

GUIDANCE NOTE GN 1.1.2

Professional Indemnity Insurance Application in the Capital Works Management Framework

Office of Government Procurement

Professional Indemnity Insurance
Specification in the Capital Works Management Framework

Document Reference 1.1.2 v1.1

02 October 2023

© 2023 Office of Government Procurement

Published by: Office of Government Procurement
Department of Public Expenditure, NDP Delivery and Reform
Government Buildings
Upper Merrion Street
Dublin 2

The document is not to be taken as a legal interpretation of the provisions governing public procurement. All parties must rely exclusively on their own skills and judgment or upon those of their advisors when making use of this document. The Government Construction Contracts Committee (GCCC), the Office of Government Procurement (OGP) and the Department of Public Expenditure, National Development Plan Delivery and Reform and any other contributor to this guidance note do not assume any liability to anyone for any loss or damage caused by any error or omission, whether such error or omission is the result of negligence or any other cause. Any and all such liability is disclaimed.

Introduction

As a result of a tightening of the insurance market for professional indemnity insurance (PII), policies for construction professionals and contractors are becoming increasingly expensive, are providing a reduced level of cover, have a greater number of exclusions and increased levels of excess.

Since 2018, the global PII market's cycle has been in a hardening phase triggered by two events. Firstly, a thematic review undertaken by Lloyd's in 2018 identified non-US PII as one of the worst performing sub-classes of insurance leading to a withdrawal of insurers and capital from this insurance line. The Hackitt Report and the ongoing inquiry into the Grenfell Tower fire has also caused insurers to focus on the liabilities taken on by contractors and consultants in the construction sector.

PII provides cover on a 'claims made' basis and purchasers of PII are reliant on the policy in place at the time the claim is made to respond to the claim. A claim may be many years removed from when the matter (that is the subject of the claim) occurred. PII policies are typically renewed on an annual basis and, in the current market, the renewal process has become protracted and is often resulting in a substantial increase in the premium which may also be coupled with a reduction in the level of cover to that previously obtained.

The tightened market for PII has meant that some firms are unable to meet the long-established PII requirements in the procurement templates published under the Capital Works Management Framework (CWMF), and thus are unable to participate in public procurement competitions.

With respect to live contracts, there is a risk that some consultants and contractors may not be able to obtain the level of PII cover that they are contractually obliged to have in place for the duration of the contract.

Purpose of Guidance Note

In response to these changed market conditions, a range of amendments to the procurement templates in the CWMF has been undertaken and which are summarised in Circular 05/2022 – *Construction Procurement Reform – Revised Guidelines for Professional Indemnity Insurance Levels in Public Works Projects*. This note provides details on the amendments and highlights further measures that contracting authorities should take to address the impact that these changes will have on their procurements.

The note also provides guidance on the steps to take in the event that a consultant or contractor, already engaged on a contract or is a participant under a framework agreement, is unable to maintain the level of PII cover that they are obliged to maintain under that contract/framework agreement.

It is important that contracting authorities comply with the provisions set down in this note, the amendments to other relevant guidance and take note of the changes in the CWMF template procurement documents. Where a contracting authority departs from the relevant guidance, the rationale for so doing must be recorded.

This guidance will be kept under review and may be amended subject to further developments in the PII market.

Section 2 Procurement of consultants and contractors – Key Points

General

Insurance may provide a remedy in the event of a financial loss suffered by a contracting authority due to consultants' or contractors' negligent acts. A carefully planned procurement, followed up once the contract is awarded by diligent oversight of performance and regular progress reviews will mitigate against the risk of underperformance that may give rise to negligent acts.

These measures are considered in further detail later in this note, they and the following key considerations, are aimed at ensuring a proportionate approach to the level of liability that is placed upon consultants and contractors engaged on public works projects.

2.1 Period of Liability

A contract may be executed under hand (simple contract) or as a deed (under seal). Where a contract is executed as a deed, the period during which an action may be brought for breach of the contract runs for 12 years from the date of the breach. For a contract signed under hand, that period is 6 years.

Contracting authorities should apply the principle of proportionality when determining whether a contract should be executed as a deed. For example the short public works contract (PW-CF6) may not be executed as a deed and so it, and the consultancy contracts awarded to undertake services associated with this form of contract, are to be awarded as simple contracts.

