



New South Wales Government Procurement System for Construction

Procurement Practice Guide

Construction insurance

July 2008

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Amendments

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Construction insurance

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Construction insurance

1 Introduction

1.1 Risks of unforeseen losses and liabilities

There is a risk that, during the course of a contract, unforeseen events will occur which may cause substantial loss of or damage to property, or incur substantial liability to the Principal or contractor, so that the success of the project is put at risk or disrupted, or that the Principal bears a substantial loss as a result of a contractor becoming insolvent.

Indemnity and insurance provisions in contracts address this risk by:

- allocating general liability between the Principal and contractors for unforeseen consequences of events or default by the parties, and
- obliging contractors or the Principal to have insurance in place to cover unforeseen losses and liabilities.

Insurance requirements are usually intended to cover the great majority of risk placed on a contractor by contract indemnity clauses, but contracts usually oblige contractors to accept the risk of any 'gaps' between the indemnity and the mandatory insurance requirement. Contractors may either obtain additional insurance to cover the 'gaps', or accept the risk that they may have to meet indemnity obligations from their own assets.

If insurance, whether required by the contract, or independently arranged by the parties does not, or is insufficient to cover a loss for which the contractor indemnifies the Principal, the contractor must meet the indemnity from its own assets. If the contractor's assets are insufficient to make up any shortfall, the Principal will ultimately bear the loss.

1.2 Common types of insurance

The most common types of insurance required by construction contracts are:

- insurance of the works,
- insurance against public liability,
- workers compensation insurance, and
- professional indemnity insurance.

Less common types of insurance that may be required include:

- marine insurance covering the operation of waterborne craft more than 8m long used in carrying out the contract.

1.3 Scope and Purpose of this Procurement Practice Guide

Some NSW government agencies required to use the NSW Government *Procurement System for Construction*. This is referred to as the Procurement System.

The State Contracts Control Board has secured a Principal Arranged Insurance policy for insurance of works and public liability that is required to be used, where possible, by agencies which are required to use standard form GC21 and Minor Works contracts provided under the NSW Government *Procurement System for Construction*. This is referred to as the Procurement System Contract Works and Public Liability Insurance Policy.

The purpose of this Procurement Practice Guide is to assist agencies, project managers, and contract administrators to:

- make appropriate choices and risk allocations in contracts;
- check compliance with contractual insurance requirements;

- respond to defaults and defects in insurance arrangements; and
- make use of the Procurement System Contract Works and Public Liability Insurance Policy.

Detailed procedures applicable to administration of the Procurement System Contract Works and Public Liability Insurance Policy are included in Procurement Practice Guide *Using the Procurement System Insurance Online System*.

1.4 Background - insurance concepts and terminology

Insurance

An insurance policy is a contract under which an **insurer** agrees to pay for losses or liabilities suffered by an **insured**, as a result of specified causes, in return for the earlier payment of a premium, subject to stated limits, conditions, and exclusions.

In some circumstances it is possible for a person or organisation, other than the party that arranges and pays for the insurance, to pursue a claim for insurance payments against an insurer. For example, a Principal might be entitled to pursue a claim for indemnity for liability arising from personal injury to a third party, against a contractor's insurer.

Liability and Indemnity

In this discussion, unless the context indicates otherwise:

- **Liability** means an obligation, especially an obligation to pay money, which may arise from a failure to perform an obligation for a specific action that may be required under a contract.
- **Indemnify** means to engage to make good a loss sustained by another, and **indemnity** has a corresponding meaning. **Indemnity** usually refers to an express contractual provision.

Amounts of Insurance

It is not possible to insure for an unlimited amount. Limits of the amount of insurance payable under an insurance policy may be expressed as **limit of liability**, or **sum insured**. These limits may apply for the duration of an annual or periodical policy, or, in the case of insurance for a specific project, for the duration of the project.

Further limits may be applied as a limit applicable to **any one occurrence**, or **in aggregate** over the duration of the policy.

Where an insurance policy provides for an annual aggregate limit, such as is done in Professional Indemnity Insurance policies a claim or series of claims may exceed the amount of the insurance specified. If this happens, further, and possibly higher, insurance premiums must be paid to secure further insurance, and in some cases the insurer may decline to provide further insurance, and another insurer must be found if coverage is to be maintained. In some cases the original insurance policy will provide for **automatic reinstatement** on payment of a premium at the same or a specified rate, which may be applied pro-rata to the amount of a claim. An insurance policy providing for one **automatic reinstatement** thus provides assurance that total insurable losses up to twice the **sum insured** under the policy can be covered, but only requires payment of the premium for the sum insured once, as long as reinstatement is not required.

Periodical Insurance - 'Blanket' or 'Floater' Policies

Most construction insurance policies are held on an annual basis, with premiums payable annually or by instalments. Works and public liability insurance may be arranged for a specific project. Works and public liability policies are often arranged on a 'blanket' or 'floater' basis, under which the insurer is prepared to cover all projects or contracts entered into by the insured during the fixed period of currency of the insurance policy, subject to payment of premiums for each project or contract.

Premiums for periodical insurance are usually paid in advance, with, in some circumstances, adjustment at the end of the period of currency.

Period of Insurance, Commencement, Cessation

For 'blanket' or 'floater' policies, which usually only apply to works and public liability insurance, the **duration of the policy**, which may be one, two, three or more years, will be different from the **period of coverage** of the insurance applicable to any one project or contract.

The **period of coverage** of a works and public liability insurance policy is typically from the commencement of work to the completion of the work, or the end of a specified defect liability or maintenance period.

Deductibles or excesses

Insurance is subject to 'deductibles' or 'excesses', which may be deducted from the amounts of losses before reimbursement to the insured. The main purposes of deductibles are:

- to contain insurer's overheads by deterring those insured from making numerous claims for small losses, and
- to reduce losses by encouraging those insured to prevent losses and control risks effectively.

The contractors' indemnity obligations in contracts normally require contractors to bear the risks and costs of deductibles so that the amounts of deductibles are not of significant concern to the Principal.

Cross-liability and waiver of subrogation

Cross-liability refers to liability of one person covered by an insurance policy for losses or damages suffered by another person also covered by the same insurance. In the absence of an appropriate cross-liability provision, the insurance might not respond to the loss.

Cross-liability is not relevant to insurance of construction works, but policies for insurance of public liability associated with construction works, where they cover more than one party, may contain a provision that ensures the policy responds to losses by one person covered by the insurance for which another covered person is liable.

Subrogation refers to the right of an insurer that has paid a claim to take over the rights of the insured (including court action) to recover the loss from whoever caused it.

Given that one of the purposes of insurance in construction projects is to recover unexpected losses without undue disruption or dispute in the project, it is undesirable for those insured to take action against one another in respect of an insured loss, or for the insurer to exercise a right to do so.

Works and public liability insurance policies, where they cover more than one party, such as the Principal, contractor, and subcontractors, usually contain a provision that the insurer agrees not to exercise rights of subrogation against persons covered by the insurance.

Certificates of Currency

A **certificate of currency** is a document providing evidence that an insurance policy exists, and including details, such as:

- insurer and insured;
- type of insurance,
- sum insured
- duration of insurance.

Certificates of currency may be issued directly by insurers or their agents, or by insurance brokers, who have arranged insurance on behalf of the insured.

Except for workers compensation insurance where the content and form is prescribed by NSW WorkCover, certificates of currency are not necessarily in any standard form. Insurers and insurance brokers may be unwilling to give a certificate in a particular form sought by an agency where they consider that this may expose them to action for misrepresentation, however, insurance brokers will generally be willing to provide statements or certificates in response to questions that Principals may have about the nature or details of contractors' insurance.

Principal Arranged Insurance or Contractor Arranged Insurance

Some types of insurance applicable to construction projects may be arranged by either the Principal (Principal Arranged Insurance (PAI)) or the contractor (Contractor Arranged Insurance (CAI)). Examples are insurance of the works and insurance against public liability. Other types of insurance can only be held by the contractor. Examples are workers compensation insurance and professional indemnity insurance.

Advantages of PAI are that it ensures that the terms of the insurance are known to and acceptable to the Principal, and that it is not necessary to examine and assess the suitability of the contractor's insurance policies for each contract. Disadvantages are the time and specialised resources required to arrange it.

The State Contracts Control Board has secured a Principal Arranged Insurance policy for insurance of works and public liability that is required to be used, where possible, by agencies which are required to use standard form GC21 and Minor Works contracts provided under the NSW Government *Procurement System for Construction*.

If PAI is used, unless tenderers are provided with details of the insurance policy, there is a risk that tenderers may not correctly allow for the costs and risks of insurance, particularly in respect of conditions, exclusions, and deductibles. This may lead to excessive tender prices or disputes about the existence or extent of insurance obligations.

If PAI is to be used, the Principal must confirm the availability and details of the insurance, including, if possible, copies of the insurance policies, from the insurer or insurance broker before tenders are called. The Principal should ensure that copies of the insurance policies or details of insurance that the Principal will obtain are made available to tenderers with tender documents. If insurance policies are not provided with tender documents, the minimum details that should be provided are:

- the insurer's name or advice as to whether the insurer will be one listed by APRA, or what minimum insurer's rating from a relevant assessment agency (such as Moody's or Standard and Poors) applicable to the insurer;
- the sum insured, or limitation of liability under the insurance;
- details of any deductibles or excesses under the insurance; and
- details of any conditions, exclusions, or other provisions in the policy of a kind not usually included in insurance policies that provide similar cover.

If PAI is used, the Principal should ensure that insurance is effected in accordance with the policy or details provided to the contractor, before work under the contract commences, and make a copy of the insurance policies available to the contractor if this has not already been done.

