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2017 Risk Transfer

Update

by

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for

PARMA, February 2017

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2017 Risk Transfer Update

1. Every time you sign a contract you do one of 2 things—

- a. Take on additional risk, or
- b. Transfer risk to the other party

Transfer of Risk Using Contracts

2. When you hire a Contractor, you become liable for their work

- a. Public Agencies have their own liability plus responsibility and liability for the actions of others with whom they Contract (Vendors, Users of facilities, Contractors, Subcontractors, etc.)
- b. All parties need to have correct Insurance for both the liabilities they have, and the liabilities they assume in a Contract

3. Party best able to control the risk should be responsible—the Contractor/Vendor

- a. Proper use of Contract Agreements can transfer financial risk to the responsible party—Public Agency Transfers risk to the hired Contractor or his Subs doing the work and directly causing the risk





- b. The Contract specifies the requirements and responsibilities of each party and therefore the liabilities they assume

4. Indemnification Transfers Risk to Another Party

- a. What it is—One party agrees to assume another's liability
- b. In this workshop we discuss, not your Public Agency's Insurance, but rather the Insurance of those with whom you Contract
- c. In California, the Legislature has codified the definition of indemnity as follows: "Indemnity is a contract by which one engages to save another from the legal consequences of the conduct of one of the parties, or some other person." California Civil Code § 2772.

5. Two principal ways to transfer the cost to protect the Public Agency

- 1. Indemnity—Insured (paid for) by Contractor and by means of Contractual liability coverage and the definition of "insured contract" in Contractor's Insurance policy
- 2. Insurance—Insure the Public Agency by Additional Insured Endorsement(s) on the Vendor/Contractor's policy. We will cover those later.

6. First look at what contracts require—then examine the coverages that will pay for it.





7. Types of liability to be Transferred

- a. Vicarious liability—liability as a function of law regardless of the actions of the Hiring Party
 - i. Negligence is not required to have vicarious liability

- b. Negligent Tort liability—Duty of Care; Prudent person standard; Breach resulting in harm = Negligence
 - i. Active liability—What you did caused the harm

 - ii. Passive liability—What you did not do, but could have, caused the harm; you could have prevented it; Failure to prevent a known danger may be considered “Active” negligence
 1. Passive examples: Failure to discover, supervise, inspect; prevent; an omission of a duty

 - iii. Strict Liability—no negligence required, only causation; Products, etc

- c. Contractual Liability—Liability of others assumed by Contract; Liability because the Contract says so! What the Contractor does to indemnify you.

- d. Joint & Individual (Several) Liability and its effect = deep pockets





- e. Professional Liability—Different from General (tort) Liability in that it includes Financial Harm even if no Bodily Injury or Property Damage happens; a financial loss from an error or omission

8. Types of indemnity agreements:

- a. Type I Contractual Indemnity— Allows indemnification for the Public Agency's Liability for damages from any tort liability, including Active or Passive, whether or not caused by the Contractor or within his scope of work.
 - i. Exceptions: 1—Sole or 2—Willful Liability, including fraud
- b. Type II—Indemnification for the Passive, but not Active Liability of the Public Agency regardless of who caused it, i.e. whether or not caused by the indemnifying Contractor; Indemnifies passive liability caused by others
- c. Type III—Indemnification only for Passive liabilities caused by the indemnifying Contractor, but not Passive liability caused by others
- d. General Indemnity clause does not specifically address how much of the Public Agency's negligence is indemnified. At most, only Passive, not Active liability, is indemnified. May be tossed out of Court entirely!
 - i. Reference for Types 1-3 & General Indemnity clause: *McCrary Construction Co. v. Metal Deck Specialists, Inc.*, 133 Cal. App. 4th 1528 (2005)
- e. Danger of so-called “2 way indemnity” agreements! Actual Example:





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- i. Rather than being explicit, they often cancel each other out and there is NO Indemnity! When the claim reaches the Insurance Company attorneys they will have a field day and the original good intent between the parties will be of no value.

9. Elements of Indemnification—

- a. Hold Harmless, Defend, Indemnify, & Waive subrogation rights.
 - i. Contractual waiver must be endorsed for Work Comp policy, but is allowed by ISO carriers for CGL policy & Business Auto
 - ii. Effect of waiver of subrogation—no right of recovery
- b. Contractual Duty to defend can stand separate from the duty to Indemnify
 - i. Crawford v. Weather Shield Mfg., Inc.(July 2008): Duty to defend arises immediately upon a proper tender of defense by the Owner regardless of actual negligence of the Contractor.
 - ii. Review and update Defense obligation in contracts!
- c. Length of obligation—During Contract, or including after completion – Why later—Construction Defect and liability for Bodily Injury
 - i. Currently, How long is allowed by law?