It should be noted that the default contractual requirement in the CWMF documents for maintaining professional indemnity insurance for a period of 6 years from the Date of Substantial Completion of the Works. A contract should only be executed as a deed where the circumstances warrant that period of liability. These will typically relate to the consultant's or contractor's level of design input into the project and the likelihood of an issue coming to light more than 6 years after the works are completed and in use. Refer to GN 1.5, Section 3.9 for guidance on executing contracts correctly - whether under hand or by deed.

The default position in CWMF template documents is a 6 year period of liability. Longer periods of liability may be applied where appropriate.

2.2 Caps on Liability

As of July 2023 both the conditions of engagement and public works contracts include a cap on liability. Contracting Authorities must use the principle of proportionality to decide on the appropriate amount at which to cap liability, depending on the particular project.

For further detailed guidance on the application of liability caps in the Standard Conditions of Engagement refer to GN 1.6.4, and GN 2.3.5 in relation to the Public Works Contract.

General

The pre-qualification process determines the capacity and capability of tenderers to undertake the project in question. Selection criteria should be appropriate to the project in question whilst the standard set under each criterion should be proportionate to its scale and complexity. Refer to GN 1.6.3 for further guidance.

A well-considered tender process should result in the appointment of the team who offer the best means to deliver the contracting authority's project objectives for a reasonable fee. Service quality has such a significant influence on project outcomes that it should always receive proper consideration in the award of a contract. The Most Economically Advantageous Tender (MEAT) is the award criterion set out in the template Instructions to Tenderers for consultancy services; lowest price may not be used.

Technical merit criteria, and the weightings applied to them, signal to tenderers where the contracting authority's priorities lie and give confidence to tenderers to price the true cost of their service.

Details on appropriate quality/price weightings are set out in guidance note GN 1.6, Appendix B. Quality should normally receive the majority weighting except in the circumstances set out therein.

3.1 Design Team Appointments

The liability imposed on design teams has implications for both the availability and the cost of their professional indemnity insurance and, if not given careful consideration, may result in reduced interest in tender competitions and capacity across the consultancy sector.

When apportioning liability it is important to consider the impact this may have on a project's successful outcome. It does not always follow that the entity who is carrying the liability will have insurance that will cover that liability. For example a consultant's insurance cover may extend to cover the activities of their sub-contractors but it would generally only apply to sub-contractors within the general confines of that consultant's discipline or area of competency.

The manner in which design teams are appointed can have a significant bearing on the liability the different members of that team have to bear.

There are essentially three main ways in which design teams are procured – 1. Single point, and 2. Integrated design teams and 3. Individually procured design team members. These are considered in greater detail below.

Continued on next page

3.1 Design Team Appointments (continued)

Single Point Design Teams

Single point design teams are those teams where a single entity only is appointed to provide a range of multi-disciplinary services. These services may be delivered either by in-house providers (such as a multi-disciplinary practice) or by sub-consultants to the contracting party. On building projects, this form of single point appointment should only be used for straightforward, low value construction projects (typically those where the Short Public Works Contract - PW-CF6 is used).

The architect will usually be the lead consultant, and if single point, will typically have to engage sub-consultants to be able to provide the full range of services. Sub-consultants delivering key services will be required to execute collateral warranties in favour of the contracting authority.

In a tightened PII marketplace, an entity's capacity to sub-contract in this manner may be severely curtailed with the lead consultant effectively paying a premium that reflects not only their own fee income but that of their sub-consultants.

Unless they are for low value or simple projects, the procurement of single point design teams should be avoided for **building projects**.

Integrated Design Teams

A procurement is run with the purpose of appointing a team to design the project and oversee the construction stage until completion (or variations thereof). A team procurement leaves it open to entities who wish to maintain their separate identities but join together in order to bid as an integrated team to deliver the principal services identified, or a single entity operating as a multi-disciplinary practice may apply to provide the required services.

On a building project, this might involve identifying the architect, building services engineer, civil and structural engineer and quantity surveyor as the 4 principal service providers with the architect identified as the lead. The scope of services for the team lead should identify the additional tasks associated with this key role.

Where a team formed by separate entities (as against a single multi-disciplinary practice) is successful, the contracting authority appoints each principal service provider separately with the identified lead having overall responsibility to co-ordinate the output and performance of the team. That approach avoids them having to contract on the basis of joint and several liability¹.