If tenderers are notified that PAI will be used, and the Principal does not provide insurance in accordance with the details notified, contractors will have grounds for dispute, which may lead to substantial costs or damages.

1.5 Checking of Insurance

Insurance is a specialised industry with complex legal and technical aspects. A balance must be struck between achieving reasonable control of the risk that contractors' insurances will be unsatisfactory and imposing checking responsibilities

on contract administrators which are beyond their technical competence, and which are unduly onerous and time-consuming. Assessment of the provisions of insurance policies is a specialist discipline. It cannot be accomplished with a simple checklist. Insurance brokers may be engaged to provide advice of this nature, where necessary, but this should not be done automatically on every contract.

It is suggested that checking requirements should be established at graduated levels as follows:

- **Large contracts and risks (works contracts over \$10m, consultant engagements over \$200,000, extra risk projects, including substantial high risk civil engineering projects such as dams, weirs, tunnels, bridges or other work over or under water) over \$1m:** detailed check of policy wordings (particularly exclusions). If contract administrators are in doubt about their ability to do this it should be referred to an insurance broker or other expert for a report;
- **Medium contracts (works contracts between \$100,000 and \$10m, consultant engagements between \$30,000 and \$200,000):** reliance on an enhanced Certificates of Currency, confirming that the insurance complies with the requirements of the contract and stating any 'unusual terms'
- **Small contracts (Works Contracts under \$100,000 and Consultant Engagements under \$30,000):** reliance on Certificates of Currency.

1.6 Other references and resources

Other resources that deal with construction insurance matters include:

- New South Wales Construction Agency Coordinating Committee, Insurance for Government Construction Projects Guidelines, which is available at:
http://www.nswprocurement.com.au/psc/nsw_government_guidelines/insurance_for_government_construction_projects.pdf
- Australian Procurement and Construction Council, Professional Indemnity Insurance Guidelines in the Building and Construction Industry, which is available at:
www.apcc.gov.au/docs/APCCGUIDELINES2004.pdf

2 Specification of insurance requirements in contracts

2.1 Insurance of the works

Risk covered by insurance of the works

As work is performed and materials are incorporated into the structure, the works progressively become the property of the Principal, but the works will not be covered by the Principal's usual property insurance until they are completed, handed over, and notified to the Principal's property insurer. Insurance of the works covers the works against damage or destruction, while under construction, and provides for reinstatement or reconstruction of works that are damaged or destroyed.

Insurance of the works is only required in construction contracts where the works are not already covered by the Principal's or owner of the asset's existing property insurance. Insurance of the works is not required for repair or maintenance contracts on property already covered by the Principal's or owner of the asset's insurance or for consultant engagements.

Contract requirements

Procurement System standard form GC21 and Minor Works construction contracts provide options for PAI using the Procurement System Contract Works and Public Liability Insurance Policy, (including information needed by tenderers and contractors) or a policy otherwise arranged by the Principal, or CAI. The GC21 standard form contract includes a Condition of Tendering enabling the Principal to waive the PAI provisions and accept CAI for contracts valued at over \$20 million where the Contractor offers CAI that is cost-beneficial to the Principal.

Principals must confirm that PAI is available before calling tenders and ensure that premiums are paid and insurance is in effect before work commences.

The standard form Mini Minor Works contract relies on CAI, and specifies required amounts.

If forms of contract, other than the Procurement System standard forms are used, agencies should ensure that appropriate insurance requirements are included in the contracts.

Amount of Insurance

The Procurement System Contract Works and Public Liability Insurance Policy provides insurance of the works up to \$30m. For works over \$30m and for high risk civil engineering contracts such as dams, weirs, tunnels, bridges or other work over or under water) over \$1m, separate arrangements need to be made.

If the Procurement System Contract Works and Public Liability Insurance Policy is not being used it is necessary to decide on the amount of coverage required for insurance of the works, to be included either in a PAI policy or as a requirement for CAI in the contract.

The amount of insurance of the works should be sufficient to fund the reinstatement of the works in the event of destruction or damage. It should be not less than the total of:

- The contract price;
- An appropriate amount to provide for costs of demolition and removal of debris;
- An appropriate amount to cover fees of consultants, in assessing damage and remedial measures and redesigning and managing, where necessary, the reinstatement of the works;
- The value of any materials stated in the contract to be provided by the Principal;
- An appropriate amount or margin to cover contingencies.

Period of Insurance

The Procurement System Contract Works and Public Liability Insurance Policy provides insurance of the works from the commencement of work for or in connection with the contract until:

- the Principal, or any person representing the Principal agrees with the contractor that:
 - the works are complete, or
 - the works are complete except for minor omissions and minor defects which do not prevent the works from being reasonably capable of being used for their intended purpose, or
- with respect to the whole of the works or any portion of the works, the time it is taken over or taken into use by the Principal or owner of the asset.

Insurance of the Works under the Procurement System Contract Works and Public Liability Insurance Policy also covers contractual liability of contractors during any defects liability period.

Once the works and public liability insurance policy coverage ceases the Principal or the owner of the asset is responsible for insurance of the project.

If the Procurement System Contract Works and Public Liability Insurance Policy is not being used it is necessary to specify the period of insurance for insurance of the works, to be included either in a PAI policy or as a requirement for CAI in the contract.

If a PAI policy other than the Procurement System Contract Works and Public Liability Insurance Policy is being used, the Principal must ensure that the insurance policy is effective before work commences.

2.2 Public Liability Insurance

Risk covered by public liability insurance

Public liability insurance covers liability for death, personal injury, property damage, or other loss sustained by persons other than the Principal and the contractor, arising out of the project or contract. Public liability insurance should also cover costs of responding to and defending claims for any such liability.

Public liability insurance is appropriate on all construction and maintenance contracts and consultant engagements, except where consultants do not attend the Principal's or owner of the asset's premises and the risk of injury or damages to persons other than the Principal or owner of the asset or the contractor, arising out of the contract are negligible

Contract requirements

Procurement System standard form GC21 and Minor Works construction contracts provide options for PAI using the Procurement System Contract Works and Public Liability Insurance Policy, (including information needed by tenderers and contractors) or a policy otherwise arranged by the Principal, or CAI. The GC21 standard form contract includes a Condition of Tendering enabling the Principal to waive the PAI provisions and accept CAI for contracts valued at over \$20 million where the Contractor offers CAI that is cost-beneficial to the Principal.

Principals must confirm that PAI is available before calling tenders and ensure that premiums are paid and insurance is in effect before work commences.

The standard form Mini Minor Works contract relies on CAI, and specifies required amounts.

Procurement System standard form consultancy and project management services agreements require contractors to hold satisfactory insurance for public liability for an amount of not less than \$5m.

If forms of contract, other than the Procurement System standard forms are used, agencies should ensure that appropriate insurance requirements are included in the contracts.

Amount of Insurance

The Procurement System Contract Works and Public Liability Insurance Policy provides public liability insurance up to \$20m for each and every occurrence, unlimited in aggregate.

If the Procurement System Contract Works and Public Liability Insurance Policy is not being used it is necessary to decide on the amount of coverage required for public liability insurance, to be included either in a PAI policy or as a requirement for CAI in the contract.

The amount of public liability insurance should be for an amount that realistically reflects likely claims arising out of the project or contract, taking into account statutory limitations on liability, such as those imposed by the *Civil Liability Act 2002* (NSW), and any additional risks inherent in the project.

- For a construction contract, which may involve injury or death to employees, visitors or bystanders, the public liability amount should not be less than \$20m.
- For a consultancy and project management services engagements not involving any unusual risks, the public liability amount should be not less than \$5m.

Public liability insurance premiums increase with the sum insured and excessive public liability insurance requirements will result in significantly increased contractors' costs, and hence increased contract prices.

Public liability insurance should cover costs of responding to and defending claims against the Principal or contractor, and payment for these costs should be in addition to the amount insured, so as not to diminish the amount available to meet claims if the defence is unsuccessful.

Period of Insurance

The Procurement System Contract Works and Public Liability Insurance Policy provides public liability insurance from the commencement of work until:

- the Principal, or any person representing the Principal agrees with the contractor that:
 - the works are complete, or
 - the works are complete except for minor omissions and minor defects which do not prevent the works from being reasonably capable of being used for their intended purpose, or
- with respect to the whole of the works or any portion of the works, the time it is taken over or taken into use by the Principal or owner of the asset.

Public liability insurance under the Procurement System Contract Works and Public Liability Insurance Policy also covers contractual liability of the contractor during any Defects Liability Period.

If the Procurement System Contract Works and Public Liability Insurance Policy is not being used it is necessary to specify the period of insurance for public liability insurance, to be included either in a PAI policy or as a requirement for CAI in the contract.

If a PAI policy other than the Procurement System Contract Works and Public Liability Insurance Policy is being used, the Principal must ensure that the insurance policy is effective before work commences.

2.3 Workers Compensation Insurance

Risk covered by workers compensation insurance

Workers compensation insurance is required by law to be held by employers to cover their financial obligations to employees who suffer work related injuries.

If a contractor does not hold legally required workers compensation insurance the Principal may become liable to pay outstanding workers compensation insurance premiums or to meet the financial obligations of the contractor to employees who suffer work related injuries.

Contractors who do not employ any workers or who pay less than \$7,500 in annual wages are not required to hold workers compensation insurance.

Contract requirements

Procurement System standard form contracts provide that contractors are required to hold workers compensation insurance and submit proof of workers compensation insurance to the Principal before commencing work under a contract and with payment claims thereafter.

