

Section 2.4 Insurance Provisions

Overview

Introduction Clauses 3.3 – 3.9 of the Contract outline the insurance requirements for the project. These are supplemented by the insurance clauses in the Schedule.

Purpose There are a number of important requirements in this area that should be addressed at tender stage. The required insurance cover will need to be determined and described in the tender invitation documents.

In this section This section deals with the following topics:

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2.4.1 Insurance Requirements

Summary of type

The following table summarises the insurance types:

Insurance Type	Description
Works Insurance	The Contractor is required to take out insurance to cover the works, documents and other risk items against loss and damage.
Public Liability Insurance	The Contractor is required to take out public liability insurance covering any accidents that might happen in the course of the project.
Employer's Liability	The Contractor is responsible for maintaining employer's liability insurance to cover the death, injury or illness of his personnel.
Professional Indemnity	Where it is requested, the Contractor is responsible for maintaining professional indemnity insurance in relation to design negligence. It may be required on traditional contracts where there is a large amount of Contractor or Specialist design, and it is always required on all contractor-designed projects.

Other special types of insurance policies may be required, depending on the nature of the works, including, for example, marine hull insurance. In situations where the Employer is dealing with a typical works project, expert insurance advice should be sought from a source recommended by the construction consultants or the Employer's insurers.

Co-insured

The Contractor's insurance shall name the Contractor, the Employer and any other person the Employer requires as co-insured. This means that the Employer and any other person the Employer requires as co-insured has direct access to the insurer in relation to a claim and does not have to go through the Contractor.

Subrogation

The fact that subrogation rights have been waived means that the insurer, having paid out on a claim to a third party, cannot pursue the insured parties to recover its loss.

Cross-liability

If two parties jointly insure a property and a claim is made by one because the other has damaged it, the insurer cannot escape liability by arguing that 'you cannot claim against yourself' and must pay the claim.

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2.4.1 Insurance Requirements, Continued

Employer approval

It is a condition of the Contract that the Contractor may take out insurance only from companies licensed to trade in Ireland.

Period of cover

As the Contractor's insurances do not start until the Starting Date, the Employer should have his own cover up to that date and as most of the insurance (i.e. the insurance for the works) which the Contractor is required to arrange only applies until the Date of Substantial Completion, the Employer should have appropriate cover in place from the Date of Substantial Completion. After the Employer takes over the works, the Contractor's own activities will continue to be covered by the Contractor's insurance (Public Liability, Employer Liability up to the date of the Defects Certificate and Professional Indemnity until the sixth anniversary of the issue of the certificate of Substantial Completion). If the Contractor returns to the site after the Defects Certificate issues, he must have full insurance cover while he is working on the Employer's property.

2.4.2 Insurance: Filling in the Schedule

Insurance details in the Schedule

The Schedule (Part 1D) sets out:

- Minimum indemnity limits for public and employers' liability insurance;
- Maximum excess limits for insurance;
- Permitted exclusions; and
- Optional insurance provisions.

The Schedule allows for a range of options relating to public liability for loss or damage due to design.

It should be noted that the Schedule allows for a total exclusion of loss or damage due design from the public liability policies, and many contractors' policies have this exclusion. In appropriate cases, such as when there is a high risk of third party claims for bodily injury, employers may consider requiring a narrower exclusion, for example:

- If there is design of temporary works or other contractor design, the existing exclusion may be substituted by inserting 'Design for a fee'; or
- If the design involves the Contractor engaging consultants to whom fees are payable, the wording of the exclusion may be amended as follows: 'Defective workmanship, materials or design but including the consequences thereof'.

Where a narrower exclusion is required, the Employer must amend the relevant exclusion in Part 1D of the Schedule. The Works Requirements should bring to tenderers' attention the requirement to have this cover in place for design-related third-party claims for bodily injury and loss or damage to third-party property. Employers should note, however, that such cover is not always easy to get, and by demanding it, they may limit the number of prospective tenderers or, depending on project size, no tender responses at all.

