require the broker to nominate one or more insurers.
- The PAI usually includes works insurance and public liability insurance.
- The PAI is to cover the agency with the Principal, each contractor, subcontractors and other service providers, together with other parties at risk such as clients, agents and employees of the insured.
- The value of the excesses in the PAI may depend on the value of the contract. Higher excesses may apply with certain types of contracts such as high risk civil contracts.
- The agency, Principal, contractor, subcontractors and others are to be named insured under the PAI, each thereby having ownership of the insurance policy. All the insured are to have the same right to claim under the policy.

5.5.4 Choice between PAI and CAI

The following should be considered with any decision on whether to set up PAI.

- With PAI the agency gets the advantage of bulk purchasing insurance through a competitive process.
- People with expertise are required to advise on insurance contracts and whether a proposed CAI policy is adequate.
- PAI provides certainty for the agency, Principal, contractor, subcontractors and other insured that there is appropriate insurance at the start of a contract. However, most medium to large contractors have reasonable "floater policies" in place that provide automatic cover up to agreed limits for contract works.
- PAI introduces a "level playing field" whereby small, medium and large contractors have no relative commercial advantage or disadvantage because of the cost of insurance.

- With CAI contractors with a good claims history may be able to obtain, and pass on in a tender and contract price, the benefit of a lower premium because of their prospective workload and claims history.
- In the event of a claim where CAI proves to be inadequate, the Principal could incur substantial costs and/or be involved in disputes. With a claim, the agency may also have to deal with a number of insurers where more than one contractor is involved in a project, or where a third party claim involves the liability of the contractor and Principal.
- Under PAI an agency needs to be motivated to ensure risks are well managed and take a greater interest in claims than with CAI, as claims impact on the future premiums paid under the PAI. Alternatively, subcontractors may be required to purchase their own insurance.
- PAI has the potential to prevent disputes over who has the liability, as under PAI there is only one insurer involved, where as with CAI there may be several insurers possibly all trying to avoid liability.
- With PAI the broker may be used to provide other agency insurance related services.

Where PAI is in place, the arrangement with the insurer may still permit the use of CAI for selected contracts within the financial range involved. Alternative tenders allowing for CAI may be sought and received to compare the relative benefits under the PAI and CAI. Allowing contractors to choose between PAI and CAI is not recommended, although agencies should consider CAI as an option for larger contracts. Agencies' bulk purchasing power with PAI is likely to reduce costs and improve the insurance terms for most contracts.

Agencies should usually be able to obtain an extension of their PAI for contracts valued above the upper contract value limit of the PAI where required. Prior to extending the PAI cover, agencies should determine whether the contractors expected to tender for a contract have CAI with at least the same cover as the PAI, and the relative cost of the two options.

5.6 Workers compensation insurance

5.6.1 NSW workers compensation insurance generally

Any employer of people carrying out work in NSW has an obligation to insure those employees under the *NSW Workers Compensation Act 1987*.

Workers compensation insurance provides injured employees with weekly payments to cover loss of earning capacity, payment of medical expenses and vocational rehabilitation expenses, where necessary, to assist them to return to work. All employers are required to have workers compensation insurance to cover financial claims when an employee suffers a work related injury.

Workers compensation insurance is compulsory and can be obtained from an insurance company approved by WorkCover NSW to underwrite workers compensation.

5.6.2 Liability of “principal contractors”

The *Workers Compensation Act* requires that the *principal contractor* is liable for any payment of workers compensation insurance premiums payable by its *subcontractor* in respect of work done in connection with the contract during the period of the contract. This is unless the *principal contractor* has a *statement* from the *subcontractor* declaring that the *subcontractor* has paid all workers compensation insurance premiums, accompanied by a copy of a relevant Workers Compensation Certificate of Currency. The *statement* must

declare whether or not the *subcontractor* is also a *principal contractor* (in terms of the *Act*) in connection with that work and, if so, state whether it has been given a similar statement by its *subcontractors*. Under the *Act* a *principal contractor* can withhold any payment due to a *subcontractor* until the subcontractor gives the written *statement*.

The *Act* does not apply where the *subcontractor* is a sole trader without employees.

Agencies when acting in the role of Principal are *principal contractors* under the *Act* and the contractor involved is the *subcontractor* under the *Act*. Accordingly, agencies when acting as a Principal are required to obtain a completed *statement* from the contractor together with the Certificate of Currency. A *Subcontractor's Statement* form covering the workers compensation requirements is available at www.workcover.nsw.gov.au.

The NSW Government *Code of Practice for Procurement* requires all service providers, including contractors, to fulfil their legal obligations regarding workers compensation. This means agencies should regularly monitor contractors to ensure they are meeting their obligations. In the case of agencies contracting service providers to manage contractors on behalf of the agency, it may be necessary to ensure each manager has a compliance program in place to verify contractors and subcontractors comply with their obligations.

