



SAICORP

GOVERNMENT CONTRACTS

A GUIDE TO THE INSURANCE ISSUES

This document is a guide only. It is not intended to replace professional advice for Government agencies intending to enter into a contract as risk profiles, legal issues and insurance requirements will vary from contract to contract. Should a Government agency require advice with respect to such a contract, it should consult with SAICORP regarding any insurance or risk management issues and with the Crown Solicitor's Office (or its other legal adviser) with respect to terms and conditions of the proposed contract or any other legal issues.

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INTRODUCTION

SAICORP recognises the positive approach adopted by many agencies to managing risk exposures associated with contracting, particularly the issues of insurance and capping of liability. This Guide was first produced in 2002 to provide agencies with guidance in respect of insurance, indemnity and limitation of liability issues.

Much has happened since that time and there are now standard State Procurement Board (SPB) contracts and Department of Treasury and Finance “Guidelines for the Limitation of Liability of Suppliers, Consultants and Contractors” (Guidelines). However, after a number of enquiries SAICORP has decided to refresh the Guide to provide agencies with guidance regarding the types and amounts of insurance that may be required in contracts.

There is currently work being undertaken in respect of the State Procurement Board Standard Contracts and the Guidelines and once this has been finalised we will update this document accordingly.

This guide is designed to assist your agency in respect of the majority of contracts involving both contractors and consultants. It does not apply to leasing and property matters.

Roles of SAICORP and the Crown Solicitor’s Office

- SAICORP provides advice to Government agencies regarding insurance and risk management issues associated with Government contracts.
- The Crown Solicitor’s Office (or other legal advisor to Government) provides legal advice on the terms and conditions to be included in contracts to be entered into by Government agencies and on any other legal issues associated with such contracts.

This guide does not apply to major/complex contracts, where more specific advice should be sought from SAICORP and/or your legal adviser.

SAICORP ADVICE

SAICORP can provide advice to agencies when a contract is:

- intrinsically complex or unusual;
- politically sensitive;
- has a potentially high risk exposure;
- capping of liability has been suggested by the contractor/consultant;
- the contractor has sought an indemnity from your agency;
- insurance/indemnity issues cause concern.

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INSURANCES, WHY ARE THEY NEEDED?

- Government Agencies should not be liable for a contractor's/consultant's failure purely because of a perception that the Government can bear a loss i.e. "deep pocket" syndrome.
- To ensure that contractors/consultants have access to funding (by way of insurance) to cover their liability to third parties and to enable your agency to claim against the contractor/consultant where it suffers losses arising out of the contractor's/consultant's negligence.

INSURANCES – POLICIES REQUIRED, LIMITS & EXPOSURE CONSIDERATIONS

TYPE OF INSURANCE & SUMMARY OF COVER	WHEN REQUIRED FROM A CONTRACTOR/CONSULTANT	EXPOSURE CONSIDERATIONS	SUGGESTED LIMITS
<p>Public Liability</p> <p>Covers:</p> <p>Legal liability for bodily injury/property damage occurring in connection with the contractor's/consultant's business arising out of its negligent acts or omissions.</p>	<p>Always</p>	<ol style="list-style-type: none"> 1. Is the activity hazardous? 2. Is there a large public presence? 3. What is the maximum probable loss as a result of one event? i.e. multiple claims from one event. 4. The limit applies at the time of the occurrence not when a claim is made. However claims may take many years to settle at amounts based on costs at the time of settlement. Minors may have up to 21 years to claim. 	<p>\$10M minimum. Where there is large exposure involving large public presence (particularly children) levels could be up to \$50M +</p> <p>* The limit of liability applies to all claims arising from any one event/occurrence.</p>