- ii. Contract should include requirement it is the Contractor's responsibility that defense and indemnity obligations shall survive the termination of the agreement for the full period of time allowed by law

- d. Is Indemnity regardless of or limited by insurance coverage?
 - i. Contract should make clear that the defense and indemnification obligations of the agreement are undertaken in addition to, and are not limited by, the insurance obligations in the agreement.

10.INSURANCE COVERAGE FOR INDEMNITY OBLIGATIONS

- a. Standard ISO CGL Policies contain coverage **for the Named Insured** for liability assumed (Indemnified by Contractor) in an “Insured contract.”
 - i. “That part of any other contract or agreement pertaining to your business under which you (*the Named Insured Vendor/Contractor*) assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization.” (definition “f.” of “insured contract” definition)

- b. **BEWARE** of endorsements restricting the Contractual Liability coverage or other endorsements excluding or changing the “insured contract” definition that provides this coverage.

- c. Do your Insurance requirements prohibit “modification of the standard ISO Contractual liability definition of an “insured Contract””?





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- i. ISO CG 21 39 deletes the “f.” portion of the definition clause above and results in no coverage for most Contracts (other than a. through e.)
- d. Effect on indemnification provisions—Contractor liable & no coverage

11. Employer’s Liability (Worker’s Comp) Indemnification—

- a. “Action over” employee liability suit against Public Agencies
- b. Employee lawsuit of Public Agency is indemnified by Employer’s coverage provided under the same ISO CGL definition of an “insured contract”

12. What about high deductibles or SIRs? What’s the difference?

- a. Danger of large Self Insured Retentions (SIRs) (not deductibles)
 - i. A policy with a deductible (not SIR) requires that the Insurance Company perform their duties (defense and coverage) without prior payment, but not for SIRs. An SIR must be paid before any defense or coverage for damages applies!
 - ii. Forecast Homes Inc. vs. Steadfast Insurance Company—Carrier not obligated to provide coverage to Additional Insureds where the Named insured failed to pay the SIR. The Additional insured could not satisfy the SIR on behalf of the Named insured in order to trigger coverage.
 - iii. **Be very careful** of granting such high limit SIRs which must be paid by the named Insured.





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- iv. With respect to a Vendor/Contractor that has a very high SIR – Do your due diligence. Require financials, collateral, Letter of Credit, security, etc sufficient to pay the SIR. Require a Contract provision that the Vendor/Contractor pay the SIR
- v. Have the Insurance Company amend the policy to provide that the Additional Insured, not just the named Insured, can satisfy the SIR (in order to trigger coverage).
- vi. Include Contract requirements that—
 1. Self-insured retentions (SIR) must be disclosed to Risk Management for approval and shall not reduce the limits of liability.
 2. Policies containing any self-insured retention (SIR) provision provide, or be endorsed to provide, that the SIR may be satisfied by either the named Insured or the Additional Insured.
 3. Additional Insured reserves the right to obtain a copy of the Insurance policy and endorsements.

13. Pass through or Pass down provision – require that any Subs hired by the Contractor require the same coverage for the Public Agency

14. Completed Operations exposure (liability after work completed) for Construction, Repair, & Maintenance Agreements:

- a. Require Contractor to maintain insurance for a minimum of 3-5 years (or more) following completion of the project.



15. Amount of risk not necessarily consistent with size of job

- a. Purchase order used for small jobs? Example: Tank Maintenance—built scaffold and EE injured
- b. Worker's comp "action over" liability for Public Agency from Vendor/Contractor's or Sub's Employees
- c. Many Public Agencies have services for which they do NOT require a Contract
 - i. Balance needed to not require overly cumbersome, strict, or excessive Insurance requirements. Doing so may rule out small, local, responsible vendors and create higher Contract costs. Do these on a pre-vetted service basis.
 1. Evaluate higher risk operations for Contract requirements with higher limits. Awareness level training to: Distinguish low & high risk; routine vs suspicious; normal vs hazardous or risky. Examples: kids, large crowds, high voltage, water, heights, ladders, scaffolding, pyrotechnics, flammable, etc
 - ii. Put your "Indemnity & Insurance Requirements" on the Purchase Order (or Proposal, Memorandum of Understanding, Letter of Intent, etc. – whatever you use) and have them sign and date it with a statement that they have read, understand, and agree to comply with the Indemnity and Insurance requirements supplied with the Purchase Order. This will "trigger" the "written Contract or Agreement" requirement for coverage in most policies.
 - iii. Surprising good coverage of small BOP policies.





