



Procurement Insurance Requirements Guideline

Introduction to procurement insurances

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Contents

Introduction	1
1. Government insurance.....	1
2. Supplier insurance.....	2
2.1 Insurable risks	3
2.2 Types of insurance	4
2.3 Determining the level of insurance – maximum probable loss.....	5
2.4 Evidence of insurance currency	5
2.5 Insurance cover extensions and exclusions	6
3. Further information.....	7

Procurement Insurance Requirements Guideline

Introduction

This guideline provides an introductory overview of the relationship between the procurement risk management process and insurance requirements. The guideline is general in nature and is not intended to substitute subject matter specific guidance or specialist advice given in the context of an individual procurement process.

1. Insurance

A contract of insurance is an agreement to transfer financial risk from one party (the insured) to another (the insurer) for a fee (i.e. insurance premium). Entering a contract of insurance does not remove the liability of a party for its actions. It only results in an insurer bearing some or all the financial costs of the insured where liability arises.

Insurance is a common risk management strategy used in government contracting, and forms one aspect of an overall risk strategy. As such, a risk assessment should first be undertaken during the planning stage to inform insurance requirements for a procurement or project (see the [Risk Management in the Procurement Context Guideline](#)). The risk assessment should be continuously monitored and reviewed to ensure risks are managed appropriately.

Most risks that may adversely impact the State will be insurable, such as injuries caused to someone visiting a supplier's premises as a result of the premises being unsafe. However, some risks are not insurable such as reputational risks. These risks should be managed through active contract management, including reporting against key performance indicators.

2. Government insurance

The Insurance Commission WA (ICWA) provides contractual liability cover to agencies, as part of the RiskCover Fund. The Fund provides cover for the State if losses occur as a result of contracts and it applies automatically unless:

- the agency waives or limits its right of recovery (i.e. agrees to cap liability) or indemnifies another party; or
- the contract establishes a joint venture or partnership in which the State is one party of the joint venture or partnership.

Agencies should notify ICWA if any of the above situations arise, and ICWA will evaluate reinstating cover.

ICWA provides cover on the condition that losses can be recovered from the supplier responsible for causing the loss. ICWA may be unable to recover a loss if the supplier

is protected by a liability cap. ICWA may subsequently limit an agency's contractual liability cover to the amount that can be recovered from the supplier. The agency would then bear any loss above the liability cap.

ICWA's notification requirements are set out in detail in the RiskCover Fund Guidelines (available from ICWA on request). In summary, an agency is required to provide ICWA with:

- details of the procurement, such as the procurement planning and approach to market documents (e.g. the Procurement Plan and Request for a goods and services process);
- a copy of the completed risk register (e.g. the 'Risk Register' worksheet in the [Risk Workbook](#) template); and
- an overview of the insurable risks and calculated maximum probable loss.

ICWA will review the information provided and if complete, provide advice on suitable indemnities and insurances. Where necessary, ICWA will request additional information to inform the advice. If ICWA agrees to reinstate contractual liability cover in full or in part, ICWA will issue the agency with a certificate.

It is recommended that the agency contacts ICWA as early in the procurement planning process as possible to discuss insurance requirements or liability capping. It is important to note that once insurances have been specified within the approach to market documentation (the **Request**) document and associated contract terms, and offers received, it may be too late to incorporate advice from ICWA regarding the levels and types of insurances most appropriate for the contract. It may be possible to incorporate the advice by addendum after the Request has been issued, however, this practice should be avoided.

Agencies can obtain further information about contractual liability cover by contacting ICWA by email at contracts@icwa.wa.gov.au or by visiting the website <https://www.icwa.wa.gov.au/>.

3. Supplier insurance

The main reasons for including insurance requirements in government contracts are to:

- reduce the risk of the supplier not having sufficient financial resources available to meet a liability to the organisation or some other party; and
- ensure that the supplier has sufficient means, via their insurance companies, to pay for any claims made and still be able to perform its obligations under the contract.

Insurance is a form of risk sharing and it is important to remember that it does not control or prevent risks from occurring. For this reason, agencies should consider the suitability of the insurance requirements included in their contracts.

A risk assessment can assist an agency in determining the appropriate insurance requirements for a contract, both in terms of the types of insurances that should be

included and the amount of insurance the supplier should hold (see the [Risk Management in the Procurement Context Guideline](#) for more information on performing a risk assessment).