TYPE OF INSURANCE & SUMMARY OF COVER	WHEN REQUIRED FROM A CONTRACTOR/CONSULTANT	EXPOSURE CONSIDERATIONS	SUGGESTED LIMITS
<p>Products Liability</p> <p>Covers:</p> <p>Legal liability for bodily injury/property damage in connection with the contractor's/consultant's business arising out of "products" sold or supplied by it (after the "products have left the Insured's possession). "Products" includes goods sold, supplied, repaired etc.</p> <p>This cover is often included as an addition to public liability. It can also be issued as a separate policy.</p>	<p>Where the contractor/consultant provides products that are sold or supplied as part of the contract and which could cause injury or property damage.</p>	<ol style="list-style-type: none"> 1. Could the products cause injury/property damage? 2. Is there a large public presence? 3. What is the maximum probable loss as a result of one event? i.e. multiple claims from one event. 4. The limit applies at the time of the occurrence not when a claim is made. However claims may take many years to settle at amounts based on costs at the time of settlement. Minors may have up to 21 years to claim. 	<p>\$10M minimum. Where the injury or damage arising from the product could involve multiple claimants higher limits should be considered.</p> <p>* The limit of liability in respect of Products Liability is the limit any one claim AND in the aggregate during a policy period.</p>

TYPE OF INSURANCE & SUMMARY OF COVER	WHEN REQUIRED	EXPOSURE CONSIDERATIONS	SUGGESTED LIMITS
<p>Professional Indemnity</p> <p>Covers:</p> <p>Legal liability arising out of negligent acts errors or omissions of a professional nature, which cause financial loss.</p>	<p>Where a negligent act, error or omission of a professional nature by a consultant could result in financial loss to Government or other third parties.</p> <p>Where it is identified that a breach of professional duty could result in a financial loss to the agency/Crown and/or any other party relying on that professional advice, the consultant should be required to carry PI cover.</p>	<p>1. What is the maximum exposure if the worst case occurs?</p> <p>Professional Indemnity and Directors' and Officers' Insurances are usually "claims made" policies. This means that such a policy responds to a claim at the time the claim is made, not when the consultancy was current or when the incident leading to the claim occurred. This often means that the consultancy is completed before claims are made. This is why the contract wording may require such policies to continue for a specified period after expiry of the contract, dependant on the perceived exposure.</p>	<p>\$1M-\$20M dependent on identified levels of risk exposure.</p> <p>* The limit of liability in respect of Professional Indemnity is the limit any one claim AND in the aggregate during a policy period.</p>

TYPE OF INSURANCE & SUMMARY OF COVER	WHEN REQUIRED	EXPOSURE CONSIDERATIONS	SUGGESTED LIMITS
<p>Workers Compensation</p> <p>Covers:</p> <p>Legal liability under legislation for injuries sustained by employees in the course of their employment.</p>	<p><u>Always</u> where the contractor/consultant employs or may employ anyone.</p>	<p>As per legislation</p>	<p>As per legislation</p>

TYPE OF INSURANCE & SUMMARY OF COVER	WHEN REQUIRED	EXPOSURE CONSIDERATION	SUGGESTED LIMITS
<p>Contract Works</p> <p>Covers:</p> <p>Contract Works policies are usually in two sections:</p> <ol style="list-style-type: none"> 1. Contract works (Material Damage to the “Works”) <p>And</p> <ol style="list-style-type: none"> 2. Liability arising from the “Works” 	<p>When the contract involves construction of new buildings/plant, building refurbishment, dismantling and installing plant, office fit out and maintenance.</p>	<ul style="list-style-type: none"> • Contract Value • Is there a large public presence? • Do the works involve any unusual hazards? 	<ol style="list-style-type: none"> 1. Contract Works <p>Contract value plus margin for additional costs.</p> <ol style="list-style-type: none"> 2. Liability <p>\$10M minimum, depending on exposure to third parties for death, injury or property damage.</p>
<p>As an alternative to requiring the contractor to carry this insurance, you can access the Government’s Principal Controlled Contract Works Insurance. Please contact SAICORP for details. If this insurance is arranged by the Agency the “Contract” should reflect this arrangement.</p>			