Continued on next page

¹ Consultants who are trading as separate entities but operating within the same discipline may be identified as the consultant in COE1 and it may reasonably be expected that their insurance policy would extend to cover their joint and several liability for the performance of the contract. The individual insurance policies carried by consultants from different disciplines will not normally extend to cover the activities of different disciplines even though they may be held joint and severally liable by the conditions (where each consultant is named in a single contract).

3.1 Design Team Appointments (continued)

Whilst clause 2.18 of the Standard Conditions of Engagement imposes joint and several liability between the different disciplines, were each to be named as the consultant, their insurance will not necessarily provide cover for the activities of the other disciplines.

Only where a multi-disciplinary practice (or formally established group, consortium or joint venture) is identified as the successful tenderer should a single contract be awarded.

Contracts for integrated design teams are open to teams (comprising separate service providers) or multi-disciplinary practices (one service provider that provides all the disciplines required). Where a team is successful each of the principal service providers in the team should be engaged by individual contracts.

Individually Procured Design Team Members

This process should be considered for large projects or where the contracting authority wishes to apply greater individual scrutiny to the appointment of key roles in the project. A single contract notice may still be utilised with each principal service broken into a separate lot. The team lead should be identified and their scope of services should identify the additional tasks associated with this key role.

PII policy exclusions

Contracting authorities should be aware that the list of exclusions to PII policies has increased as a result of the tightened market. Fire safety advice and cladding design are two areas that are now excluded from many PII policies. As these constraints are subject to the prevailing market conditions contracting authorities are advised to engage with the relevant professional representative bodies to establish the impact these may have on service provision.

It is understood that firms in general practice² are, for the most part, unable to obtain cover for fire safety advice whereas specialist fire safety consultants continue to obtain cover, albeit on reduced terms and increased cost.

Fire safety design and certification is an essential aspect of all building development. It is vital therefore that this be considered by contracting authorities when procuring design teams and to structure the procurement accordingly.

Fire safety advice should be identified as a principal service provision on large or complex building projects and as a specialist skill requirement for all other building projects where there is a requirement to comply with Part B of the Building Regulations³.

² Architectural and engineering consultancy firms that offer a broad range of construction design services.

³ Whilst a fire safety certificate is not required for residential developments comprising only of houses, nonetheless there will be a requirement to certify compliance with the Building Regulations as part of the Building Control (Amendment) Regulations and so fire safety advice should still be highlighted as a specialist skill for such projects.

**3.2 Managing
Design Teams**

Once appointed it is for the contracting authority to manage the performance of the appointed team to ensure that they deliver the service to the required standard. Key performance indicators linked to the scope of service that are capable of measurement and monitoring are important management tools.

Regular engagement and performance reviews are recommended with feedback given on deficiencies. Where performance does not improve, formal warnings should be issued and, where appropriate, payments withheld until matters are rectified.

It is recommended that key information outputs should be linked to milestone fee payments – these should be highlighted in the Management Services in Schedule B to the Form of Tender and Schedule (FTS 9 or FTS 10).

4.1 Appointing Contractors

The pre-qualification process determines the capacity and capability of tenderers to undertake the project in question. Selection criteria should be appropriate to the project in question whilst the standard set under the selected criteria should be proportionate to the project's scale and complexity. Guidance is available in GN 2.3.1.3 Minimum Standards for Suitability Works Contractors Criteria.

The award criteria applied to works contracts will vary depending on the scale, complexity and extent of design input that the contractor is expected to provide. PW-CF1 – PW-CF5 inclusive and PW-CF10 must be awarded on the basis of MEAT. However the default position in the Instructions to Tenderer is a cost only MEAT⁴. The short public works contract (PW-CF6) is to be awarded on the basis of lowest price only whereas the Term Maintenance and Refurbishment Contract (PW-CF11) has the option for either a lowest price or MEAT award. The investigation forms (PW-CF7 & PW-CF8) may be awarded on the basis of MEAT where the restricted procedure is used, if the open procedure is used the award is lowest price only.

Where the option presents itself, contracting authorities are encouraged to include technical merit (quality) criteria, as appropriate. Because of the requirement for employer design contracts to be comprehensively designed prior to tender, the capacity for tenderers to introduce significant changes in the tender process is constrained. This is because key elements such as structure, servicing and building fabric have already been defined and late stage changes can give rise to knock on delays and the potential for costs arising elsewhere.