In NSW, licensed insurers issue and administer their policies on behalf of WorkCover NSW. These licensed insurers also manage the collection of premiums, remind employers of their responsibilities in this regard, and administer most claims processes.

5.7 Products liability insurance

Products liability insurance covers the liability arising from a defective product that causes personal injury, property damage or other losses such as the delay in delivery of a service usually following handover of the constructed works for use.

Where an agency's contractor purchases a product from a service provider the contractor would normally be required to check the service provider's Certificate of Currency for product liability insurance.

If the agency has a contract directly with a product supplier, the agency should require the supplier to submit a Certificate of Currency to cover product liability insurance.

Products liability and public liability insurance, covers are usually purchased as a combined cover, which is often also included with the works insurance cover.

5.8 Motor vehicle insurance

Contractors and consultants using a registered motor vehicle to provide services or construction to an agency should have in place motor vehicle comprehensive or third party property damage insurance effected with an Australian registered insurance company approved by the Australian Prudential Regulatory Authority.

The following are requirements that should be included with a robust policy and cover.

- A minimum sum for any single occurrence to be \$20M and to be unlimited in the aggregate as to the number of occurrences.
- The period of insurance to be from the time the contract is awarded to completion of the contract, including any warranty/maintenance/service/post construction period.
- The Crown through the agency and Principal is covered during the course of contracts.

6 Special insurances

6.1 Work over water insurance

Contract work involving waterborne craft of less than eight metres in length, wharves and jetties is usually covered under the works insurance policy. However, each policy should be checked to ensure this is included.

To cover work involving waterborne craft eight metres in length or greater, a separate marine insurance cover is required. The level of cover needs to be decided by the agency. As an example, the NSW Government *GC21 General Conditions of Contract*, available from www.construction.nsw.gov.au, requires a minimum cover of \$5M for any one occurrence for the period of use of waterborne craft eight metres or more in length.

6.2 Asbestos liability insurance

Exposure to asbestos dust has negative health impacts that are not apparent until many years after the exposure.

Contract work involving asbestos is not usually covered under a works insurance policy because of the potential for long term claims. This means agencies or contractors must arrange a separate policy where asbestos handling risks are involved. Under an asbestos policy the contractor is required to advise the insurer when the asbestos decontamination is to commence and when it is concluded.

The level of cover should be decided by the agency. As an example, the NSW Government *GC21 General Conditions of Contract* require a minimum cover of \$10M for any one loss and \$20M in the aggregate for exposure risks until the end of the contract.

7 Obligations on completion of capital works

Arrangements are to be made for the insurance of the constructed assets following the handover of capital works to the user/owner.

Agencies covered by the Treasury Managed Fund (TMF) should add the new asset to the agency's asset register in accordance with the TMF Guidelines. The TMF is a self-insurance scheme owned and underwritten by the NSW Government.

Where assets are covered by a commercial insurer the agency's insurance broker should be advised of the change in the assets.

8 Evidence of service provider insurance

Agencies reduce their exposure to risk by ensuring insurance policies taken out by service providers to comply with the conditions of contract are current at the commencement and for the duration of the contract.

Service providers will not usually provide copies of an insurance policy to an agency, given it is a commercial-in-confidence agreement with the insurer.

Evidence may be sought and obtained regarding policy currency and adequacy in a Certificate of Currency. However, as policies can be cancelled at any stage it is prudent to require service providers to confirm the currency of a policy at various stages during the course of a contract.

In general terms a Certificate of Currency should specify the following:

- names of the insured;
- policy number;
- expiry date;
- name of the insurer;
- the level of cover in the aggregate and for each occurrence;
- a summary of the cover provided including limits, excesses and the like; and
- the jurisdiction and territorial limits.

Other details pertaining to the specific type of insurance should also be included.

The Certificates should be signed and stamped by the insurer or the service provider's insurance broker.

Annexures 1 to 4 are Certificates of Currency for typical types of construction related insurance that can be included by agencies in contracts with service providers, subject to the inclusion of any special requirements.

The checking of policies has traditionally been undertaken by agency project staff as part of their overall management responsibilities or checked centrally by an agency. To cover the risks with not identifying key policy requirements, the task should be undertaken by persons with skill in scrutinising policies and with expertise in construction related insurance. This could be an agency insurance expert, an insurance broker, or arranged through a specialist certificate verification service.

Where an agency has Principal Arranged Insurance in place the broker may also be engaged to check the other required insurances not covered by the PAI as an additional service.

Annexure 1 Certificate of Currency - Contractor Initiated Works Insurance

Contract Number:	
Principal:	
Contractor:	
General Description of the Works:	
Contract Period:	
Commencement of the Contract:	

Policy No.