Consult with SAICORP if contemplating requiring any of the undernoted insurances

TYPE OF INSURANCE & SUMMARY OF COVER	WHEN REQUIRED	EXPOSURE CONSIDERATIONS	SUGGESTED LIMITS
<p>Assets (Industrial Special Risks - "ISR").</p> <p>Covers:</p> <p>Declared assets against loss, damage or destruction. Can also cover consequential losses such as loss of revenue and additional costs arising out of the loss, damage or destruction of the declared assets.</p>	<p>Rarely. Only if specific contractor's/consultant's assets can be identified (and valued) as being an integral means of providing the services and to which no alternative would be available if lost, destroyed or damaged to enable the continuation of those services.</p>	<p>1. Are specific assets needed to supply the services and can they be identified/valued?</p> <p>2. If those assets were destroyed/lost could the services continue?</p>	<p>Replacement value of the assets.</p>
<p>Motor Insurance</p> <p>Covers:</p> <p>Motor Vehicle "Comprehensive"</p> <p>(1) Damage to insured vehicle.</p> <p>(2) Third Party Property Damage - covers liability for damage caused by the use of the insured vehicle.</p>	<p>Rarely. Only if the use of motor vehicles is an integral part of the contract (not just incidental).</p>	<p>Are motor vehicles an integral part of the provision of the contractual services?</p>	<p>Either Comprehensive Insurance or Third Party Property Damage with \$20M limit.</p>

TYPE OF INSURANCE & SUMMARY OF COVER	WHEN REQUIRED	EXPOSURE CONSIDERATIONS	SUGGESTED LIMITS
<p>Personal Accident Covers:</p> <p>Insured persons for accidental death, permanent or temporary disablement as a result of accident.</p> <p>Lump Sum for death and permanent injury. Weekly amount for temporary disablement.</p>	<p>Rarely. Only if using a sole trader as contractor/consultant. Assists to establish that no employer/employee relationship exists.</p>	<p>Where sole trader and not registered with Return To Work SA.</p>	<p>Commensurate with workers compensation benefits.</p>
<p>Fidelity Covers:</p> <p>Losses sustained by the contractor/consultant through the fraudulent or dishonest acts of its employees (i.e: misappropriation of money or goods).</p>	<p>Rarely. Only where the misappropriation of funds by a contractor's/consultant's employees could financially impact on the Government or jeopardise the contractor's/consultant's financial viability.</p>	<p>Amount to represent worst case scenario of a collusion situation over a long period.</p>	<p>Assessment of financial exposure.</p>

TYPE OF INSURANCE & SUMMARY OF COVER	WHEN REQUIRED	EXPOSURE CONSIDERATIONS	SUGGESTED LIMITS
<p>Directors & Officers</p> <p>Covers:</p> <p>Individual directors and officers of the contractor/consultant against personal liability for managerial errors and omissions (“wrongful acts”).</p>	<p>Rarely. When the wrongful act of a director or officer of the contractor/consultant could result in a personal legal liability on behalf of the director/officer that impacts on the Government.</p>	<p>Warranties/representations made on a personal basis with Directors and Officers of contractors regarding their financial reputation where those comments underpin the financial aspect of the venture.</p> <p>Assessment of financial exposure of the director/officer and impact on Government.</p>	<p>Range of \$5M-\$50M dependent on identified levels of risk exposure.</p>
<p>There are many other types of insurance policies available some of which may, in special circumstances, be appropriate. These include Comprehensive Crime (including Financial Institutions Bond, Electronic and Computer Crime), Advanced Profits, Machinery and Computer Breakdown, Aviation Hull and Liability etc. The requirement for these (and other) policies is exceptional rather than the rule.</p>			

INDEMNITY PROVISIONS

It is often counterproductive to include in a contract an indemnity by one party against losses for which damages would in any event be claimable for breach of contract or negligence.