Liability can also extend to subcontractors engaged by the supplier. If relevant, the agency should require the supplier to take appropriate steps to ensure that subcontractors have sufficient cover under their relevant insurance policies.

Procurement templates developed by the Department of Finance or your agency (as applicable) contain standard insurance clauses. Changing these clauses may have unintended consequences, so advice should be sought from ICWA early in the procurement planning process and prior to making a request to reinstate the cover (as discussed in the section 2 above).

3.1 Insurable risks

The risk assessment process can help to determine which risks can be insured, either by the supplier or the agency. Insurable risk categories that are generally applicable to a broad range of procurement types include events that may cause:

- injury;
- property loss or damage;
- financial loss, e.g. costs and expenses to redesign; or
- other loss, e.g. breach of copyright, defamation.

There are other specialist insurances available that may be relevant depending on the nature of a procurement. Some examples of other specialist categories of risk include:

- cyber;
- property in transit;
- plant and equipment;
- contract works / material damage;
- asbestos, pollution and environmental liability;
- hazardous materials
- motor vehicle third party liability (other than risks covered under compulsory third party motor vehicle insurance); and
- aviation or maritime issues.

While the names of insurance policies are a guide to the type of insurance they provide, it is important to remember that sometimes policies with the same names cover different risks, and sometimes policies that cover the same risks have different names. Further, some insurance companies may offer combined policies covering more than one type of insurance. It is therefore always important to look beyond the name of any insurance policy and consider the risks that it actually covers. Seek advice from ICWA who will assist in identifying the correct policy to correspond with the risk to be insured.

3.2 Types of insurance

Below are descriptions of some of the common types of insurance included in government goods, services and works contracts:

(a) Public and Products Liability Insurance

Public and product liability insurance covers legal liability to pay compensation for loss of or damage to property and personal injury, death or illness to any person (other than liability required under workers compensation law) as a result of an occurrence arising out of or in connection with the goods or services provided.

(b) Workers' Compensation Insurance

Workers' compensation insurance is required by law to be held by employers to cover their statutory obligations to employees who suffer work-related injuries or disease. If a party does not hold the required workers' compensation insurance, the agency is likely to be required to pay statutory compensation claims for work related injuries or disease. Workers' compensation insurance is usually held by all parties as part of their ordinary business practices.

(c) Professional Indemnity Insurance

Professional indemnity insurance covers breach of duty owed in a professional capacity by professionals and other skilled suppliers for legal liability arising out of the provision of professional activities and services. This relates to claims for negligence, breaches of professional duty and reasonable care connected with the standard or quality of the professional activities or services in relation to a project. It may also cover pure financial loss, death, illness, personal injury or property loss or damage arising from or directly from a breach of professional duty, fraud, infringement of intellectual property rights, breach of confidentiality, defamation or loss of documents.

(d) Contract Works Insurance (Material Loss or Damage)

Contract works insurance (material loss or damage) *is applicable to works contracts only*. It covers costs and losses arising from physical loss of, or damage to, the contract works and associated materials while under construction or during the defects liability period. Where the contractor or other negligent party does not have the financial resources to fund the rectification of the damage to the works and associated materials, the agency may be exposed to loss unless the works are insured.

(e) Contract Works Insurance (Legal Liability)

Contract works insurance (legal liability) *is applicable to works contracts only*. It covers legal liability for loss of or damage to and loss of use of any property (other than property covered under contract works (material loss or damage) Insurance) and personal injury, death or illness to any person (other than liability under workers' compensation law) arising out of or in connection with the works.

3.3 Determining the level of insurance – maximum probable loss

Insurance requirements should be appropriate for the scale and complexity of the procurement, otherwise an agency may pay additional costs due to suppliers incorporating these costs in their offered price. Excessive insurance requirements can also potentially dissuade suppliers from submitting an offer or require negotiations between the parties, particularly if the supplier is a small or medium enterprise and the insurance requirement is expensive or unnecessary.

The amount of insurance should be based on the likely financial exposure or loss that the agency would incur if the risk materialised. The estimate of the financial exposure or loss is known as maximum probable loss. The agency representative, using their knowledge of the goods, services or works and the agency environment, must make its own estimate of the financial consequences to determine the maximum probable loss for each risk.

Maximum probable loss combines the financial consequences of the identified risks with the likelihood of those risks eventuating, as well as any controls and treatments that are in place to mitigate it.