However, even on employer-designed projects, technical merit criteria may be deployed in a targeted fashion to defined aspects of the project. For example, they may be used to reward tenders proposing materials/products/systems with enhanced energy performance or durability or those products with a lower carbon footprint to those in the specification. In tandem with the appropriate weighting, these can encourage a better quality or more sustainable outcome.

For design and build contracts, technical merit criteria should attract the majority weighting even where specimen designs are provided with considered criteria that both challenge tenderers to propose innovative and sustainable construction solutions which rewards quality proposals and, where appropriate, shorter delivery periods.

Technical merit criteria and the weightings applied to them signal to tenderers where the contracting authority's priorities lie and give confidence to tenderers to price key elements of the project that add real value.

⁴ For contracts forms PW-CF1 – PW-CF5 inclusive the Comparative Cost of Tender must be applied. This requires contracting authorities to consider both the tendered price plus the cost of a notional compensation event to determine the MEAT. Technical merit criteria may also be deployed.

Section 4

Procuring Works Contractors

4.2 Managing Contractors

It is for the Employer's Representative to administer the contract which involves monitoring the performance of the appointed contractor to ensure that they deliver on the promises made in the tender. Key performance indicators (linked to the technical merit criteria) that are capable of measurement and monitoring are important management tools.

There are a range of provisions in the public works contracts that address quality and timely delivery as well as the remedies to be applied where the required standards are not met. To be effective these provisions must be applied early, consistently and in accordance with the contract.

Whilst interim payments are linked to progress it is important to note that payment is also contingent on the work meeting the standards set out in the Works Requirements and, where relevant, the Works Proposals. Where workmanship or materials do not achieve the required standard, payments should be withheld in accordance with the conditions of contract.

Section 5

Setting PII requirements

When setting the PII requirements in the Suitability Assessment Questionnaires (Criterion 3.3e of QC1, QC2, QW1, QW2 and QW3) please be aware that the recommended standards have been amended to align with the standard of insurance that is currently generally available.

For consultancy services, QC1 and QC2 have been amended to include the statement of minimum levels on an each and every claim basis and on an annual aggregate basis – the levels to be selected to apply should be in accordance with Appendix I, unless justified by the particulars of the project. Both types of insurance are acceptable and where the successful tenderer is only able to provide insurance on an annual aggregate basis at the level stated in 3.3e they will be awarded the contract. However the form of tender contains a new section placing an obligation on the consultant to obtain cover on an each and every claim basis (the Required Level) should it become available at rates that are defined therein.⁵

For contractors (QW1, QW2 & QW3), PII is only available on an annual aggregate basis please consult Appendix II for guidance on appropriate levels. Where reserved specialists are being sought the level of PII should be set in relation to the estimated contract value for the specialist works in accordance with Appendix II.

⁵ Please refer to the Form of Tender and Schedule for COE1 and COE2 – FTS 9 and FTS 10
GN 1.1.2 v1.1 02/10/2023

Where pre-tender market engagement indicates that the level of insurance that may be obtained by consultants/contractors is likely to fall short of the optimum level required then project insurance may be worthy of consideration. It may also be appropriate where a contracting authority is not satisfied that higher levels of cover will become available to the members of the project team over the course of the project.

It presents challenges of its own and may have significant contractual implications and so must be considered early in a project's development.

Single Project Professional Indemnity Insurance (SPPII) provides project specific cover to contractors and designers – the project team. It is typically only available for projects in excess of €100m, however contracting authorities may wish to engage with insurers on lower value projects to determine whether this type of policy will address the contracting authority's requirements.

Because PII insurance is issued on a claims made basis, contracting authorities should have regard to the long term risks and consider whether this type of insurance may be an appropriate option, particularly on projects with longer delivery timeframes. The policy period is typically 10 years from the start of construction activity and provides retroactive cover for the design activity prior to construction. Extensions to the period of cover may be negotiated but only in limited circumstances.

Whilst it represents a high upfront cost to the contracting authority, it is uncancellable, has a ring-fenced aggregate limit and covers design, build and post-completion run-off. There should be no expectation of a reduction in the level of the fee/contract sum from consultants/contractors because their other project commitments may require them to carry their own insurance. The SPPII policy would not normally impose an obligation for project team members to carry their own PII policies as all members of the project team would typically be co-insured. However there is usually a substantial level of excess with such policies.

Engagement with insurers is required in the early stage of the project's development and before any significant design team and or contractor engagements are undertaken to determine the exact terms upon which the insurance will operate. A failure to consider the detailed conditions of the policy at the earliest point is likely to give rise to significant contractual issues further on in the project's development.