If forms of contract, other than the Procurement System standard forms are used, agencies should ensure that appropriate insurance requirements are included in the contracts.

2.4 Professional Indemnity Insurance

Risk covered by professional indemnity insurance

Professional indemnity insurance covers professionals and other skilled service providers (referred to in this discussion as 'consultants', and including contractors) for liabilities arising out of the provision of professional or skilled services. Coverage may include claims for personal injury, death, loss of or damage to property or other loss. Claims may include those by the Principal or other persons. Professional indemnity insurance should also cover the costs of responding to and defending claims for any such liability.

Professional indemnity insurance is primarily for the benefit of the consultant, so that if claims are made, they are covered by insurance, and consultants' assets are protected. It is in the interest of consultants to hold adequate professional indemnity insurance, which will usually exceed the amount required under any one contract.

It is not normally possible for a Principal to obtain insurance against losses arising from the defective professional performance of consultants or other parties: such professional indemnity insurance is normally available only to the professional individual or organisation providing services. Likewise it is not normally possible for a Principal to claim directly against a professional indemnity insurance policy, without first making a claim against the consultant.

Project specific professional indemnity insurance may be obtainable in limited circumstances, primarily for very large infrastructure projects. This may have to be negotiated individually in all aspects and may require identification of the particular consultants to be engaged to the prospective insurer, and the participation of those consultants in risk analysis and other risk management processes to the satisfaction of the insurer.

Contract requirements

Procurement System standard form GC21 and Minor Works contracts provide options to specify requirements for contractors to hold professional indemnity insurance where there is a substantial component of skilled or professional services, such as design, required under the contract. Professional indemnity insurance should not normally be required for Mini Minor Works contracts

Procurement System standard form consultancy and project management services agreements require contractors to hold satisfactory professional indemnity insurance.

If forms of contract, other than the Procurement System standard forms are used, agencies should ensure that appropriate insurance requirements are included in the contracts.

Pre-contract requirements

There is a risk that a contractor may be unable to obtain the professional indemnity insurance required by a contract, because the contractor does not employ appropriately qualified professionals, or because the contractor has an unsatisfactory claims history. This risk will apply to small-scale minor works contractors. It is unlikely to apply to large construction contractors or regularly practicing construction consultants.

Principals should avoid entering into contracts that require professional indemnity insurance with contractors that are unable to obtain it. The Procurement System standard form GC21 and Minor Works contract Conditions of Tendering provide that a certificate of currency or other evidence of ability to obtain required professional indemnity insurance, such as a letter from a broker or insurer, may be required as a condition of acceptance of tender.

If forms of contract other than the Procurement System standard forms are used for contracts where professional indemnity insurance is required and which are likely to be awarded to small-scale contractors, agencies should ensure that appropriate insurance requirements are included in the contracts.

If a tenderer that is a small-scale contractor is in contention for a contract where professional indemnity insurance is required, the tenderer should be required to submit a certificate of currency or other satisfactory evidence of ability to obtain required professional indemnity insurance, such as a letter from a broker or insurer, before being awarded the contract.

Amount of Insurance

Methods of calculating amounts of professional indemnity insurance include:

- a risk based method suitable for large projects of any value, and
- a simplified method, based on the consultant costs, suitable for straightforward projects of moderate value.

Under the *Professional Standards Act 1994* (NSW) some consultants may participate in schemes under the Act that impose statutory limits upon their liability, but these limits do not apply to liability for personal injury. The amount of professional indemnity insurance otherwise calculated and required under any contract should not normally be limited or reduced on account of considerations of *Professional Standards Act 1994* (NSW) limitations of liability.

A risk based method of determining amounts of professional indemnity insurance, suitable for large projects of any value and unconventional projects with unusually high risks, is described in detail in the following:

- New South Wales Construction Agency Coordinating Committee, *Insurance for Government Construction Projects Guidelines*, which may be accessed at:
http://www.nswprocurement.com.au/psc/nsw_government_guidelines/insurance_for_government_construction_projects.pdf
- Australian Procurement and Construction Council, *Professional Indemnity Insurance Guidelines in the Building and Construction Industry*, which may be accessed at:
www.apcc.gov.au/docs/APCCGUIDELINES2004.pdf

The risk based method may be used for any project, but should be used for any project with a pre-tender estimated cost exceeding \$5m.

A simplified method of determining amounts of professional indemnity insurance, suitable for projects without unusual risks with pre-tender estimated cost below \$1m, and which may, at an agency's discretion, be used for projects up to \$5m is to determine the required amount of professional indemnity insurance as the greater of:

- \$1m, or

- 10 times the expected consultant's fee (conveniently rounded).

In the case of a construction contract that includes a substantial component of skilled or professional services, such as a design and construct contract, in the absence of any better estimate, the expected consultant's fee may be taken to be 10% of the contract pre-tender estimate.

The amount insured under a professional indemnity insurance policy, in respect of any one occurrence, must not be less than the total amount of professional indemnity insurance required under the contract.

If a consultant represents that it considers the amount of professional indemnity insurance required under a contract excessive, and provides evidence that it holds professional indemnity insurance for an amount of not less than 50% of the amount required in the contract, and that the professional indemnity insurance policy includes provision for one automatic reinstatement, then this qualification may be accepted.

It is highly desirable that professional indemnity insurance should cover costs of responding to and defending claims against the Principal or consultant, and payment for these costs should be in addition to the amount insured, so as not to diminish the amount available to meet claims if the defence is unsuccessful. Professional indemnity insurance policies, however, frequently do not provide for legal and defence costs to be separate and additional to the sum insured.

Period of Insurance

Professional indemnity insurance policies are referred to as 'claims made' policies, which means that, generally speaking, they cover claims made or taken to be made during the period that the policy is current. The claims can relate to circumstances or events that occurred during or before the period that the policy is current. Some policies, however, may limit the past periods covered by the policy ('retroactive period').

Professional indemnity insurance is usually acquired as an annually renewable policy covering claims made during that year.

The professional indemnity insurance coverage of a liability arising from a particular project depends, not on whether the consultant held professional indemnity insurance at the time the work was performed, but on the consultant holding professional indemnity insurance at the time the claim is made.

Because professional indemnity insurance is based on claims made it is not essential to ensure that consultants hold professional indemnity insurance before commencing work under the contract, provided that the Principal checks and enforces professional indemnity insurance requirements without undue delay after entering into the contract.

Agencies should determine whether to specify in contracts or consultant agreements a period during which the consultant is obliged to hold professional indemnity insurance, and if so, what that period should be.

Enforcing an obligation to maintain post-engagement professional indemnity insurance is generally difficult. Unless the Principal includes elaborate periodic review of evidence of insurance requirements for up to six years after the work under the engagement is complete (and diligently enforces these requirements, at ongoing cost), the Principal will be unaware that a consultant has ceased to be insured, until the Principal makes a claim. Once the Principal has made a claim against a consultant whose professional indemnity insurance has lapsed, the consultant may be unable to replace or reinstate the insurance, because of the existence of the claim, and the Principal will be pursuing a 'man of straw'. The self-interest of consultants in maintaining professional indemnity insurance, however, should be borne in mind.

If there are high risks in a consultancy and the Principal is prepared to dedicate resources to annually monitoring the currency of professional indemnity insurance

held by a consultant, then the Principal may specify that the consultant is required to maintain professional indemnity insurance for a particular number of years (usually 6 years, in accordance with the *Limitation Act 1969* (NSW)), and should specify an obligation on the contractor to regularly submit proofs of insurance, without further demand.

If the Principal does not consider that high risks justify the dedication of resources to monitor the currency of professional indemnity insurance, there is no point in specifying any particular period during which the consultant is required to maintain professional indemnity insurance, and the contract or consultancy services agreement may remain silent on this issue, relying on the consultant's self-interest in maintaining necessary professional indemnity insurance.

2.5 Special Insurances

Marine Liability Insurance

Risk covered by marine liability insurance

The operation of any waterborne craft over eight metres in length is excluded from general works and liability insurance policies because it is covered by different legislative provisions included in the *Marine Insurance Act 1909* (Cwlth). Such craft may include boats or barges used in connection with bridge work, levee work, or ports and harbours work. If such craft are used in connection with work under the contract, a marine liability insurance policy is required to cover liabilities for damage to, or caused by those craft.

Contract requirements

Procurement System standard form GC21 and Minor Works contracts provide that if work under the contract includes the use of water borne craft in excess of eight metres in length the contractor must take out marine liability insurance.

If forms of contract, other than the Procurement System standard forms CC21 and Minor Works contracts are used, and work involving water borne craft in excess of eight metres in length is contemplated, agencies should ensure that appropriate insurance requirements are included in the contracts.

Amount of Insurance

Standard form contracts provide that marine liability insurance must cover liability not less than \$5m for any one occurrence.

Period of Insurance

Standard form contracts provide that marine liability insurance must be effected before commencing work covered by the insurance and maintained until the contract is finalised.

Other Special Insurances

Where risk analysis identifies special risks that should be covered by insurance, Principals should arrange necessary special insurances, using the services of an insurance broker, if required, so that the insurance is effective at the appropriate time.

3 Checking Insurance

3.1 General

Importance of checking insurances

Insurance is required under contracts to protect the Principal and other parties from financial loss, and disruption to projects. Insurance policies are either project specific or subject to annual renewal, and the existence or application of insurance coverage to a specific project or contract must not be taken for granted. It is important that contract administrators check insurance policies before work commences, and at other appropriate times, to ensure that the specified insurance is in place.