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- iv. **For RFPs:** It is strongly recommended when distributing an RFP (proposal) or RFQ (qualification) to include a document containing a summary of your Indemnity and Insurance Requirements that includes language to provide a copy of the requirements to their insurance broker or insurer to confirm compliance.
- v. Then, at the bottom of the form have them sign, date, and return with language that they have read, understand, and agree to comply with the Indemnity and Insurance requirements supplied with their proposal.

Provides quick & early problem screening & policy trigger with late or no Contract!

15. Anti-Indemnity Public Agency restrictions for all construction related contracts:

- i. Civil Code Section 2782(b) provides that indemnification for the active negligence of a public agency relating to a construction related contract is invalid (i.e. void and unenforceable)

1. Type 1 is not allowable! Type 2 & 3 are ok

- ii. Assembly Bill 573, effective January 1, 2007 (Section 2782.8 of the California Civil Code) prohibits public agencies (but not the State) from requiring design professionals to indemnify for the public agencies' negligence or other fault (not just active), unless caused by that design professional

1. Type 1 & 2 is not allowable! Only Type 3 is ok





SB474—effective 1-1-2013

- b. NO MORE Type 1 indemnity—For contracts executed on or after 1-1-2013, Indemnification for active liability of the Public Agency will no longer be allowed in any construction related contract
 - i. Limitation also applies to defense for the Public Agency’s active negligence—may now obtain only defense proportionate to the extent of damage caused by the Contractor.

- c. The above does NOT apply to non-construction related contracts
 - i. To avoid overly broad indemnity provisions, use qualifying language such as: To the fullest extent allowed by law, Contractor shall...

The best indemnity Contract in the world is no good if the Contractor can not afford to pay for the indemnification promises; OR does not have Insurance to do so!

NOTE: Boilerplates are a great starting point, but unless you understand them you will not know if they apply to your specific needs

We have included sample boilerplate language in the REFERENCE Section of this handout for some of the exposures discussed above.





RECAP: There are 2 primary ways to cover Contract obligations with Insurance

- 1) **Coverage for the Public Agency as an Indemnified Party (Indemnitee)**—
 - a) Covered on Contractor policy by means of Contractual liability coverage
 - b) Coverage is limited by definition of “Insured Contract” in Contractor’s Policy
 - i) Is definition amended to require named insured Contractor’s fault
 - ii) Does definition otherwise exclude or reduce Contractual Coverage
 - c) **Other Policy exclusions or limitations** can also prevent coverage!





Now we will discuss the 2nd way to cover the Public Agency – by Naming as an Additional Insured

- 2) **Coverage for the Public Agency by endorsement as an Additional Insured Party**
 - a) By means of **Additional Insured Endorsement** – not just Certificate of Insurance!
 - b) Coverage is limited by which form is used for Additional Insured. The issues that vary are:
 - i) When does coverage apply, i.e. during operations, after completion, or both?
 - (1) Completed Operations exposure for Construction, repair, and maintenance
 - ii) Does the form require the Contractor be at fault
 - iii) Does the policy itself have other exclusions or limitations that prevent coverage





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ALL Newer ISO Additional Insured forms do not apply unless required by Contract!

1. **ALL** of the 2013 ISO Additional Insured Endorsements with the edition date of 04.13 contain provisions limiting and restricting their Insurance coverage for the Additional Insured to ONLY the requirements in the written contract (or agreement) between the parties.
2. **COVERAGE**—The Contract must explicitly require the extent of coverage or there is NO coverage! No clear Contract requirement = NO COVERAGE!
3. **LIMITS**—Even if your Contractor’s policy contains broader coverage or higher limits of liability than your contract requires, they will NOT apply in behalf of the Additional Insured or Indemnified Party (Indemnitee) unless it is required in the contract!

Contracts should require that (1) the full coverage and (2) the full limits available to the named insured shall also be available and applicable to the additional insured!

You should further require that the coverage and limits shall be (1) the minimum coverage and limits specified in your Agreement; or (2) the broader coverage and maximum limits of the coverage available to the named Insured; whichever is greater.

1. The new ISO CG 20 38 endorsement provides Additional Insured “ongoing operations” liability coverage for the Public Agency from the Contractor you hire **as well as for Subs he may hire** on an automatic basis **provided it is required** in the Contract.
 - a. The CG 20 33 provides this coverage for only the Contractor you hire and not any of his Subs. In this case the Subs must name you individually.
 - b. **Make sure your Contract requires it!** How—To receive the automatic blanket provisions of the CG 20 38 04 13 endorsement or coverage “at least as broad” (do not say “equivalent”) include a provision requiring it in your Contract. Have the Contractor require and verify that all subcontractors or other parties hired for this work purchase and maintain coverage for indemnity and insurance requirements as least as broad as specified in your agreement (to the extent they apply to the scope of the subcontractor’s work) and naming as additional insureds all parties to the Contract. Then have the Contractor provide a certificate of insurance as proof of Compliance and verification by the subs to the Public Agency upon request.