As PII policies are typically renewed on an annual basis, the current tightened market phase may result in a consultant or contractor being unable to obtain or renew a policy with the level of cover they had previously enjoyed and which they are contractually obliged to maintain. These requirements are listed in Schedule A of the Standard Conditions of Engagement for consultants and the Form of Tender and Schedule, part 1D for contractors. They may also be stipulated under the requirements for framework participants.

Consultants or contractors who are unable to obtain cover at the levels required under their contract/framework agreement should notify the client/Employer as soon as they become aware that they are unable to meet their contractual obligations in respect of maintaining PII.

In the event that this arises, the contracting authority should request the consultant/contractor to provide written confirmation from their insurer that the change in the policy is not as a result of claims made⁶ against the consultant/contractor. Once confirmed, the contracting authority should not deduct the cost of taking out the required level of insurance from the contract sum⁷ where the consultant/contractor fails to maintain the required insurances. The contracting authority should issue Model Form MF 2.11 to the consultant or MF 1.29 to the contractor at this point.

In the event that the contracting authority considers that they are exposed, a contingency PII policy (taken out and paid for by the contracting authority) such as Owners Protective PII may be an appropriate remedy. The terms of such policies vary and contracting authorities should contact specialist insurers for more information.

⁶ In the event that the change in the level of cover is related to claims made against the consultant/contractor the contracting authority may invoke the provisions of sub-clause 2.21 of the standard conditions of engagement in the case of a consultant or sub-clause 3.9.8 of PW-CF1 – PW-CF5 inclusive in the case of a contractor.

⁷ As provided for in sub-clause 2.21 of the standard conditions of engagement in the case of a consultant or sub-clause 3.9.8 of PW-CF1 – PW-CF5 inclusive in the case of a contractor.

Appendix I Recommended Levels of PII for Consultants

Professional indemnity insurance levels on an each and every claim basis with an alternative annual aggregate level where each and every claim cover is not available – maximum permitted level of excess to be 2% of annual turnover or €5,000 whichever is greater.

Estimated Construction Cost	Level of Indemnity for Each and Every Claim Cover	Alternative Level of Indemnity for Annual Aggregate Cover
€50,000 or less	Up to €300,000	Up to €400,000
€50,001 - €1,000,000	€300,000 - €600,000	€400,000 - €700,000
€1,000,001 - €5,000,000	€600,000 - €1,250,000	€700,000 - €1,500,000
€5,000,001 - €20,000,000	€1,250,000 - €3,000,000	€1,500,000 - €3,500,000
€20,000,001 - €30,000,000	€3,000,000 - €3,500,000	€3,500,000 - €4,000,000
€30,000,001 - €40,000,000	€3,500,000 - €4,000,000	€4,000,000 - €4,500,000
€40,000,001 - €60,000,000	€4,000,000 - €5,500,000	€4,500,000 - €6,000,000
Over €60,000,000	€6,000,000*	€6,500,000*

*As project values exceed €80,000,000 higher levels may be appropriate but should only be sought following pre-market engagement.

Appendix II Recommended Levels of PII for Contractors and Specialists

Professional indemnity insurance levels for Employer and Contractor design – maximum permitted level of excess to be 2% of annual turnover or €5,000 whichever is greater.

Estimated Construction Cost	Employer Design Contracts Level of indemnity (annual aggregate)	Contractor Design Contracts Level of indemnity (annual aggregate)
€50,000 or less	-	-
€50,001 - €1,000,000	Up to €250,000	Up to €700,000
€1,000,001 - €5,000,000	€250,000 - €750,000	€700,000 - €2,000,000
€5,000,001 - €20,000,000	€750,000 - €1,500,000	€2,000,000 - €4,000,000
€20,000,001 - €30,000,000	€1,500,000 - €2,000,000	€4,000,000 - €4,500,000
€30,000,001 - €40,000,000	€2,000,000 - €2,500,000	€4,500,000 - €5,000,000
€40,000,001 - €60,000,000	€2,000,000 - €2,500,000	€5,000,000 - €6,500,000
Over €60,000,000	€4,000,000*	€7,000,000*

*As project values exceed €80,000,000 higher levels may be appropriate but should only be sought following pre-market engagement.

For specialist works tenders the PII levels should be based upon the estimated value of the specialist works.