Contract administrators must be prepared to act decisively if insurance arrangements are unsatisfactory because lack of insurance can put at risk the whole value of the works, or expose the Principal to large claims for personal injury or death. Contract actions in response to unsatisfactory insurance may include:

- terminating contracts,
- denying contractors' access to sites,
- suspending work, and
- withholding payment of contractors' claims

Contract administrators should, however, exercise judgement and take care not to act precipitately or excessively so that a project is disrupted or delayed because of some defect in proofs of insurance that is readily remedied.

Graduated risk response - insurance checking

It is suggested that checking requirements should be established at graduated levels as follows:

- **Large contracts and risks (construction works contracts over \$10m, consultant engagements over \$200,000, extra risk projects, including substantial high risk civil engineering projects such as dams, weirs, tunnels, bridges or other work over or under water over \$1m):** detailed check of policy wordings (particularly exclusions). If contract administrators are in doubt about their ability to do this it should be referred to an insurance broker or other expert for a report;
- **Medium contracts (works contracts between \$100,000 and \$10m, consultant engagements between \$30,000 and \$200,000):** reliance on enhanced Certificates of Currency, confirming that the insurance complies with the requirements of the contract and stating any 'unusual terms'
- **Small contracts (Works Contracts under \$100,000 and Consultant Engagements under \$30,000):** reliance on Certificates of Currency.

When insurance should be checked

Insurance should be checked for compliance with contract requirements:

- before giving a contractor access to the site or before contract work commences, or, for consultancy services, without undue delay after the award of a contract;
- whenever there is reason to believe that a contractor is failing to comply with the insurance requirements;
- whenever requirements for work for which special insurance such as marine work is identified; and
- in the case of workers compensation insurance, where contractors are required to submit certificates of currency with claims for payment, or otherwise, whenever contractors are required to submit certificates of currency.

Procedures to ensure checking of insurance

Agencies should establish procedures to ensure that insurance is appropriately checked. This may be done by including insurance checking requirements in post contract award checklists such as the Procurement System for Construction [Checklist for Actions at the commencement of a Contract](#).

Checklists may be used to assist contract administrators routinely to check insurance. Sample checklists are provided as indicated by hyperlinks in this Procurement Practice Guide.

Evidence or proof of insurance

All Procurement System for Construction standard form contracts require the contractor to hold required insurance before starting work, and the GC21 and Minor Works contracts, and consultancy and project management services agreements require contractors to submit evidence or proof of insurance when required to do so. An instruction to submit evidence or proof of insurance is a reasonable requirement under a Mini Minor Works contract.

To ensure that proofs of insurance are available to be checked the text shown in Sample letter [Proof of insurance](#) should be included in all letters of award or letters of acceptance:

It is possible that contractors will submit the following as proof of insurance:

- copies of insurance policies
- certificates of currency, and/or
- cover notes (cover notes are documents issued by insurance companies or brokers asserting the existence of an interim contract of insurance, pending the payment of premiums which will bring a final policy into effect).

Certificates of currency, showing correct details, will always suffice for Workers Compensation Insurance because the coverage of the insurance and the content and form of the certificate of currency is prescribed by legislation and WorkCover.

A certificate of currency showing correct details will suffice for CAI in Mini Minor Works contracts.

If a cover note is submitted, it may be accepted as satisfactory proof, provided that it does not disclose any non-compliance with the insurance requirements, but the contractor should be notified that it is required to submit proof of a final policy of insurance no later than the expiry date of the cover note, and this should be diarised and followed up.

Errors and defects that can be promptly remedied

While contract administrators must be prepared to act decisively in response to unsatisfactory insurance, they will rely largely on proofs of insurance submitted by contractors. These may be defective as a result of mistake, or otherwise in ways that can be promptly remedied by the contractor. Examples are:

- the contractor does not submit any proof of insurance at all, or omits to submit one or more required proofs;
- the contractor submits a wrong certificate of currency, indicated, for example, by the certificate being not current, or for a company associated with the contractor but not the contractor itself, or for the wrong type of insurance;
- a certificate of currency contains an apparent error;
- a certificate of currency does not contain, or is not accompanied by an appropriate letter or notice from the insurer or broker stating whether the insurance policy complies with the requirements of the contract and clearly stating the effect of any provisions in the policy of a kind not usually included in contracts of insurance that provide similar cover, where this is required; or

- a certificate of currency is not accompanied by a copy of the insurance policy, where this is required.

In these cases or any other case where it is likely that the contractor can promptly remedy any defect, the contract administrator should contact the contractor by telephone, fax or e-mail and find out whether or not the contractor claims that it is a mistake, or can otherwise be immediately remedied, for example, by the contractor promptly obtaining extra or other appropriate insurance, and if so the contract administrator may allow not more than 24 hours for the contractor to remedy, but if the contractor fails to remedy within the allowed period the contract administrator should take follow up action promptly.

If work has not commenced, the contract administrator should refuse to give the contractor access to the site and prevent commencement until satisfactory insurance is in place, but if work has commenced, it need not be suspended immediately, but may be allowed to continue for the 24 hours allowed to remedy any deficiencies. If, however, the contractor does not meet its requirements within the allowed time, or produce good, convincing evidence that it will do so without undue delay, then work should be suspended without further delay.

More detailed procedures and processes are discussed later in this Procurement Practice Guide.

These kinds of defects, however, may also be indicative that a contractor does not have (and may *not* be readily able to obtain) required insurance coverage. If any opportunity is extended to a contractor to make good any insurance requirements, any time allowances should be strictly applied, and no extra time for compliance should be allowed unless it is fully justified.

3.2 Checking requirements

Major and Minor Aspects

Aspects of insurance that must be checked may be categorised into major and minor aspects as follows:

- Major aspects
 - insurer,
 - insured,
 - type of insurance,
 - coverage of particular project,
 - currency of insurance,
 - amount of coverage not grossly deficient compared to required amount,
 - any other defect which in the opinion of the contract administrator represents a serious risk to the Principal;
- Minor aspects
 - coverage of the Principal,
 - coverage of subcontractors,
 - cross-liability and waiver of subrogation
 - amount of coverage deficient but not grossly deficient,
 - exclusions detrimental to the Principal's interest, or no information about exclusions, and
 - any other defect or deficiency.

Payments of contractors' claims for payment may be withheld until defects in either minor or major aspects are remedied.

Checklists

Checklists suitable for checking the following types of insurance are shown at these hyperlinks:

- [Checklist for Works and/or public liability insurance](#)
- [Checklist for Workers Compensation insurance](#)
- [Checklist for Professional Indemnity insurance](#)
- [Checklist for other forms of insurance](#)

The aspects and items contained in the checklists are explained subsequently.

Major aspects - proofs and common consequences

The reasons that proofs of insurance are unsatisfactory in respect of major aspects will typically be that:

- no proof at all is submitted, or
- the proof submitted contains positive evidence that the insurance does not comply with the contract requirements

If proofs of insurance are unsatisfactory in respect of major aspects, then, unless the contractor has submitted the wrong documents by mistake, it will usually be necessary for the contractor to obtain new or additional insurance to bring itself into compliance with the requirements of the contract.

Defects in major aspects may lead to denial of site access, suspension of work, and termination of contracts.

In summary, for major aspects, if it is likely that the contractor can promptly remedy the identified defect, the contract administrator should contact the contractors by telephone, fax or e-mail and if the contractor undertakes to immediately remedy the defect, the contract administrator should allow the contractor not more than 24 hours to do so. If the contractor cannot, or does not, within 24 hours remedy the identified defect:

- for **workers compensation insurance**: treat as failure to produce, inform WorkCover, withhold payment of claims. If contractor declares that pays less than \$7,500 in annual wages (is an *exempt employer*) or employs no workers, and is not required to hold workers compensation insurance, this declaration may be accepted;
- for **CAI works and/or public liability**: treat as failure to produce, consider suspending work and suspend if necessary, withhold payment of claims; and
- for **professional indemnity insurance**: treat as tentative evidence that the contractor is unable to obtain required professional indemnity insurance, treat as failure to produce, withhold payment of claims until satisfactory insurance is in place.

Sample text that may be included in e-mails or fax confirming requirements to produce proof of conformity with major aspects of requirements is shown in Sample letter [Submission of proof of insurance](#).

Sample text that may be included in notices to contractors that evidence of insurance submitted indicates that the insurance is unsatisfactory and instructing that the insurance must be brought into conformity with the requirements of the contract is shown in Sample letter [Unsatisfactory proof of insurance](#).

Major aspect - insurer

Procurement System standard form contracts require that insurance be provided by an insurer subject to the approval of the Principal.

Companies authorised to carry on insurance business in Australia are regulated by the Australian Prudential Regulation Agency (APRA). Underwriters that are

members of Lloyds of London are also authorised to carry on insurance business in Australia.

Principals should normally approve insurers that are listed by the APRA as general insurers, and Lloyds underwriters.

APRA Lists appear at the APRA website at www.apra.gov.au/

If a certificate of currency, insurance policy or other correspondence issued by an insurer or insurance broker states that the insurer is a Lloyds underwriter, this may be accepted and approved by the Principal unless there is some reason to doubt the genuineness of the document. If there is doubt, the advice of a reputable insurance broker or the Australian office of Lloyds may be sought.

While it is possible to enter into insurance contracts for major projects with insurers outside Australia, this should only be contemplated for very large projects and with specialist advice, which should be obtained well in advance of the award of any contracts.

Major aspect - insured

An insurance policy or certificate of currency will identify one or more entities as 'insured'. The contractor must be identified as an insured, usually by using the same legal name as the name under which it has entered into the contract, or by having the same Australian Business Numbers (ABN) shown for the 'insured' in the insurance policy or certificate of currency as is shown in the contract, or in the Principal's records.