Note: for Professional Indemnity policy wordings do vary and some wordings may exclude bodily injury to third parties and loss or damage to third party property so that the insurance only covers the damage to the structure itself and consequential loss resulting from it. Provided that the Professional Indemnity insurance only has the permitted exclusions, the insurance will cover both third party bodily injury and property damage claims. However, limits of indemnity under Professional Indemnity insurance in Ireland are generally low and may not be sufficient to cater for such third party exposure in which case the Public Liability cover would be required.

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2.4.2 Insurance: Filling in the Schedule, Continued

Limits

The Employer should set the limits of insurance required in the Schedule. Increased limits for Employers' Liability and Public Liability insurances can be obtained at relatively low cost. Increased limits for Professional Indemnity can be costly as the increase must operate from commencement of design until at least the sixth anniversary of Substantial Completion.

Note: defence costs can seriously erode the indemnity limit in legal and other expenses leaving a significantly depleted residue to address the risk insured. Professional Indemnity normally includes defence costs which means that those costs can be offset against the indemnity limit. If the Employer on a particular project does not require defence costs to be part of the indemnity limit for liability claims, he should investigate the insurance market in advance of tenders being sought to see if such cover is available. If it is, he can specify its requirements in the tender documents (Works Requirements).

Exclusions

Asbestos is listed as a permitted exclusion. If there is a risk of asbestos being encountered, the exclusion should be deleted. In that case, the Contractor will have to employ a specialist to remove asbestos, and a collateral warranty should be required. The date by which the collateral warranty is to be provided should be stated in the Schedule (Part 1F). It should be noted that the cover available for this risk is under rectification/remediation including a reduction in the value of the property cover. Furthermore cover is available on an aggregate basis only and for relatively low limits – for example, in the range €250,000 – €500,000.

Terrorism is listed as a permitted exclusion. If the Employer decides that terrorism cover is required, then terrorism must be deleted from the list of permitted exclusions in Part 1D of the Schedule. If not deleted, the Employer carries the risk of terrorism damage to the works. This cover is only available for relatively low limits similar to the limits for asbestos.

Optional insurance provisions

The indemnity limit of the insurance in respect of the works, documents and things (except for the loss of or damage to Contractor's things) should be set down and professional indemnity insurance should be completed as appropriate by the Employer in Part 1D of the Schedule.

Required extensions to insurance

If required in the Schedule, any section of the works taken over shall continue to be covered by the Contractor's insurance until the whole of the works have reached Substantial Completion. This requirement should be imposed on the Contractor if independent contractors are engaged to carry out fit-out or other works before Substantial Completion. Where an extension to the Contractor's insurance is required for a section of the work, this should be stated in the tender documents and listed in Part 1D of the Schedule. The extension should run until the ER issues a certificate of Substantial Completion for the whole of the Works. Normally, once a section of the works is taken into use, it is no longer insured by the Contractor.

2.4.3 Insurance Details

Employers' liability insurance

The Contractor is responsible for maintaining employers' liability insurance (for death, injury or illness of his personnel) from the Starting Date until the date the Defects Certificate is issued. Subcontractors should also maintain similar cover.

Professional indemnity insurance

Professional Indemnity insurance (PII) will normally be required in all contractor-designed contracts. It also may be required in an employer-designed contract when there are significant contractor (or specialist)-designed work items.

There may be circumstances where an employer has good reasons why it is not appropriate to have PII cover in contractor-designed contracts. In such circumstances the requirement in relation to PII in Part1D of the Schedule is completed accordingly.

Professional indemnity requirements

The Contractor must provide evidence to the Employer, annually at the anniversary of the policy renewal, that the required insurance policy has been effected for the following year. This requirement recognises the fact that the Contractor may not be able to secure six-year cover with one premium payment or that the cost of the premium for such a policy would not represent value for money.

Professional Indemnity insurance must cover and indemnify the Contractor for liability arising from the performance or non-performance by the Contractor of his duties as project supervisor for the construction stage, and for the design process in the case of a design-and-build contract, in relation to the works under the Construction Regulations. The Professional Indemnity insurance does not cover the professionals contracted by the Employer.