2. The certificate of insurance, despite what it may say, is not enough! Be sure they provide proof to you (a copy and/or listing on the policy declarations and endorsement page) of the actual CG 20 38 policy endorsement that changes the coverage on the policy.
3. **With this new CG 20 38 04 13 we see no reason to use the CG 20 33 form once the CG 20 38 form is available to your contracting party.**

The NEW ISO CG 20 01 ENDORSEMENT PROVIDES EXPLICIT PRIMARY AND NON-CONTRIBUTORY COVERAGE

1. This is a new endorsement that expressly states that the coverage is provided to an additional insured Public Agency on a “primary and non-contributory” basis – the Public Agency’s Insurance does not pay until Contractor’s policy is exhausted.
2. This endorsement is activated only if the named insured Contractor has agreed to these terms in a written contract or agreement.
3. **Make this a requirement in all your Contracts!**
The Additional Insured coverage under the Contractor’s policy shall be “primary and non-contributory” and will not seek contribution from the Public Agency’s insurance or self-insurance and shall be at least as broad as CG 20 01 04 13.
4. **Excess Insurance**—Most excess or umbrella policies usually contains language that makes them excess only, and not primary. This policy language requires exhaustion of all policy limits (including the Public Agency’s) before **any** excess policy applies. Include language in your Contract that requires the umbrella or excess Insurance to provide coverage on a primary and non-contributory basis:
The limits of Insurance required in this agreement may be satisfied by a combination of primary and umbrella or excess Insurance. Any umbrella or excess Insurance shall contain or be endorsed to contain a provision that such coverage shall also apply on a primary and non-contributory basis for the benefit of Public Agency as required in a written contract or agreement before the Public Agency’s own Insurance or self-insurance shall be called upon to protect it as a named insured.





PRACTICAL EFFECTS OF THE 2013 FORMS—

1. The first thing the Insurance Company will look for to deny coverage is the underlying Contract! **Your Contract becomes an endorsement to the policy!**
2. Even if the Contractor's policy contains broader coverage or higher limits of liability they will NOT apply in behalf of the Additional Insured / Indemnified Party (Indemnitee) unless it is required in the contract!
3. Unless agreements between "friendly parties" (both are Public Agencies and they agree to work together with NO written Contract or Agreement) contain clear written requirements, you may have no Insurance coverage at all from your Insurance carrier for anything in excess of your own Deductible or Self Insured Retention (SIR) limits!
4. Public Agencies need the correct written requirements in their contracts! Otherwise the Insurance of Contractors will not provide the expected coverage!
5. Contracts or agreements **must be clear** as respects the extent of additional insured coverage required. Many agreements simply require a party to the contract to be an "additional insured" or simply "an insured." What, then, is the scope of coverage agreed upon? (Negligence or "Caused by" requirement, Active, Passive, Vicarious, etc.)
6. Require that Contractors provide coverage "at least as broad" (not just "equivalent") as the specific ISO forms listed in your Insurance requirements. Make provisions to analyze whether "non-standard (non-ISO) forms" constitute coverage "at least as broad" since most, but not all Companies, use the ISO forms.

A reference Matrix of various ISO Indemnity and Additional Insured Endorsement forms and their appropriate application follows.





ISO COVERAGES for Parties Other than the Named Insured

CAUTION! Non-ISO Manuscript Policies or Modified Definitions or Endorsements differ from the standard ISO coverages below! Be very careful!

INDEMNIFIED PARTY Contractual Liability Coverage for Named Insured (Definition of “Insured Contract”)

Ongoing Operations (During Construction)	Completed Operations (After Construction)	NOT require “caused by” Named Insured; Covers Type 1, 2 or 3	REQUIRES “caused by” Named Insured; covers <u>only</u> Type 3 indemnity
Standard ISO “Insured Contract” definition in CG 00 01	Standard ISO “Insured Contract” definition in CG 00 01	Standard ISO “Insured Contract” definition in CG 00 01	CG 24 26 07 04 & 04.13+ AMENDMENT OF INSURED CONTRACT DEFINITION
CG 21 39 deletes “f.” NO COVERAGE	CG 21 39 deletes “f.” NO COVERAGE	CG 21 39 deletes “f.” NO COVERAGE	CG 21 39 deletes “f.” NO COVERAGE

BEWARE of endorsements amending, excluding, or changing Contractual Liability coverage or the “insured contract” definition that provides the liability coverage for Indemnification obligations assumed by Contract by the Named Insured Vendor/Contractor.