In some circumstances a holding company may hold insurance covering its subsidiaries, which may identify the covered subsidiaries by description rather than express name or ABN. This is acceptable provided that the description clearly includes the contractor.

If the insured shown on the certificate of currency is not the same as the legal name of the contractor that entered into the contract, then the insurance is not normally acceptable to the Principal. Insurance covering even an entity related to the contractor will probably not cover the contractor, and presentation of Certificates of Currency from other entities is a common deception practiced by dishonest contractors.

Major aspect - type of insurance

An insurance policy or certificate of currency submitted as proof of insurance of one required type must be for the required type of insurance. For example, product liability insurance will not satisfy requirements for construction works insurance, and professional indemnity insurance will not satisfy requirements for public liability insurance.

The likely cause of submitting proof of the wrong type of insurance is oversight by submitting the wrong document.

For workers compensation insurance, the certificate of currency is required to state the industry or industries covered or the type of business of the insured contractor. If the industry or type of business shown on the certificate of currency is not appropriately related to construction work or a relevant consultant discipline, then the certificate should not be accepted.

Major aspect - coverage of particular project

An insurance policy or certificate of currency submitted as proof of insurance for a particular project or contract must actually cover that particular project or contract. The normal arrangement for construction contractors' insurance policies is 'blanket' of 'floater policies that cover all or any contracts entered into by the contractor during the currency of the policy, conditional on a part-payment of the premium (usually a substantial amount of the estimate of the premium), with a final

declaration of turnover and adjustment of the premium payment at the end of the policy. Coverage of a contract is not normally dependent on declaration of a particular contract to the insurer, or the naming of the contract or project in the insurance policy.

A certificate of currency or insurance policy which names the project or contract as being covered, or which refers to 'all contracts' or to 'all contracts in some category to which the contract or project belongs', may be accepted as evidence that the insurance covers the contract in question. A certificate of currency or insurance policy that names some project or contract other than the contract or project in question may have been submitted in error and should not be accepted.

Major aspect - currency

An insurance policy or certificate of currency submitted as proof of insurance must demonstrate that the insurance is current. Insurance policies and certificates of insurance will state dates from which and until which the insurance applies.

CAI policies for insurance of works and public liability normally cover contracts entered into or work commenced during the currency of the policy. Proof that insurance is current at the date of submission, and will be current at the date of commencement of the work may be accepted. If the expiry date of the insurance is before the expected date for completion of the work, the expiry date should be diarised, and the renewal of the insurance followed up.

Workers compensation insurance certificates of currency may only be issued for periods up to four months, but Procurement System standard form contracts require the submission of workers compensation insurance certificates of currency with every claim for payment from the contractor. Proof that insurance is current at the date of submission of the payment claim may be accepted.

Professional indemnity insurance is usually held on an annual basis. Proof that insurance is current at the date of submission, and will be current at the date of commencement of the work may be accepted. If the expiry date of the insurance is before the expected date for completion of the work, the expiry date should be diarised, and the renewal of the insurance followed up.

Major aspect - amount of insurance

An insurance policy or certificate of currency submitted as proof of insurance must show the amount of insurance, and should show any limitations on that amount, such as any limitations applying to any one occurrence or in aggregate.

Amount of insurance does not need to be checked for workers compensation insurance because amounts of workers compensation insurance are prescribed by law.

Where a proof of insurance is defective because the amount of insurance shown is less than the amount required under the contract, as long as the amount is not completely inadequate (and provided the proof is not defective on the other grounds shown above), it will not be appropriate to suspend work. If the discrepancy between the amount shown and the required amount is substantial it may be appropriate to withhold payments to the contractor, or to make deductions from payments, until the requirements are met.

Minor aspects - proof not submitted or incomplete

The reasons that proofs of insurance are unsatisfactory in respect of minor aspects will typically be that:

- proof submitted omits mention of a requirement,
- the proof submitted contains positive evidence that the insurance does not comply with the contract requirements, or
- the proof submitted is ambiguous or unclear.

If defects in minor aspects are identified before work has commenced, site access may be denied so that a contractor is prevented from commencing work, but it is not necessary to suspend work or terminate the contract on this account.

The following minor aspects items may not necessarily be disclosed in proofs initially submitted by contractors:

- coverage of the Principal,
- coverage of subcontractors,
- exclusions detrimental to the Principal's interest.

The first question, therefore, is whether the proofs submitted:

- contain positive evidence that the Principal or subcontractors are not covered by required insurances, or that insurances do contain exclusions significantly detrimental to the Principal's interests, (such evidence may be in the form of actual copies of insurance policies, or extensive or expanded certificates of currency, or other documents) or
- are merely standard certificates of currency, which omit mention of the required items.

If proofs of insurance that are otherwise satisfactory merely omit mention of Principal or subcontractor coverage, or of any exclusions, or of whether policies for insurance of works and/or public liability contain cross liability and waiver of subrogation provisions, the contractor must be required to submit particularised proofs. Sample text that may be included in a notice to contractors that evidence of insurance is insufficient and instructing that proof that the insurance complies with the requirements of the contract must be submitted is shown in Sample letter *Proof of insurance is insufficient in respect of minor aspects*.

If the contractor does not respond or submits further proof that is still unsatisfactory, the contractor should be given a further notice, referring to the original notice and in similar terms to Sample letter *Proof of insurance is insufficient in respect of minor aspects*, allowing a further reasonable period (usually seven days) to provide satisfactory proof. If the contractor has still failed to provide satisfactory proof of insurance, after this further notice, the contract administrator should secure appropriate insurance for the Principal, in substitution for the insurance required of the contractor, and recover all costs of doing so against claims for payment by the contractor.

If evidence of insurance submitted demonstrates that insurance does not comply with the minor aspects requirements of the contract (cover Principal, subcontractors, no significantly detrimental conditions or exclusions), but is otherwise satisfactory (insurer satisfactory, contractor correctly identified as insured, current, amount and type satisfactory) the contractor should be given the opportunity to remedy the insurance, for example by paying extra premiums to remove exclusions or extend the coverage. Sample text that may be included in a notice to contractors that evidence of insurance indicates that the insurance is not satisfactory, and instructing that proof that the insurance complies with the requirements of the contract must be submitted is shown in Sample letter *Unsatisfactory proof of insurance*.

Minor aspect - coverage of the Principal

Procurement System standard form GC21 and Minor Works contracts require the Principal to be covered by any CAI of the works and/or public liability, so that the Principal may claim directly on the insurer in the event of loss of or damage to the works or the Principal's property, or a claim against the Principal for third party loss, personal injury or death.

Coverage of the Principal by an insurance policy may be accomplished by:

- the Principal being among the entities listed in the policy as 'the insured', either by name or by descriptive reference, such as references to 'client' 'principal', or 'principals to contracts';
- the Principal being identified in a document issued by the insurer or insurance broker, associated with the policy identifying the Principal as 'insured', 'named insured', or otherwise as a person to whom the insurance cover provided by the policy extends, either by name or by descriptive reference.

This requirement may generally be stated as a requirement that the insurance policy or associated documents must identify the Principal, whether by name or otherwise, as a person to whom the insurance cover provided by the policy extends. It is not necessary that the Principal be a 'named insured' or 'additional named insured'.

If the contract does not require the Principal to be covered by any CAI for works and/or public liability it is reasonable for the Principal to require this as a term of the insurance, before the Principal approves the insurance.

For small contracts (works contracts under \$100,000 and consultancy services engagements under \$30,000) the Principal may accept the risk of non-coverage, and if the contractor submits a certificate of currency or other proof of insurance that does not mention coverage of the Principal, the Principal may refrain from following up this requirement.

For contracts other than small contracts, the Principal should not waive this requirement.

Minor aspect - coverage of subcontractors

Procurement System standard form GC21 and Minor Works contracts require that subcontractors should be covered by any CAI of the works and/or public liability, so that additional expense is not generated by requiring every subcontractor to arrange its own insurance.

Coverage of subcontractors by an insurance policy may be accomplished by:

- subcontractors being among the entities listed in the policy as 'the insured', usually by descriptive reference, such as by references to 'subcontractors', or 'contractors to the insured';
- subcontractors being identified in a document issued by the insurer or insurance broker, associated with the policy identifying subcontractors as 'insured', 'named insured', or otherwise as persons to whom the insurance cover provided by the policy extends, usually by descriptive reference.

This requirement may generally be stated as a requirement that the insurance policy or associated documents must identify subcontractors, whether by name or otherwise, as a person to whom the insurance cover provided by the policy extends.

If the contract does not require subcontractors to be covered by any CAI for works and/or public liability it is reasonable for the Principal to require this as a term of the insurance, before the Principal approves the insurance.

For small contracts (works contracts under \$100,000 and consultancy services engagements under \$30,000) the Principal may accept the risk of non-coverage of subcontractors, and if the contractor submits a certificate of currency or other proof of insurance that does not mention coverage of subcontractors, the Principal may refrain from following up on this requirement.

For contracts other than small contracts the Principal may waive this requirement if the contractor provides evidence that exceptional circumstances apply and it is not practicable, without excessive additional cost to secure insurance that will cover subcontractors for works and/or public liability.

Minor aspect - cross-liability and waiver of subrogation

Procurement System standard form GC21 and Minor Works contracts require that policies for insurance of works and public liability, and marine insurance contain a cross-liability provision that ensures the policy responds to losses by one person covered by the insurance for which another covered person is liable, and a waiver of the insurer's rights of subrogation against persons covered by the insurance.

If the contract does not expressly require the inclusion of cross-liability and waiver of subrogation provisions in policies for insurance of works and related public liability, it is reasonable for the Principal to require these before the Principal approves the insurance.