Some aspects to consider when calculating maximum probable loss include:

- The damages that a party can claim as a result of a direct or indirect loss (e.g. if critical systems shutdown or are compromised). Legal costs and awarded damages for similar claims could be used to quantify this type of loss; and
- The cost of replacing goods or purchasing additional services that may occur as a result of the risk occurring (e.g. the cost of replacing damaged equipment, property, etc). The value of the goods that need to be replaced could be used to quantify this type of loss.

To assist with quantifying maximum probable loss, agencies could consider seeking guidance from internal subject matter experts, risk management advisors or legal teams. If advice is not available internally, the agency could consider engaging the services of a risk management consultant from the [Common Use Arrangement for Audit and Financial Advisory Services](#) (CUAFA2018).

3.4 Evidence of insurance currency

Suppliers should be asked to provide a certificate of currency from their insurer as evidence of the currency of required insurance(s) prior to contract award.

Agencies should be satisfied that the certificate of currency is true and correct and issued by a reputable and solvent insurer, which is authorised to operate as an insurance company in Australia. Agencies should also ensure that the certificate confirms the currency of an underlying insurance policy that complies with the insurance provisions in the relevant approach to market and/or contract documents.

Refer to ICWA's [Certificate of Currency Checklist](#) for further guidance on reviewing certificates of currency. This checklist has been prepared for use in connection with goods and service procurements and covers the key information required to confirm

the scope and coverage of any required insurances. While the concepts in the checklist may also be applicable to other types of procurements (such as works), you should consider adapting or supplementing the checklist as required. If in doubt, seek advice from your agency's subject matter experts and/or ICWA to ensure that you use a checklist that is suitable and sufficient for your process.

A certificate of currency will usually include the following information:

- the type of insurance cover;
- who the insured is;
- who the insurer is;
- the level of cover;
- the period of insurance; and
- the scope of cover (which may be limited geographically or exclude certain events).

Certificates may also include details of any extensions of cover, excesses (deductibles), indemnities, sub-limits of liability, and details of any exclusions. Depending on the nature of the procurement, it may be necessary to also check these details.

For any project-specific insurance, for example works insurance, design and construct, or insurance of specific plant or equipment, it is recommended that details of the project and the specific plant are specified in the certificate of currency, consistent with the details in the contract.

The currency of insurances should be monitored in the contract management stage. This includes periodically checking the currency and any changes in insurance cover. If an insurance policy will expire and require renewal during the term of the contract, the contract manager should ensure renewals are attended to at the appropriate time and sufficient evidence of renewal is provided before the policy expires, usually around 4 weeks before expiry.

3.5 Insurance cover extensions and exclusions

Exclusions in insurance policies are often, but not always, referred to on certificates of currency. Where exclusions are not listed on a certificate, or the detail in the certificate is insufficient to determine the scope of the exclusion, it is recommended that agencies clarify any relevant exclusions with the supplier. Agencies should ensure that there are no exclusions for any risks that should be covered under the contract or that may impact the ability to make a claim under the policy.

Likewise, if the Request requires the supplier to obtain extension(s) to standard insurance cover, the extended cover should also be specified in the certificate of currency or otherwise confirmed in writing by the relevant supplier and their insurer. Principal indemnity cover under a workers' compensation insurance policy is an example of coverage that is commonly provided by way of an extension to standard cover.

4. Further information

This guideline has been published by the Department of Finance to provide an introductory overview of procurement insurance requirements for practitioners working across the public sector. It is general in nature and should be read together with related resources, including:

- the [Risk Management in the Procurement Context Guideline](#), [Risk Workbook](#), and other [Procurement Guidelines](#), and
- relevant online and workshop training, such as [Risk Management in the Procurement Context Training](#) and related modules, and other [training for buyers](#).

You are also encouraged to seek further information and guidance, relevant to the type of procurements conducted by your agency, from sources including but not limited to:

- your agency's risk management policies, procedures or guidance
- industry or risk category specific information (e.g. cyber (technology) insurance guidance under the [CUAICTS2021](#) buyers guide or advice from the Office of Digital Government's [Cyber Security Unit](#))
- your agency's subject matter experts (e.g. works practice advisors), risk management advisors or legal team, and
- external experts such as ICWA or risk consultancy services sourced from CUAFA2018, and SSO for legal matters.