The following are exceptions to this approach:

1. Where in the context of a particular transaction, it is desirable for the Government party to seek an indemnity from the other party to compensate the Government party for something which the other party would not otherwise have an obligation to pay.
2. Where the parties have agreed that any liability on their part to a third party will be allocated (as between the parties to the contract) in a particular manner.

Legal advice should be sought to establish whether an indemnity should be included and, if so, in what form.

CONTRACTS BETWEEN STATE AND LOCAL GOVERNMENT

The following clause has been agreed between SAICORP and the Local Government Association Mutual Liability Scheme (LGAMLS) for use in contracts/agreements between State government and local government entities. This clause replaces any indemnity and insurance clauses.

The (Minister) warrants that the (Minister) is entitled to the benefits of the South Australian Government Insurance and Risk Management arrangements administered by SAICORP, the insurance division of the South Australian Government Financing Authority in respect of the operations under this Agreement.

The (Council) warrants that it is a member of the Local Government Association Mutual Liability Scheme (“the Scheme”) and is bound by the rules of the Scheme pursuant to Section 142 and Schedule 1, Part 1, 2 of the Local Government Act 1999 (“the Act”) and in the event that the (Council) ceases to be a member of the Scheme it will forthwith, pursuant to Section 142 (1) of the Act and the Regulations Under the Act, take out and maintain insurance to cover its civil liabilities at a minimum level of cover of \$50 million.

The (Minister) and the (Council) shall ensure as far as practicable that any contractors and any sub-contractors are insured to a level determined by the (Minister) and the (Council).

CERTIFICATES OF CURRENCY – WHAT TO LOOK FOR

Certificates of Currency generally indicate that at a given point in time the insurance protection is in place. Certificates normally include headings relating to, amongst other things:-

Insured

The description of the “Insured” should indicate that the contractor/consultant required to have insurance cover under the contract is included under the heading “Insured”.

Class of Insurance

This must be the type required under the contract between the parties. For example Public Liability.

Insurer/Broker

The certificate may be issued by either the insurer (preferably) or the broker on their letterhead. This is accepted practice.

Policy No

This is self-explanatory

Period of Insurance

This is important. The period should cover the period of the contract. Where the policy expires during the currency of the contract the agency should require the contractor to provide a certificate covering the ongoing period.

Limit of Liability

This must be for at least the level of cover requested under the contract.

Special Conditions

If you see any condition that appears to limit the extent of cover, please refer to SAICORP.

Signature/Stamp

The certificate should be signed by an officer of the insurer or broker on the appropriate letterhead and with the insurers /brokers stamp displayed.

SEEKING ADVICE FROM SAICORP ON RISK AND INSURANCE ISSUES ASSOCIATED WITH CONTRACTS

Please ensure that the following steps are taken when referring a contract to SAICORP for advice on risk and insurance issues.

- A draft of the contract should be provided at the earliest possible time and well before it is finalised or signed. Where the contract is so large that this is impractical, an extract from the contract including the following clauses will suffice:
 - warranty clauses
 - indemnity clauses
 - insurance clauses
 - liability clauses (including capping clauses)
 - any other clauses that may impact upon the potential liability of the Crown.

- Provide a brief summary of the background, operation and objectives of the contract including an assessment of how the contract will affect your agency or Department. An executive summary from a contract brief or tender document should be sufficient.

- Provide details of:
 - the parties to the contract
 - the term of the contract
 - the contract sum (price or other consideration)
 - when the contract is to be signed
 - when the contract is anticipated to commence

- Please provide an analysis of the risks in relation to the contract and in particular the potential risk exposures of your Agency, Department or the Crown generally (i.e. what are the worst case scenarios if something goes wrong).

This is one of the most important but most overlooked steps

- Please provide a statement outlining the current negotiating position of the parties including what (if any) discussions have occurred in relation to the contract.

SAICORP should then be in a position to provide a response to you.