ADDITIONAL INSURED ENDORSEMENT Coverage (CG 20 01 adds Primary & Non-Contributory)

Ongoing Operations (During Construction)	Completed Operations (After Construction)	NOT require “caused by” Named Insured	REQUIRES “caused by” Named Insured to trigger coverage. <u>ALL</u> 07.04 & 04.13
Named AI- CG 2010 & 2026#—All editions	CG 2010 & 2026# 11.85 Edition only	YES—all except 07.04 & 04.13*+	CG 2010 & 2026# 07.04 & 04.13*+
“Blanket” CG 2033 All editions & 2038 4.13*+	CG 2033 & 2038 04.13*+ = NO Coverage	YES—all except 07.04 & 04.13*+	CG 2033 07.04 & CG 2038 04.13*+
Named AI - CG 2037 = NO Coverage	CG2037 ALL editions	YES 10.01; NO 07.04 & 04.13*+	CG 2037 07.04 & 04.13*+

EXAMINE CAREFULLY Non-ISO Additional Insured Endorsements to see how they differ from the above for coverage in each of the 4 column and 3 row categories.

2026 (or 2011) covers “Designated” Additional Insured for rental of premises; 2012 = AI for Permits “Blanket” (Automatic Status) forms need written Contract or Agreement requirement to trigger coverage.

+ All of the 04 13 Endorsements above apply only to the extent permitted by law.

* ALL of the 04.13 Additional Insured Endorsements **will NOT (1) provide broader coverage or (2) pay higher limits than required by the written Contract or Agreement!** The Contract must explicitly require the limits and extent of coverage or there is NO coverage even if the policy would otherwise provide the coverage!

No clear Contract requirement = NO COVERAGE!



“RESTRICTED COVERAGE POLICIES” – A Whole new class of Insurance

- 1) Some Companies actually specialize in Restricted Coverage policies, and other Companies have them as options.

- 2) Chilling statements made by an executive of a large, national Insurance Company:
 - a) ‘Brokers need to understand and explain to their Insureds that we don’t ever expect to pay a loss under this type of policy.’

 - b) ‘They need to understand all they are getting is paper to allow them to get on the job.’

- 3) **Certificates of Insurance will not warn you of the restricted or excluded items!**

- 4) Your Contractor’s Insurance Company will not pay for defense or damages

- 5) Many, if not most, Contractor polices now have special endorsements!

- 6) **Examples of Restricted Coverage Endorsements** put on policies:
 - a) **Non-standard Additional Insured Endorsements** providing less coverage, or with unreasonable limitations or conditions

 - b) **Prior work exclusions—These are deadly!**
 - i) **Montrose exclusions – continuous injury coverage exclusions.**





- ii) Modification of Occurrence definition

- iii) Various Continuous and Progressive / Pre-existing Damage endorsements

- iv) **These endorsements can have the effect of deleting Completed Operations Coverage, including Construction Defect coverage for both Additional Insured Endorsements and Contractual Liability indemnity coverage—The 2 principal methods of covering the Public Agency!**

- c) **Restrictive Exclusions** – type of work, residential, # of units, etc—No coverage if the work excluded is what they are doing for you!

- d) **Limitation** of Coverage to Designated Premises or Project (CG 21 44)—No coverage if the Designated Project is not yours!

- e) **Exclusion**—Designated Ongoing Operations (CG 21 53)—No coverage if the Operations are the work they are doing for you!

- f) **Exclusion—Damage to Work Performed by Subcontractors on Your Behalf (CG 22 94 & 95) – Removes coverage for Property Damage liability!**

- g) **Wrap Up policies** (OCIPs, CCIPS, etc) – can be very good, or very, very bad
 - i) **Coverage Considerations for a Wrap Policy are completely different! All the normal rules above will not apply! Please get help if you are involved in a Wrap-up project! Much of my expert witness time the last several years has been where Wrap policies were involved!**





h) Contractor's Endorsements – the catch all!