This is to certify this Policy covers the Insured for work undertaken for and on behalf of the Principal, <Agency> and others as described below.

Specifically the Policy (subject to the attached standard policy terms and conditions):

1. Covers the Works for:
 - Material Damage - includes perils of loss, damage or destruction by earthquake, fire, explosion, flood lightning, storm and tempest, accidental damage, burglary/theft, malicious damage and transit;
 - Maintenance of the Works; and
 - Third Party Liability.
2. Protects the interests of the Contractor and Subcontractors involved in carrying out the Works.
3. Includes the Principal and <Agency> as an additional named Insured for liability arising out of the Principal's or <Agency's> activities. This extension includes liability:
 - for injury to any Principal or <Agency> employee;
 - arising from work undertaken at and away from the site of the Works; and
 - for damage to the Principal's or <Agency> property not in the Contractor's physical or legal control.

4. Covers loss &/or damage or destruction of the following for an amount not less than the following amounts:

- The Works \$.....
- Temporary Work \$.....
- Equipment and material on site \$.....
- Constructional plant \$.....
- Removal of debris \$.....

Architects/Engineers fees \$.....

5. Location anywhere in Australia.
6. Includes a Cross Liability Clause and operates as if there was a separate policy of insurance covering each of the Insured.
7. Agrees to waiver of subrogation clause against any Insured where they are indemnified by the policy.
8. Covers liability arising out of the use of hoists, cranes unregistered vehicles, boilers and pressure vessels.
9. Attached is a copy of the current policy wording, including the names of the Insured.
10. Is subject to excess/deductible \$..... which the Contractor is required to pay.
11. Is current for the period toplus a maintenance or post Works completion period ofmonths.

Signed: Insurance Company Stamp

Dated:

Note: The following Certificates of Currency (COC's) are deemed to be acceptable:

- a. *The COC as above, signed and stamped by the insurer; or*
- b. *The COC as above, signed and stamped by the Contractor's Insurance Broker with a written authority from the respective insurer/s; or*
- c. *The COC issued by the insurer/s which incorporates all the information described above.*

Annexure 2 Certificate of Currency - Broadform Public & Products Liability Insurance

Contract Number:	
Principal:	
Contractor:	
General Description of the Works:	
Contract Period:	
Commencement of the Contract:	

Policy No.

This is to certify this Policy covers the Insured for work undertaken for and on behalf of Principal, <Agency> and others as described below.

Specifically the Policy (subject to the attached standard policy terms and conditions):

1. Covers the Contractor's liability arising from bodily injury or damage caused by any act or omission of the Contractor, its employees and vicarious liability for its subcontractors or agents;
2. Indemnifies the Contractor's subcontractors Yes/No (# see note below);
3. Includes the Principal and <Agency> as an additional named insured for liability arising out of the Contractor's activities. This extension includes liability:
 - for injury to any Principal or <Agency> employee;
 - arising from work undertaken at and away from the Contractor's premises;
 - For damage to the Principal's or <Agency's> property not in the Contractor's physical or legal control
4. Includes a cross liability clause operates as if there was a separate policy of insurance covering each of the Insured;
5. Covers liability arising out of the use of hoists, cranes unregistered vehicles, boilers and pressure vessels;
6. Covers property of the Principal and <Agency> whilst in the Contractor's legal and physical control limited to \$.....any one occurrence;
7. Agrees to waiver of subrogation clause against any Insured where they are indemnified by the policy;
8. Provides a limit of indemnity of not less than:
 - Public Liability - \$20,000,000 for any single occurrence and unlimited in the aggregate and the number of occurrences; and
 - Products Liability - \$20,000,000 for any single occurrence and total aggregate liability during any one period of insurance for all claims arising out of the Contractor's products.

9. Is subject to the following excess: \$..... each and every occurrence or series of occurrences arising out of the one event which the Contractor is required to pay.

10. Is current for the period to.....

11. Protects the interest of the Contractor for the business activity of:

.....
.....
.....

Signed:.....

Insurance Company Stamp

Dated:

Note:

If subcontractors are not covered under this insurance as per item 2 above, the Contractor must obtain a separate set of Certificates of Currency from all subcontractors as evidence of each subcontractor's insurance covers.

Note: The following Certificates of Currency (COC's) are deemed to be acceptable:

- a. The COC as above, signed and stamped by the insurer;*
- b. The COC as above, signed and stamped by the Contractor's Insurance Broker with a written authority from the respective insurer/s; or*
- c. The COC issued by the insurer/s which incorporates all the information described above.*

Annexure 3 Certificate of Currency - Professional Indemnity Insurance

Contract Number:	
Principal:	
Contractor:	
General Description of the Contract:	
Contract Period:	
Commencement of the Contract:	

Policy No.

