

Clause 19: Insurance

Written by Richard Adams¹

The insurance requirements both in Clause 19 and the related tender information in the Contract Data are now considerably more prescriptive.

The positive aspect may be that this will lead to a more careful consideration of what in many applications is a key aspect of the Contract.

Against that there is a concern that the requirements here are now too prescriptive and do not allow more flexibility against the known potentially wide and varied applications of these forms. The use of the term “*insuring Party*” in Clause 18 of the 1999 edition, allowed for flexibility in the allocation of insurance obligations as between the Parties. At the same time those obligations applied with equal effect, depending on the Party to which the obligations were assigned.

The new provisions in what is now Clause 19 have done away with the “*insuring Party*” approach; almost all the obligations are on the Contractor. In applications where that is not to be the intended position, it will now mean careful amendment to Clause 19 itself.

Furthermore, the earlier flexible approach also allowed for the terms of what was then Clause 18 to be overridden by specific insurance terms agreed between the Parties before the date of the Letter of Acceptance. That further flexibility is also now lost, at least within the new Clause 19. The mechanism now lies in adding “*memoranda*” to the Letter of Acceptance; see the asterisked footnote against the heading on the form of the Letter of Acceptance, and which incorrectly refers to Sub-Clause 1.1.51. It should refer to the defined term of “*Letter of Acceptance*” which is at Sub-Clause 1.1.50, and which does refer to the possibility of including, “*annexed memoranda comprising agreements*

between the Parties”. Hardly the language of clarity.

There is a concern that even where the Parties essentially remain within the outline of the Clause 19 terms, many typical insurance policies may well not match the now much more specific requirements within Clause 19. What remains to be seen is whether or not those Parties will correctly react and go down the memorandum/addendum route. Failing that, the Clause 19 terms will apply and the scope for misunderstandings to arise is very real. It seems a pity that the more fail safe earlier way of dealing with this has now been lost.

In going to a more prescriptive basis, it is perhaps a missed opportunity that Clause 19 did not at least address the insurance requirements and implications against the possibility of:

- Joint names insurance cover extending to all parties for their Site interests, particularly Subcontractors of any tier and other contractors of the Employer, as may be applicable.
- The Works forming a part of a larger project, all at or about the Site.
- The presence of significant existing property of the Employer at or about the Site.

To the extent applicable via the Contract Data, the new requirements relating to professional indemnity insurance in Sub-Clause 19.2.3 will deserve careful review by a tendering Contractor with his professional insurance advisor. The basis of the required cover, the absence of the usual protection where such cover is no longer available at reasonable market rates, and the requirement to extend such professional indemnity insurance to fitness for purpose, are likely to be problematic.

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In summary the more extensive and prescriptive nature of Clause 19 and the associated Contract Data is a positive development if the outcome is that Parties will consider the requirements carefully and take the necessary professional insurance advice.

The potential downside is twofold; (i) the provisions of Clause 19 may well need amending even where the Parties intend to remain within its structure, and (ii) the route to ensuring that such amendment is properly incorporated into any Contract is now not so clear and lacks the earlier and more fail safe provision to allow amendments specifically agreed between the Parties to prevail over what is now Clause 19.



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