- i) One Company underwriter said ‘we put all the bad stuff in that one endorsement hoping they won’t notice.’
- 7) If the Public Agency is named on a **policy with exclusions** or “wrong” coverage or no coverage—**there is no coverage** for the Public Agency as an Additional Insured, or the named Insured Contractor!
- 8) **VERIFICATION** of Coverage Compliance[®] IS THE MOST IMPORTANT PART OF THE ENTIRE PROCESS! Make it **standard practice** (authorized & required by your Contract) that you require a Certificate of Insurance with the following attached—
- i) **Waiver of subrogation endorsement for Workers' Compensation**
 - ii) **Additional Insured Endorsement for “ongoing operations”** (i.e., CG 20 10, CG 20 33, or CG 20 38. Do not use the CG 20 33 if Subs may be involved. Phase out usage of the CG 20 33 as the CG 20 38 becomes available.)
 - iii) **Additional Insured Endorsement for “completed operations” exposures such as construction, repair, or maintenance operations** (i.e., CG 20 37 if scope of work makes it applicable due to completed operations exposure.)
 - iv) **Primary & non-contributory coverage** (Such as CG 20 01 04.13)
 - v) **A copy of the Declarations & Policy Endorsements page for the GL policy.**





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(This is **necessary** to help **identify** “Restricted Coverage” policies and endorsements and verify if limitations or exclusions have been added to the policy – the policy endorsements will be listed here.)

IF YOU DO NOT KNOW WHAT AN ENDORSEMENT OR POLICY PROVIDES OR CONTAINS—GET HELP!

THE BEST CONTRACT FOR INDEMNITY AND INSURANCE REQUIREMENTS IS USELESS UNLESS VERIFIED FOR COVERAGE COMPLIANCE!

More information on Verification is contained in the REFERENCE Section





APPLICATION OF KNOWLEDGE LEARNED

- 1) Use approved Contract language & Additional Insured endorsements!
- 2) Use a “Summary of Indemnity and Insurance requirements” with signature for RFPs, RFQs, Purchase Orders, MOUs, LOIs, etc to prevent problems, solve earlier, trigger coverage, and make the process simpler & quicker!
 - a) Having this signed “Summary” triggers available coverage for:
 - i) Indemnity for Contractual Liability coverage (“Insured Contract” definition) and “action over” Workers' Compensation claims
 - ii) Automatic Blanket Additional Insured Endorsements
- 3) Use the new ISO CG 20 38 as available for broader coverage (for Subs) to replace the 20 33 automatic blanket Additional Insured (OK if no Subs)
- 4) Focus on high risk operations for higher limits. Awareness level training to:
 - a) Distinguish low & high risk; routine vs suspicious; normal vs hazardous or risky.
Examples: kids, large crowds, high voltage, water, heights, ladders, scaffolding, pyrotechnics, flammable, etc
- 5) Verification of requirements –Require the Declarations & Endorsements page with the Certificate of Insurance. Review the Schedule and Evaluate Yellow (Need more info—could be a problem) and red flags (Prohibited endorsements). It saves time, expedites any delays and questions to an earlier, manageable time process.
- 6) Pay special attention to the Schedule of Policy endorsements for—
 - a) Contractual Liability “Insured Contract” definition changes or exclusions
 - b) The correct Additional Insured Endorsements per your requirements
 - c) Policy exclusions, limitations, and reductions in coverage





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BIOGRAPHICAL PROFILE—Robert J. Marshburn, CRM, CIC, ARM, CRIS, CISC, CCIP



In independent industry evaluations, Mr. Marshburn is consistently rated as one of the nation's top Risk Management Consultants and Educators. He is the founder and principal of R. J. Marshburn & Associates, CertifiedRiskManagers.com, an independent risk management consulting and educational firm. He has been in risk management 40 years.

Mr. Marshburn holds the professional designations of Certified Risk Manager (CRM), Associate in Risk Management (ARM), Certified Insurance Counselor (CIC), Construction Risk & Insurance Specialist (CRIS), Certified Insurance Specialist in Construction (CISC), and Certified Construction Insurance Program (CCIP).

Mr. Marshburn works as an outsourced risk manager, as an independent consultant to clients, and in association with other professionals with their clients. He is an appealing, frequent speaker before various groups on risk management and insurance topics.

Mr. Marshburn was an original designated member of the National Faculty of the Certified Risk Managers teaching courses for qualification for the CRM professional designation and served as a consultant developing the CRM program on the Curricula Advisory Committee. He authored Graduate courses and teaches workshops in Indemnification & Additional Insureds, Contractual Liability & Insurance Coverage, Construction Defect issues, Wrap-Up Policies, and Ethics.

He is the co-creator and author of the Certified Insurance Specialist in Construction (CISC) professional designation that was later merged into the Construction Risk & Insurance Specialist (CRIS) program from the International Risk Management Institute which he also teaches. In addition, he serves as the Senior Educational Consultant and Instructor to the Insurance Community University and is a co-creator of the University's Certified Construction Insurance Program (CCIP).