This is to certify this Policy covers the Insured for work undertaken for and on behalf of Principal, <Agency> and others as described below.

Specifically the policy:

1. Covers the Contractor's liability arising from a breach of professional duty, whether owed in contract or otherwise, caused by any act or omission of the Contractor, its employees and vicarious liability for its subcontractors, consultants or agents subject to the attached standard policy terms and conditions.
2. Provides a limit of indemnity of not less than \$.....
3. Is current from..... to
4. Protects the interests of the Contractor for the business activity of:
.....
.....
.....
5. Includes one automatic reinstatement provision.
6. Is subject to the following excess. \$..... each and every occurrence or series of occurrences arising out of the one event which the Contractor is required to pay.
7. Retroactive date is unlimited.

Signed:.....

Insurance Company Stamp

Dated:.....

Note: The following Certificates of Currency (COC's) are deemed to be acceptable:

- a. *The COC as above, signed and stamped by the insurer;*
- b. *The COC as above, signed and stamped by the Contractor's Insurance Broker with a written authority from the respective insurer/s; or*
- c. *The COC issued by the insurer/s which incorporates all the information described above.*

Annexure 4 Certificate of Currency - Motor Vehicle Fleet/Mobile Plant Insurance

Contract Number:	
Principal:	
Contractor:	
General Description of the Services:	
Contract Period:	
Commencement of the Services:	

Insurer: Policy No.

This is to certify this Policy covers the Insured for work undertaken for and on behalf of the Principal, <Agency> and others as described below.

Specifically the Policy (subject to the attached standard policy terms and conditions):

1. Covers the Contractor’s liability for damage to property resulting from an incident or arising out of the use of a motor vehicle insured under the policy.
2. Covers any other person in charge of a motor vehicle insured under the policy with the permission of the Contractor (including the Contractors’ subcontractors) for liability they incur for damage to property resulting from an incident caused by or arising out of the use of the vehicle.
3. Includes the Principal and <Agency> as an additional named insured for:
 - a) liability (if liability is incurred whilst on the Principal’s or <Agency’s> business) for amounts Principal and <Agency> may be held legally liable to pay as compensation for damage to property resulting from an incident occurring during the Period of Insurance and caused by or arising out of the use of a motor vehicle insured under the policy; and
 - b) damage to property (including the Principal’s or <Agency’s> property not in the Contractor’s physical or legal control) arising out of the use of a motor vehicle insured under this Policy provided the vehicle is being used in connection with the Contractor’s business.
4. Is either a comprehensive policy or third party property damage policy covering all motor vehicles and mobile plant.
5. Includes a cross liability.
6. Agrees to waive rights of subrogation against any Insured where they are indemnified by the Policy.
7. Provides a limit of indemnity for liability to third parties for property damage of not less than \$20,000,000 for any single occurrence and unlimited in the aggregate and the number of occurrences.
8. Attached is a copy of the Policy wording.
9. Is current for the period to.....

10. Is subject to the following excess \$..... each and every claim, which the Contractor is required to pay.

11. Protects the interest of the Contractor relating to the business activity of:

.....
.....
.....

Signed.....

Insurance Company Stamp

Dated.....

Notes:

- i) *If the Contractor does not have a motor vehicle fleet policy but instead has a single motor vehicle insurance policy, a Certificate of Currency (COC) will not be required. Instead copies of the following documents are required:*
 - a) *current registration paper;*
 - b) *paid current renewal or new business certificate for motor vehicle insurance; and*
 - c) *motor vehicle insurance policy.*

- ii) *The following Certificates of Currency (COC's) are deemed to be acceptable:*
 - a) *The COC as above, signed and stamped by the insurer;*
 - b) *The COC as above, signed and stamped by the Contractor's Insurance Broker with a written authority from the respective insurer/s; or*
 - c) *The COC issued by the insurer/s which incorporates all the information described above.*

Annexure 5 Applicable legislation

The following legislation and regulation is applicable to the insurance of service providers in NSW. It is not an exhaustive list.

Civil Liability Act 2002

Civil Liability Amendment (Personal Responsibility) Bill 2002

Insurance Act 1973

Insurance Contracts Acts 1994

Insurance Contracts Regulations

Insurance (Agents and Brokers) Act 1984

Insurance (Agents and Brokers) Regulations

NSW Workers Compensation Act 1987

Limitations Act 1969

Motor Accidents Act 1988

Motor Vehicles (Third Part Insurance) Act 1942

Professional Standards Act 1994

Terrorism Insurance Act 2003

Workers Compensation Legislation Amendment Act (2002)

Workplace Injury Management Act 1998