An example clause for cross-liability is as follows

The policy must include a cross-liability clause, under which the insurer agrees that the term 'insured' applies to each of the persons covered as if a separate insurance policy had been issued to each of them.

An alternative example clause for cross-liability is as follows:

The policy must provide that, in respect of liabilities, it will operate in the same manner as if there were a separate insurance policy covering each of the persons covered by the policy.

An example clause for waiver of subrogation is as follows:

The policy must include a waiver of subrogation clause, under which the insurer agrees to waive all rights of subrogation or action against any of the persons covered.

For small contracts (works contracts under \$100,000 and consultancy services engagements under \$30,000) the Principal may accept the risk of not having cross-liability and waiver of subrogation provisions, and if the contractor submits a certificate of currency or other proof of insurance that does not mention cross liability or subrogation, the Principal may refrain from following up this requirement.

For medium contracts (works contracts between \$100,000 and \$10m, consultant engagements between \$30,000 and \$200,000) the Principal may accept a certificate of currency or other correspondence issued by an insurer or insurance broker, to whom a copy of the contract has been provided, stating that the insurance policy complies with the requirements of the contract, as evidence of satisfactory compliance with the cross-liability and waiver of subrogation requirements.

For contracts other than small contracts, the Principal should not waive the requirement for cross liability and waiver of subrogation.

Minor aspect - amount of coverage deficient but not grossly deficient

An insurance policy or certificate of currency submitted as proof of insurance must show the amount of insurance, and should show any limitations on that amount, such as any limitations to any one occurrence or in aggregate.

Amount of insurance does not need to be checked for workers compensation insurance because amounts of workers compensation insurance are prescribed by law.

Where a proof of insurance is defective because the amount of insurance shown is less than the amount required under the contract, but the discrepancy between the amount shown and the required amount is not substantial, the contract may be permitted to proceed, but it may be appropriate to withhold payments to the contractor, or to make deductions from payments, until the requirements are met.

Minor aspect - exclusions

Information about exclusions detrimental to the Principal will not normally be contained in a standard certificate of currency.

Examples of exclusions that may be detrimental to the Principal are:

- exclusions of any substantial category of work which is likely to be required under the contract, or
- exclusion of professional work performed by subcontractors or consultants engaged by the contractor.

For small contracts (works contracts under \$100,000 and consultancy services engagements under \$30,000) the Principal may accept the risk of detrimental exclusions, and if the contractor submits a certificate of currency or other proof of insurance that does not mention coverage of subcontractors, the Principal may refrain from following up on this requirement.

For contracts other than small contracts the Principal should ensure that this requirement is considered by:

- requiring disclosure in the form of an enhanced certificate of currency or a communication from the insurer or insurance broker stating whether the insurance policy complies with the requirements of the contract and clearly stating the effect of any provisions of the policy of a kind not usually included in contracts of insurance that provide similar cover, or
- in the case of large contracts examining the insurance policy itself.

If exclusions detrimental to the Principal are identified the Principal may choose to waive its rights to require or secure further insurance if the exclusions or possible detriments to the Principal are minor.

3.3 Procedures for checking insurance and responding to defects

Contract Requirement

Procurement System standard form GC21 an Minor Works contracts oblige contractors to effect and maintain insurance as specified in the contract, entitle the Principal to instruct the contractor to submit proof of insurance at any time, and, if the proof is not submitted or not to the satisfaction of the Principal, entitle the Principal to effect and maintain the insurances and to recover the premiums paid for insurance plus an amount of \$250 to cover the Principal's costs to cover the Principal's costs as a deduction against the contractors claims. Other construction contracts usually require the contractor to maintain specified insurance, and an instruction by the Principal to provide proof of insurance will normally be a reasonable instruction with which the contractor must comply.

Obtaining proof of insurance for checking

Letters of award or acceptance of contracts should instruct contractors to submit proofs of insurance. A suitable instruction to be included in letters of award or acceptance is shown in Sample letter *Proof of Insurance*.

The contract administrator should ensure that compliance with insurance requirements is checked before giving the contractor access to or possession of the Site. If no proofs of insurance are received when they are required for checking before the commencement of work, the contract administrator should check that the requirement to submit proofs has been communicated to the contractor, and if it has not, should promptly communicate that requirement by fax or e-mail, which may include the text shown in Sample letter *Proof of Insurance*.

The contract administrator may require the contractor to submit proofs of insurance other than before commencement. The text in Sample letter *Proof of Insurance* may be used.

Timing of initial checking

As soon as practicable after award of contract but in any case not less than 2 days before the date on which it is expected to make the site available to the contractor, the contract administrator should check whether or not proofs of insurance have been received from the contractor.

If proofs of insurance for all required insurances have not been received from the contractor, if work has not been commenced, the contract administrator should be prepared to prevent the contractor from commencing work, and not to give the contractor access to the Site. In any case the contract administrator should contact the contractor and discuss the submission of proofs of insurance.

The contract administrator should emphasise in any discussions, and confirm by facsimile or e-mail that the contractor must submit the required proofs to the satisfaction of the Principal within 24 hours, otherwise the contractor might not be permitted to commence work or given access to the Site. The text in [Sample letter *Submission of proof of insurance*](#) may be used in the confirmatory fax or e-mail.

Responses to unsatisfactory insurance

Termination - should be considered in some cases

It is unacceptable for work under a contract to proceed without the necessary insurance. If a contractor is unable or unwilling to secure required insurance, this constitutes a substantial breach of the contract and consideration should be given to terminating the contract.

For workers compensation insurance, it is not possible for the Principal to arrange substitute insurance, and it is not lawful for a contractor who is an employer to perform work without workers compensation insurance. Legislation compels insurers to provide workers compensation insurance to all employers, so there is no excuse for a contractor who is an employer to break the law by failing to hold workers compensation insurance. If a contractor does not obtain required workers compensation insurance, government agencies should, in all cases, take steps to terminate the contract.

In other cases, when the contractor has not been given access to the Site and prevented from commencing work because of failure to produce proof of insurance, the contract administrator should discuss the issue with the contractor and form an opinion whether the contractor is able to secure the required insurance or not. If the contract administrator forms an opinion that the contractor is not able to secure required insurance, steps should be taken to terminate the contract for default of the contractor, except in exceptional circumstances it is considered impractical to award the contract to any other contractor.

Suspension - only in limited cases

Apart from the case where defective insurance is discovered before work commences and it is decided to terminate the contractor, it will only be appropriate to suspend work for defective insurance in respect of contractors Insurance for Liability (including contractors insurance for special liability such as Marine, but in that case suspend only the special component of the works). It is not necessary to suspend works for defective insurance for workers compensation insurance or professional indemnity insurance, because workers compensation insurance, if necessary, is covered by the Principal's workers compensation insurance, and professional indemnity insurance is claims made cover, with the policy not required to be in effect at the time defective work is performed.

Withholding payments - usually appropriate

In each of these cases it is appropriate, where the contract conditions permit, to withhold payment of any contractors claims until the insurance requirements are

met, either by the contractor, or the Principal putting insurance in place, with costs recoverable from the contractor.

Workers compensation insurance - Informing WorkCover of defaults

For workers compensation insurance, where the contractor does not remedy the defective proofs by submitting satisfactory proofs promptly, WorkCover should be informed.

Procedure steps and flowcharts

Procedure steps

Procedure steps for checking and responding to defects in proofs of insurance are shown in the flowcharts below. The procedures shown apply equally to checking of insurance before and after commencement of work and to all natures of insurance. Special considerations for different natures of insurance are noted where necessary.

The steps shown in the flowchart are based on checking of certificates of currency or insurance policy following the guidance about major and minor aspects, and the checklists provided elsewhere in this Procurement Practice Guide.

Sample text for communication to contractors

Example texts that may be used in communications to contractors are included in the sample letters as follows:

- Instruction to contractor to provide proof of insurance which may be used in letters of award or acceptance, or at any time proof of insurance is required: Sample letter *Proof of insurance*;
- Confirmatory fax or e-mail which may be used following contract administrators discussions with the contractor, when contractor is being allowed 24 hours to provide proofs of insurance: Sample letter *Submission of proof of insurance*;
- Notice that proof of insurance is insufficient: sample letter *Proof of insurance is insufficient in respect of minor aspects*;
- Notice that proof of insurance indicates that insurance is unsatisfactory: Sample letter *Unsatisfactory proof of insurance*.

