



THE HONG KONG INSTITUTE OF SURVEYORS

22 January 2007

Secretary for the Environment, Transport and Works
Environment, Transport and Works Bureau
Government Secretariat
Murray Building, Garden Road
Hong Kong

By Fax & Post
2905 1181

Attn: Mr. Joseph Yung

Dear Sirs

Draft ETWB Technical Circular – Professional Indemnity Insurance for Consultancy Services, Design and Build Contracts and Works Contracts Involving Contractor's Design or Independent Checking Engineer's Services

With reference to your letter dated 20 December 2006 on the subject matter, we would have the following observations and comments:

Old and New Circulars

1. The draft Technical Circular provides at Appendix D three tables specifying the estimated, minimum and maximum PII cover, while Technical Circular (Works) No. 6/2003 (to be superseded by the proposed draft circular) provides at Appendix A one table only. The three new tables are intended to deal with different levels of risks. Table 2 of the new Appendix D is the same as the table of the old Appendix A. It is observed that Table 1 of the new Appendix D is to provide for lesser amounts of PII cover but is not really so for the reasons described later, while Table 3 of the new Appendix D provides for higher amounts of PII cover.
2. According to Note 1 of Appendix A to Technical Circular (Works) No. 6/2003, for consultancy services with an estimated consultancy fee of less than \$1.3M, the minimum / maximum limits stipulated in the table specifying the estimated, minimum and maximum PII cover are not applicable. This note has been taken out from the draft Technical Circular and would have implications as shown in item 3 below.

Consultancy Fee < \$1.3M

3. For estimated consultancy fee < \$1.3M for assignments other than for feasibility, the minimum PII covers required are compared as follows:
 - (a) Low and medium risk assignments: No PII under new circular vs 2 x fees under old circular. There will be a reduced cover;
 - (b) High and very high risk assignments: \$5M under new circular vs 2 x fees under old circular. There will be an increased cover;

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- (c) Extreme risk assignments: \$150M under new circular vs 2 x fees under old circular. There will be an increased cover.
- 4. Consultants generally maintain PII with a fixed cover for the year. Therefore, the occurrence of no PII requirement for a specific project within a year would not effectively reduce the premium. In addition, for a fee less than \$1.3M, it is very unlikely that the Consultants would bid for an assignment demanding \$150M PII cover. Therefore, from the Consultants' view point, the draft Technical Circular may not really benefit those Consultants earning fees generally below \$1.3M.

Consultancy Fee >= \$1.3M

- 5. For estimated consultancy fee >= \$1.3M for assignments other than for feasibility, the minimum PII covers required are compared as follows:
 - (a) Low risk assignments: No PII under new circular vs 2 x fees but within \$10M - \$150M under old circular. There will be a reduced cover;
 - (b) Medium risk assignments: \$5M under new circular vs 2 x fees but within \$10M - \$150M under old circular. There will be a reduced cover;
 - (c) High risk assignments: \$10M under new circular vs 2 x fees but within \$10M - \$150M under old circular. There will be a reduced cover;
 - (d) Very high and extreme risk assignments: \$150M under new circular vs 2 x fees but within \$10M - \$150M under old circular. There will be an increased cover.
- 6. Consultants earning fees generally more than \$1.3M would welcome this change, but the \$150M PII cover still appears intimidating.

Table 3

- 7. It would appear unreasonable that under Table 3, the minimum PII cover required from consultants, designers and ICEs is \$150M while that from Contractors is only \$75M, bearing in mind that fees are only a small percentage of the costs of the works.

Maximum Cover

- 8. Both the old and new tables specify maximum covers to cap the estimated PII covers which are calculated either as fee or as 2 x fee. Again bearing in mind that fees are only a small percentage of the costs of the works, if the fees are so huge to reach half of the maximum cover, the maximum cover would become too small to be meaningful for the works designed and should be removed.

Quantity Surveyors

- 9. Both the old and new tables do not appear to explicitly specify for Quantity Surveyors' PII covers, though possibly treated as under "Investigation, design and construction assignments".