When Professional Indemnity insurance is taken out it should include a retroactive provision with a date from when design of the works or works items started or earlier. Where a policy is to be renewed the retroactive date will normally not change. However, if a new policy is to be taken out (for whatever reason), it is important that the retroactive date of the policy reaches back to the design period of the project in question – to ensure continuity of cover over six years.

Collateral warranties required from specialists will include a requirement to carry professional indemnity insurance if the specialist is involved in design. The same requirements apply to the specialist's professional indemnity insurance as outlined for the Contractor above and similar procedures should be followed for vetting the insurances.

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2.4.3 Insurance Details, Continued

Professional indemnity limitations

If the Contractor is required to maintain a Professional Indemnity insurance policy, it may be on an 'each and every claim' basis or on an aggregate claim basis. In the present insurance market contractors or subcontractors are unlikely to obtain Professional Indemnity insurance on an 'each and every claim' basis and the insurance will more likely be subject to an aggregate limit in respect of all claims during each insurance year, normally 12 months. In this context careful consideration should be given to the level of the cover being sought. Furthermore, as defence costs are normally paid out of the indemnity limit this factor should also be taken into account when deciding on level of cover.

It should be noted that cover for claims relating to pollution/contamination, date recognition and asbestos are generally subject to an aggregate limit. However, the Employer should be aware that some contractors may only be able to obtain professional indemnity cover which excludes claims for pollution/contamination, date recognition and asbestos.

There is a choice in the Schedule for the Employer to decide whether to look for professional indemnity insurance on an 'each and every claim' or on an annual aggregate limit basis. For a contractor the normal cover available in the market is on an annual aggregate limit basis, therefore employers should choose this option in all but exceptional cases where an employer is satisfied that the insurance market can provide the cover on an each and every claims basis.

Insuring existing facilities

When the project involves work on the Employer's existing facilities, the Employer has a number of options in relation to the risk of damage to these facilities. He can require the Contractor to arrange all risks insurance in respect of the facilities. He can also require the Contractor to bear the risk of damage to the Employer's facilities. Even if the all risks insurance is not extended to cover the existing facilities, the Contractor's public liability insurance should cover loss or damage caused by the Contractor's negligence.

The Employer can elect to bear the risk of damage to the facilities caused by certain perils. The Employer will need to take insurance advice in making this selection. If there is no work on existing facilities, the Employer should retain the default option, which is that damage to existing facilities is at the Contractor's risk, but (except for damage caused by Contractor negligence) the existing facilities do not have to be insured in the Contractor's all risks insurance for the works.

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2.4.3 Insurance Details, Continued

Valuing Employer's facilities

The replacement value or the indemnity value of the Employer's facilities and properties should be provided to the Contractor in the tender documents. In determining the replacement value, the value should be calculated on the basis of the Contract Sum plus a sum for professional fees, removal of debris and inflation. The required cover for professional fees is specified by the Employer in the Schedule, Part 1D; the default is 12.5%. If cover is required on an indemnity basis, for example, where the item would not be replaced if destroyed or damaged, the value should be calculated on the current cost price, less depreciation.

Another scenario is the case of a building which if damaged would not be reinstated, for example, a contract for short-term remedial work to an unsafe dilapidated building. It may be appropriate to require insurance for the costs of demolition and site clearance only. The Contractor must be advised of the basis on which cover is required. The Contractor must also be given a full description of the facilities to enable him to obtain quotations, for example, in the case of a building, details of the construction of floors, walls and roof, occupation, fire extinguishing appliances, security provisions and so on. Any subsequent change in the information provided to the Contractor prior to Substantial Completion must be immediately notified to the Contractor.

Owner- controlled insurance

If the Employer considers that it would be more appropriate for the Employer to control the project insurances, this must be clearly stated in detail as an option in the Works Requirements.

This is normally referred to as *owner-controlled insurance*. Where owner-controlled insurance is being considered, tenderers should make their submissions on the basis of excluding the cost of providing certain insurances, but should show separately the extra cost of providing those insurances should the Employer decide not to exercise the option of taking out separate insurances. The extra cost should be an all inclusive cost – for example, premiums, compounds, fencing, lighting, guards, guard dogs and any other security requirements. More details on owner-controlled insurance are set out in

2.7.4 Insurance Options – see page 93.