Figure 1 - Procedure Flowchart - Checking Insurance Page 1

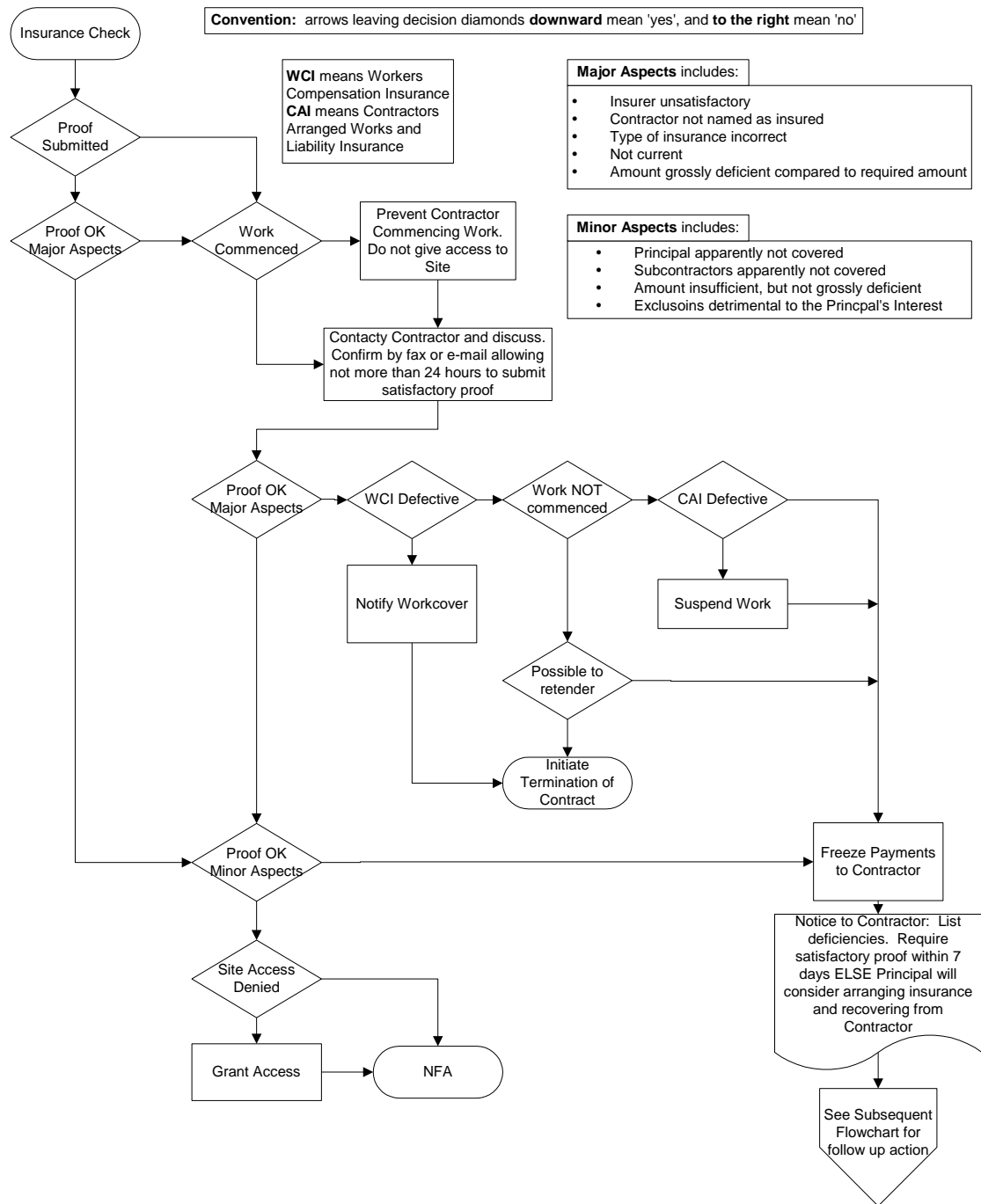
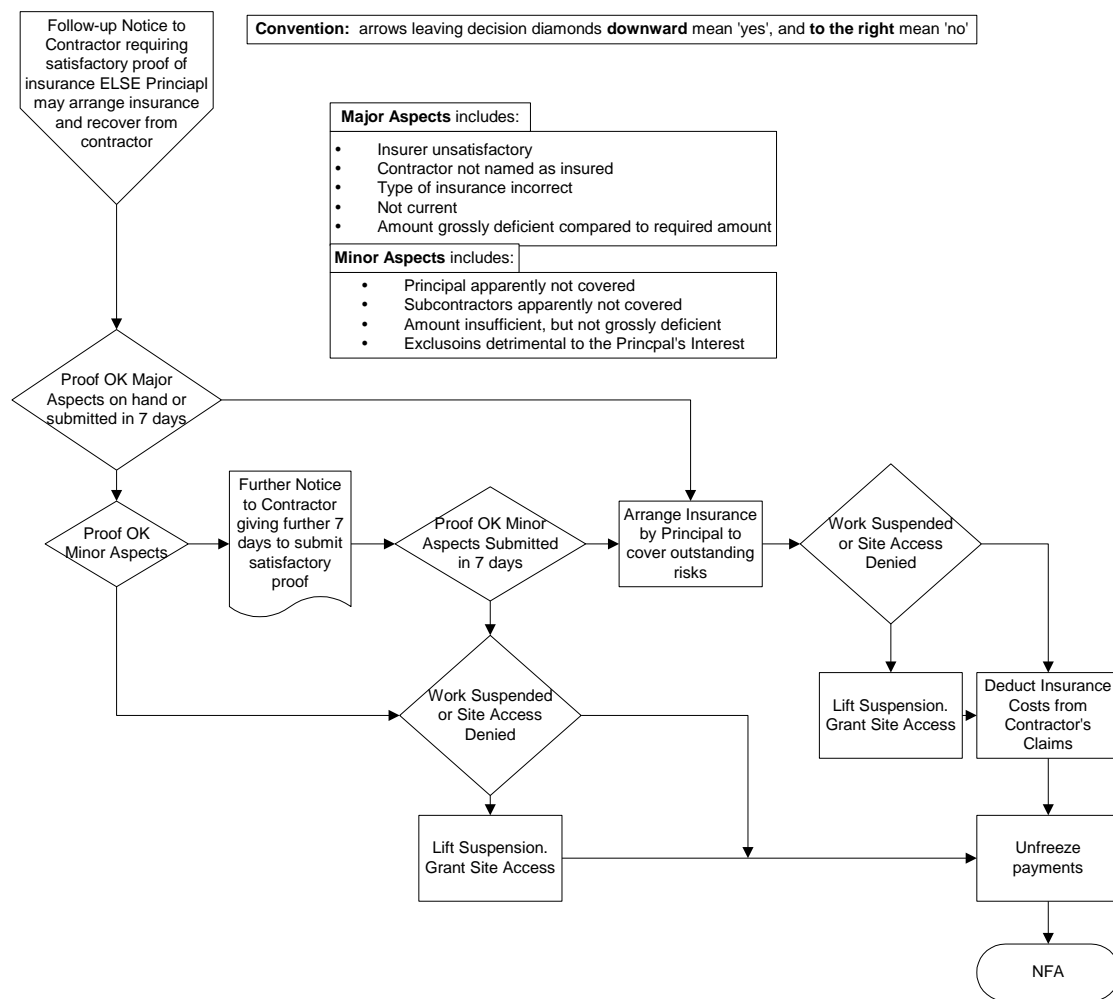


Figure 2 Procedure Flowchart - Insurance Checking Page 2



4 Use of Procurement System Insurance Policies

4.1 Introduction

The State Contracts Control Board has secured a Contract Works and Public Liability Insurance Policy with associated insurance broker services which is required, where possible, to be used to provide PAI for projects for agencies which are required to use the Procurement System. The policy may also be used by the following agencies which are not required to use the Procurement System:

- Department of Housing,
- Maritime Authority,
- Roads and Traffic Authority,
- Sydney Catchment Authority,
- Sydney Harbour Foreshore Authority, and
- Sydney Olympic Park Authority.

The policy will usually only be available to cover conventional building and minor engineering works and will not be available to for large scale or specialised civil engineering works.

Works estimated below \$100,000 may be covered by contractor's insurance instead of Procurement System insurance.

The Procurement System Contract Works and Public Liability Insurance Policy is at:

<http://www.nswprocurement.com.au/Procurement-System-for-Construction/Contract-management/Insurance-Policies.aspx>

or alternatively, www.jlta.com.au/nswgci.

Agencies that are required to make use of the policy must:

- enter certain agency details into the on-line system maintained for the Procurement System by the insurance broker;
- authorise Project Managers or other persons or staff to input details of contracts to be covered by the Procurement System insurance into the on-line system;
- ensure that details of contracts to be insured are declared to the insurance broker; and
- Ensure that necessary premiums are paid to the insurance broker promptly on invoice.

Required procedures for use of the Procurement System Contract Works and Public Liability Insurance Policy are shown subsequently.

Details of the insurance broker are:

Jardine Lloyd Thompson Pty Ltd
Level 11, 66 Clarence Street
SYDNEY NSW 2000

Contact Person: Brenda Duncan-Smith
Telephone: 9290 8182
Facsimile: 9262 2627
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4.2 Values and risk levels covered and sum insured

Valuation of contracts for insurance purposes

For the purposes of insurance, estimated costs or contract values are values exclusive of GST.

Works and Public Liability Insurance

The Procurement System Contract Works and Public Liability Insurance Policy covers all works except:

- where the cost of the works is estimated to be over \$30m;
- where the works include High Risk Civil Engineering works which are works which involve flood mitigation, levy banks, dams, weirs, tunnels, bridges, jetties, work under and over water, and similar type works and the estimated cost of the High Risk Civil Engineering works is over \$1m;
- projects where the estimated period at the time of award of contract for the following exceeds the period shown:
 - the contractual period for completion (GC21 and Minor Works) of all milestones exceeds 36 months; or
 - any Maintenance or Defects Liability Period exceeds 12 months.

Contracts falling outside the above limits may have project specific insurance provisions similar to those in the Procurement System policy arranged through the insurance broker.

For contracts with values estimated to be less than a specified amount and which include High Risk Civil Engineering works components, the cover for the works is the specified amount for any one occurrence (specified amount is \$1m as at 1 October 2007).

For contracts with values estimated to be less than a specified amount, which do not require special insurance, the cover for the works is the specified amount for any one occurrence (specified amount is \$30m as at 1 October 2007).

Public Liability cover is \$20 Million for any one occurrence. The insurance covers the contractor, Principal, Superintendent, Project Managers, and all subcontractors employed on work under the contract.

For contracts where a separate project specific policy has been arranged, the cover will be the amounts advised by the insurance broker.