Contractors

10. The Contractors' PII covers are generally reduced when using Table 1 for most of the cases but would be increased when using Table 3. Following the discussions on Consultancy Fees, the Contractors' designers' and ICEs' PII covers would generally be decreased. However, whether such decrease would address the concerns of Contractors and their designers and ICEs being unable to provide PII covers would need to be addressed by the Contractors.
11. Same as the old Technical Circular, the draft Technical Circular requires the Contractors, his Designers and ICE to individually take out PII. While this may seem to be double or triple security, now suppose the Contractors or their insurers claim against the Designers and ICE after the occurrence of design fault, what would then be left to the Employer? Would the present arrangement be a false security? Would a single cover by the Contractors be a better solution to the Contractors' concern?

Letter of Undertaking

12. The draft Technical Circular requires at paragraph 22 the consultant / contractor to provide a Letter of Undertaking to confirm that the policy complies with the contract and at the same time submit a certified copy of the policy. The contract itself is an undertaking by the consultant / contractor. The pro-forma Letter of Undertaking does not add extra strength to the contract. Breach of the Letter of Undertaking would not bring additional liability to the consultant / contractor. In spite of the Letter of Undertaking, the project officer still has to satisfy himself that the certified copy of the policy is satisfactory. Therefore, the Letter of Undertaking appears to be superfluous and causing additional administrative work to the Consultant / Contractor / Project Officer to the benefit of nobody. Waiver of the Letter of Undertaking does not appear to cause any harm.
13. The draft Technical Circular requires at paragraph 23 the Consultant / Contractor to provide another Letter of Undertaking if the policy submitted does not cover the entire period under the Contract. While this Letter is different from that required under paragraph 22 and undertakes to do something in the future, in essence, it only repeats what the contract says and adds no real substance. Waiver of this Letter of Undertaking does not appear to cause any harm.
14. Assuming that this latter Letter of Undertaking is to remain, Sub-Clause (6)(b)(i) should be clarified as to whether the undertaking should be provided by the Contractor or his Designer or ICE.

Limits of Indemnity

15. The phrases "any one occurrence or series of occurrences arising out of one event" and "each and every claim" have been introduced in the draft Technical Circular and have been used at the same time as alternatives connected by "



or" when referring to the limits of indemnity. It would appear that the two phrases mean different things and cannot be used as equivalent alternatives.

16. Paragraphs 27 and 28 of the draft Technical Circular are difficult to comprehend. The spirit of paragraphs 27(a) and 28(a) appears to require the reinstatement of the PII cover after indemnity payment but why should it be 2 or 3 times the original limit of indemnity per event / claim? Similarly, paragraphs 27(b) and 28(b) require the limit of indemnity to be 2 or 3 times the minimum covers. This would be fine if it is intended to refer to the limit of indemnity for the period of insurance, but the same requirement applies to limit of indemnity per event / claim. This would not be understandable. These paragraphs together with the supposedly the same but actually different provisions drafted in Sub-Clauses (3)(a) and (b) of the Special Condition of Employment and Sub-Clauses (5)(a) and (b) of the Special Condition of Contract would need to be re-written to beyond doubt.

Others

17. Without being exhaustive:
- (a) Paragraph 16(a) - "in the Appendix B of" should read "in Appendix B to".
 - (b) Paragraph 24 - "the period of 6 years after completion requirements under the contract" should read "the period of 6 years after completion as required under the contract".
 - (c) Paragraph 25 - "Bills of Quantity" should read "Bills of Quantities".
 - (d) Top left cell of matrix in Appendix B - "Consequence Probability" should read "Probability / Consequence".
 - (e) Clause (1) in Appendix E - "reasonably commercial rates" should read "reasonable commercial rates".

Thank you for your attention.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Raymond Chan', written over a horizontal line.

Raymond Chan
President
The Hong Kong Institute of Surveyors

RC/PH/my