Mr. Marshburn is a nationally recognized expert in the field of Contractual risk transfer, including indemnity and insurance requirements for risk management. He currently serves as the contributing editor of the California Public Agency Insurance Contract Manual.

He is the founder and creator of the [Coverage Compliance Verification](#)[®] Program and specializes in the challenges posed in Construction Risk, including Construction Contracts, Contractual Liability Analysis & Design, Insurance Policy Coverages and Endorsements, Wrap Policies (OCIPs, CCIPs, etc), Construction Defect Liability, and Coverage Disputes.

Mr. Marshburn has been retained as a consultant, educator, and expert witness for some of the nation's premier builders, contractors, risk managers, carriers, developers, brokers, consultants, attorneys, public entities, industry & trade associations, and educational organizations.





Reference

Risk Transfer & Coverage Verification

The job of Risk Transfer and Coverage Verification has become much more difficult in recent years. After you set up your Risk Transfer provisions for your Vendor/Contractor, you **MUST** verify the coverage to know if they are complying with your requirements.

After the Contractor has contractually agreed to assume risk, it will require Insurance to pay for that risk, since most Contractors are not flush with cash!

How do you verify their Compliance with your Insurance requirements, especially with so many Insurance Companies now issuing “Restricted Coverage” policies?

Certificates of Insurance for every Contractor/Vendor are NOT sufficient!

Many things NOT shown on Certificates of Insurance (COIs, Certs) endanger your Liability protection from the Contractor’s Insurance Policy when there is substandard coverage – much of which they or their insurance Brokers may not even know about!

1. Certs will NOT show if coverage complies with your Contractual requirements – the Certificate of Insurance picks and chooses what to tell you – and it's not the important things!
2. Certs will NOT show “Restricted Coverage” policy exclusions & endorsements that result in NO coverage, or reduced coverage for you – There are many of them!
3. Restrictions, Exclusions, or Limitations for location, types of ongoing or completed operations, type of work, etc. Examples:
 - a. Limitation of Coverage to Designated Premises or Project (CG 21 44)
 - b. Exclusion—Designated Ongoing Operations (CG 21 53)
4. Certs will NOT show exclusions or limitations for Contractual liability coverage, changes to the “insured Contract” definition, or Vendor/Contractor employee





- “action over” exclusions—all of which result in no coverage for your Indemnification on very expensive matters!
5. Certs will NOT show exclusions for Property Damage liability done by Subcontractors
 - a. Exclusion—Damage to Work Performed by Subcontractors on Your Behalf (CG 22 94 & 95)
 6. Certs will NOT show Prior work exclusions, including:
 - a. Montrose exclusions, Continuous injury coverage exclusions, Modification of Occurrence definition, Continuous and Progressive or Pre-existing Damage endorsements.
 - b. All of these endorsements can have the effect of deleting Completed Operations Coverage, including Construction Defect coverage for you!
 7. Certs will NOT show “Contractor’s endorsements” that change or exclude coverages that are otherwise included in standard policy provisions!
 - a. These are completely customized and manuscripted endorsements that totally change policy provisions – occasionally for good, but nearly all the time for bad.
 8. Certs will NOT show waiver(s) of subrogation – they must be attached as actual copies of policy endorsements.
 9. Certs will NOT show if coverage is primary for Underlying & Excess policy(ies)
 10. Certs will NOT show specific Additional Insured Endorsements & Compliance for ongoing and completed operations – they must be attached as actual copies of policy endorsements.
 11. Certs will NOT show details of any large SIR endorsements and dangers.
 - a. If the SIR is not paid, there is **NO COVERAGE** for the Insured or for you as the Additional Insured or indemnified Party
 12. Certs will NOT show verification of Insurance for any Subs hired by your Contractor.
 13. **The worst part** – Under many of the Additional Insured forms, your Contract must specifically and correctly Require (1) the limits and (2) the extent of coverage or there is NO coverage beyond the Contract Requirements even if the policy would otherwise have provided for the coverage! No clear Contract Requirement = NO COVERAGE! See <http://www.certifiedriskmanagers.com/ISO0413forms.htm>





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Sample hold harmless language

NOTE: Always have your Attorney and Risk Management consultant review and approve any language to be sure it applies to your case.

Basic Hold Harmless language (Type 1) for most contracts including Lease and Rental agreements, not related in any way to Construction Contracts or Professional Agreements (see following examples) reads as follows:

To the fullest extent permitted by law, Contractor shall hold harmless, defend at its own expense, and indemnify Entity its officers, employees, agents, and volunteers, against any and all liability, claims, losses, damages, or expenses, including reasonable attorney's fees, arising from all acts or omissions of contractor or its officers, agents, or employees in rendering services under this contract; excluding, however, such liability, claims, losses, damages, or expenses arising from Entity's sole negligence or willful acts.