Alternative CAI for contracts valued at more than \$20m

For contracts valued over \$20m the Procurement System standard form GC21 Conditions of Tendering provide that a tenderer may propose CAI as an alternative to PAI. A Principal may accept the contractor's proposal if it represents value for money. If CAI is proposed in place of PAI, the Principal should only consider the proposal if it offers a substantial saving without a significant reduction in coverage compared to the applicable PAI policy.

If CAI is being considered, the Project Manager must examine copies of the proposed CAI policies, with the assistance of an independent insurance expert if required, and verify that the terms and conditions are not significantly less favourable to the Principal than the applicable PAI policy. The CAI alternative must not be accepted unless this has been verified. If such a proposal is accepted by the agency, then a copy of a report detailing the review and its findings is to be provided to the Department of Commerce.

4.3 Exclusions and Conditions and Exceptional High Risk

Works and Public Liability Insurance

The Procurement System Contract Works and Public Insurance Policy contains specific exclusions and extra conditions. Examples include

- work at gaols,
- piling work,
- underground services excavation precautions (Dial before you Dig) , and
- welding work.

Project Managers for projects involving work like this should examine the policy, and ensure that contractors are aware of their obligations in regard of these issues.

Some contracts with exceptionally high-risk exposure, for example, minor excavation next to the Sydney to Melbourne telephone cable, may need additional insurance cover. This should be by specific risk management processes in consultation with the insurance broker.

4.4 Deductibles or Excesses, Premiums and Policy Details

Insurance is subject to deductible amounts ('deductibles' or 'excesses'), required to be met by contractors before payment under the policy will be made. Different deductibles are specified for different values of works and for High Risk Civil Engineering works. Deductibles are payable by the contractor, and are not a direct risk to the Principal. Contractors may ascertain the deductibles by referring to the insurance policy.

Premiums for Principal Arranged Insurance vary from time to time and will be notified to Agencies and incorporated the Conditions of Tendering contained in current Procurement System standard form contracts.

4.5 where Procurement System PAI may not apply

The insurer may decline to provide coverage under the Procurement System Contract Works and Public Liability Insurance Policy, or the insurance cover may be subject to excessive premiums or conditions for:

- Large projects over valued \$30m,
- High Risk Civil Engineering projects over \$1m, or

- Long duration projects over 36 months.

For these sorts of projects, which are exceptional and readily identifiable, the Principal must take special care to ensure that insurance availability and terms are confirmed, through the insurance broker, before calling tenders.

If the Procurement System insurer declines to provide cover or requires excessive premiums or conditions, CAI obtainable by contractors may be also expensive and severely limited. Special PAI may well be the best option.

If the insurer declines cover, or requires additional premiums or special conditions that are unacceptable to the Principal, the Principal must make appropriate alternative arrangements for insurance, choosing between PAI arranged specially for the project, and CAI. The Principal must either amend tender documents or vary the awarded contract to reflect changed insurance requirements.

If the insurer advises that it declines or withdraws coverage late in the tendering process or during the contract period, the Principal must ensure that alternative insurance is in place, issuing addenda to tender documents or variations to contracts as necessary.

If a tenderer proposes CAI in place of PAI the Principal should only consider the proposal if, initially, there is an apparent substantial saving in tender price. If the Principal wishes to consider a proposal for CAI, the Principal must obtain a copy of the CAI policy proposed and examine it in detail to verify that the terms and conditions are not significantly less favourable to the Principal than the applicable PAI.

If the Principal has no available staff with the necessary knowledge and experience in analysing insurance policies, the Principal should engage a reputable insurance broker to examine the insurance policies and provide advice.

The Procurement System insurance broker may be engaged, but this service is not available without charge, and a separate engagement, with an appropriate fee, between the Principal and the insurance broker must be entered into.

4.6 Procedures for using the Procurement System Contract Works and Public Liability Insurance Policy

Tender and Contract Requirements

Procurement System standard form conditions of tendering include reference to the website which shows details of the Procurement System Contract Works and Public Liability Insurance Policy and general contract conditions include an undertaking by the Principal to provide the insurance.

On acceptance of a tender this insurance policy comes into effect and the Principal is required to pay the premium invoiced by the insurance broker.

System Outline

The Procurement System Insurance online system relies on interaction between the following entities:

- the insurance broker,
- Project Managers,
- Agency Client Administrators for each Principal, and
- Branch/Region/Project Offices identified by Principals which will be responsible for receiving and paying invoices for insurance premiums

Project Manager Responsibility

Where these procedures describe actions or responsibilities of a Project Manager, these need not be performed personally by the Project Manager, but may be performed by employees of the Project Manager or other persons, as directed or

arranged by the Project Manager, but the Project Manager remains responsible for the effective performance of those actions and responsibilities.

After the Letter of Acceptance or Award is issued, the Project Manager must promptly declare the details of the contract to the insurance broker, using the Procurement System Insurance online system, to ensure that insurance coverage is documented and invoices for payment of premiums are issued.

Project Managers must ensure that the correct Branch/Region/Project Office is nominated for each contract declared.

System Access and Authorisation for Project Managers

To enter contract details on the Procurement System Insurance online system, the Project Manager must:

- have a UserID and password for the system, and
- know which Branch/Region/Project Office of the Principal will be responsible for receiving and paying invoices for premiums, and have authorised system access to enter contract details against that Branch/Region/Project Office.

Principals must appoint Agency Client Administrators to ensure that necessary access is authorised for Project Managers to enter insurance details on the online system.

Detailed Procedures for Declaring Contracts, Requesting Quotations and Controlling System Access

Procurement Practice Guide [Using the Procurement System Insurance Online System](#) contains detailed procedures to be followed by:

- Project Managers to obtain access to the Procurement System Insurance online system and declare contracts or obtain quotations for insurance premiums; and
- Principals and their Agency Client Administrators to maintain data and give Project Managers access to the system.

4.7 Making and Monitoring Payment for Procurement System Contract Works and Public Liability Insurance

When the Project Manager has submitted details of contract that is eligible for coverage under the standard Procurement System Contract Works and Public Liability Insurance Policy, the insurance broker will immediately pass the details to the insurer and issue an invoice for the premium to the Branch/Region/Project Office named, with an information copy to the Project Manager, to assist the Project Manager in any necessary certification, monitoring and following up of payment.

The Branch/Region/Project Office receiving the invoice must make arrangements for its prompt payment in accordance with the terms of the invoice.

If the invoice is not paid on time the insurance broker will issue a non-payment follow-up to the Branch/Region/Project Office, with an information copy to the Project Manager. The Branch/Region/Project Office and the Project Manager must cooperate to ensure that overdue payments are made promptly.

If payment is not made, the insurer may, with notice, cancel the insurance, which will expose the Principal to serious risk of loss or damage to property or contractual default and damages to the Contractor.

4.8 Changes in Contract Price Escalation During Course of Contract

If at any time, by variation or otherwise, the amount payable to the contractor increases so as to exceed the Contract Sum or Contract Price at the time of award by more than 15% the insurance broker must be notified, so that the insurer's agreement to the additional sum insured can be obtained, and the additional insurance premium can be calculated, and the Branch/Region/Project Office invoiced for the adjustment.

Procedures for Identification of Escalation at Finalisation

Upon finalisation of the contract, if the final amount payable to the contractor exceeds the Contract Sum or Contract Price at time of award by more than 15%, the insurance broker must be notified, so the total insurance premium can be adjusted, and the Branch/Region/Project Office invoiced for the adjustment.

Procedures for Identification of Diminished Value at Finalisation

If the final amount payable to the contractor is less than Contract Sum or Contract Price at time of award by more than, the contract administrator must notify the insurance broker of the total final value to enable the insurance broker to refund the insurance premium adjustment to the Principal.

4.9 Claims and Notification of Incidents or Accidents

The contractor must notify the insurance broker immediately of any accident or circumstance which might give rise to a third party liability claim. The contractor is to make claims direct to the insurance broker and is responsible for meeting any “excesses” under the policy.

The Project Manager must assist the Contractor to make claims by providing access details to the insurance broker if necessary.

Procedures and insurance broker contact details for making claims appear on the Procurement System Insurance online system website at www.jlta.com.au/nswgci

4.10 Insurance of Works and Public Liability - Contractor Arranged

Insurance

Mini Minor Works Contracts and Minor Works Contracts under \$50,000

Procurement System Mini Minor Works standard form contracts require, for works under \$50,000, that, instead of the Procurement System Contract Works and Liability Insurance Policy being used, the contractor must hold or effect works and public liability insurance with approved insurers.

4.11 Insurance of the Works - Cessation of Construction Insurance

Insurance of the Works under the Procurement System Contract Works and Liability Insurance Policy ceases and the Principal or the Owner of the asset is responsible for insurance of the Works from the earliest of

- time agreed between the Superintendent or any other person representing the Principal and the contractor that:
 - the works are complete, or
 - the works are complete except for minor omissions and minor defects which do not prevent the works from being reasonably capable of being used for their intended purpose, or
- with respect to the whole of the Works or any portion of the Works, the time it is taken over or taken into use by the Principal (including the owner of the asset).

The Procurement System Contract Works and Liability Insurance Policy also covers contractual liability of the contractor during the any Defects Liability Period up to 12 months.

Insurance under Contractor Arranged Insurance may be taken to cease no later than Principal Arranged Insurance unless otherwise advised by the contractor.

Consequently, the Principal or Client Agency must be advised *in sufficient time before agreement about the time of Completion (or Practical Completion), or taking over or taking into use of any part of the Works, that the agency or entity having ownership of the asset must ensure that the Works are adequately insured from the date to be agreed, or on which taking over or taking into use is to occur.*