NOTE: As discussed above, Special limitations apply to Design Professionals and Construction related agreements for which sample language follows...





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Sample hold harmless language

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Construction related Contracts Hold Harmless language (Type 2), with active negligence limitation shown in **bold**, (not for Design Professional Agreements) reads as follows:

To the fullest extent permitted by law, Contractor shall hold harmless, defend, and indemnify Entity and its officers, officials, employees, and volunteers from and against all claims, damages, losses, and expenses including attorney fees arising out of the performance of the work described herein, caused in whole or in part by any negligent act or omission of the Contractor, any subcontractor, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, **except where caused by the active negligence**, sole negligence, or willful misconduct of the Entity.





Sample hold harmless language

NOTE: Always have your Attorney and Risk Management consultant review and approve any language to be sure it applies to your case.

Design Professional Agreements for Licensed Architects, Landscape Architects, Professional Engineers, and Professional Land Surveyors with limitations shown in bold, reads as follows:

Design Professional agrees to indemnify, including the cost to defend, entity and its officers, officials, employees, and volunteers from and against any and all claims, demands, costs, or liability that arise out of, or pertain to, or relate to the negligence, recklessness, or willful misconduct of Design Professional and its employees or agents in the performance of services under this contract, but this indemnity **does not apply to liability for damages arising from the sole negligence, active negligence, or willful acts of the Public Entity; and does not apply to any passive negligence of the Public Entity unless caused at least in part by the Design Professional.**

For design/build contracts or liability that may arise from the activities of the design professional not related to professional services you may want to use two separate hold harmless agreements: This sample for Design Professional liability, and the previous Type 2 for Construction related Contracts for all other liability in the contract. You may also consider separate contracts, one for the design and one for the build, if appropriate.





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Sample hold harmless language

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Example of Type 3 - Limited Form Indemnity

Contractor agrees to protect, indemnify, and save harmless Entity and its officers, officials, employees, and volunteers from and against all claims, demands, and causes of action by Contractor's employees or third parties on account of personal injuries or death or on account of property damages arising out of the work to be performed by contractor hereunder and resulting from the negligent act or omissions of Contractor, Contractor's agents, employees, or subcontractors.

This example is the most limited, Type 3, of indemnity agreements because it only provides indemnity for any passive negligence of the Entity cause in whole or in part by the negligent Contractor, but not from passive negligence of the Entity caused by other contractors (this would be Type 2 shown above).

This Type of language may be necessary due to negotiations based on decreased bargaining power for the Public Agency due to unique or exclusive providers, etc.





Additional Insurance Requirements for IT Vendor or IT Professional Services

NOTE: Always have your Attorney and Risk Management consultant review and approve any language to be sure it applies to your case.

Technology Professional Liability (Errors and Omissions) Insurance appropriate to the Consultant's profession, with limits not less than **\$2,000,000** per occurrence or claim, **\$2,000,000** aggregate. Coverage shall be sufficiently broad to respond to the duties and obligations as is undertaken by Consultant in this agreement and shall include, but not be limited to, claims involving infringement of intellectual property, including but not limited to infringement of copyright, trademark, trade dress, invasion of privacy violations, information theft, damage to or destruction of electronic information, release of private information, alteration of electronic information, extortion and network security. The policy shall provide coverage for breach response costs as well as regulatory fines and penalties as well as credit monitoring expenses with limits sufficient to respond to these obligations.





Additional Insurance requirements for the use of Drones (UAVs)

NOTE: Always have your Attorney and Risk Management consultant review and approve any language to be sure it applies to your case.

Owner/Operator shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damage to property which may arise from or in connection with the ownership, maintenance or use of the Unmanned Aerial Vehicle.

MINIMUM SCOPE AND LIMIT OF INSURANCE

Coverage shall be at least as broad as:

Aviation Liability Insurance-on an “occurrence” basis, including products and completed operations, property damage, bodily injury with limits no less than \$1,000,000 per occurrence, and \$2,000,000 in the aggregate.

This coverage may also be provided by endorsement to a **Commercial General Liability** policy. In that event then:

Commercial General Liability (CGL): Insurance Services Office Form CG 00 01 covering CGL on an “occurrence” basis, including products and completed operations, property damage, bodily injury and personal & advertising injury with limits no less than \$2,000,000 per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location (ISO CG 25 03 or 25 04) or the general aggregate limit shall be twice the required occurrence limit.

