



R. J. Marshburn & Associates

CertifiedRiskManagers.com

## **2018 Risk Transfer** **Update – Part 1**

For:

PARMA  
February 15, 2018

By:

Robert J. Marshburn, CRM, CIC, ARM, CRIS, CISC, CCIP

R. J. Marshburn & Associates  
Laguna Beach, California  
[Bob@CertifiedRiskManagers.com](mailto:Bob@CertifiedRiskManagers.com)

**Disclaimer:**

This material is for educational purposes only. R J Marshburn & Associates is independent of any insurance company, law firm, or other entity. These matters are in a constant state of change. What is current today can be outdated tomorrow. This information is presented from an insurance and risk management perspective only, and can not apply to any single set of circumstances. It is not intended as a substitute for competent legal advice. You should check with your legal adviser to determine suitability, if any, to your specific circumstances. R J Marshburn & Associates expressly disclaim any responsibility for damages arising from any use, application, or reliance upon the information presented herein. Forms from the Insurance Services Office (ISO) are reproduced and included with permission of ISO.





R. J. Marshburn & Associates

CertifiedRiskManagers.com

## **2018 Risk Transfer Update – Part 1**

### **An Examination of General Liability Risks facing Public Agencies and the Elements of Indemnity & Insurance for Transferring and Reducing those Risks through Contracts**

To obtain maximum liability protection for PARMA Public Agencies, we will discuss:

1. Transfer of Risk using Contracts & Indemnification – What it is & Why it's needed
2. Recent Insurance changes that Require your Contracts be Updated
3. What is needed to Satisfy the New Insurance Policy Provisions
4. Coverage Verification for your Contract Indemnity & Insurance Requirements
5. Need for early communication with Risk Management by the Public Agency is most important to help avoid risks and have more time to help negotiate contracts.
6. How the Scope of Work determines the Contract Requirements
7. Establish Public Agency policy to stipulate who is authorized to alter and sign off on exceptions to Contracts
8. Will provide overview concepts, along with some granularity

Updated Contract language is necessary due to (1) changes in the new insurance coverage forms and (2) to help plug the gaps in the problem areas we have observed in many contracts. PLEASE ASK QUESTIONS AS WE GO ALONG...

**If you think you don't want to spend time avoiding liability, just wait for the time you'll spend preparing for and participating in depositions!**

### **Transfer of Risk Using Contracts**

1. When you Contract with a Vendor/Contractor, you become liable for their work
  - a. Public Agencies have their own liability plus responsibility and liability for the actions of others they hire (Vendors, Contractors and Subs)





# R. J. Marshburn & Associates

CertifiedRiskManagers.com

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

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

## 3. Two principal ways to transfer the risk & protect Public Agencies

1. **Indemnity**—Contractor agrees to assume the liability of the Public Agency. This is insured by Contractual liability coverage (the definition of “insured contract”) in Contractor’s Insurance policy.

- a. **Waiver & Release** is a common example of this

2. **Insurance**—Insure the Public Agency by Additional Insured Endorsement(s) on the Contractor’s policy. We will cover those later.

## 4. Types of liability to be Transferred by Indemnity & Insurance

- a. Vicarious liability—Liability as a function of law regardless of the actions of the Public Agency. No Negligence is required to have vicarious liability!

- b. Negligent Tort liability—Party causes harm through their negligence

- i. Active liability—What you did caused the harm





# R. J. Marshburn & Associates

CertifiedRiskManagers.com

- ii. Passive liability—What you did not do, but could have, caused the harm; you could have prevented it – Most Common for Public Agencies
  - 1. Passive examples: Failure to discover, supervise, inspect; or prevent the harm—an omission of a duty
  
- 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; it covers financial loss from an error or omission
  - i. Design & other Professionals: Consultants, Engineers, etc
  
  - ii. SB 496 effective 1.1.2018 – See Reference Section (not now!)
  
  - iii. Cyber & Tech liability – Loss or destruction of data is NOT tangible property damage and is not usually covered
  
- f. Physical & Sexual Abuse – not accidental or unintentional
  - i. Usually not insured; or insured with a low CAP on limits





# R. J. Marshburn & Associates

CertifiedRiskManagers.com

- ii. Need for strong Risk Management practices!

## **5. 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. The Indemnity obligation must cover you both during the Contract **and** after the Contract is completed for liabilities that can occur later – especially in construction, maintenance, service, and repair operations. Example: Deck collapses.
  - i. 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
  - ii. Contract should make clear that the defense and indemnification obligations are in addition to, and are not limited by, the insurance obligations in the agreement.

## **6. Contractor's INSURANCE COVERAGE FOR INDEMNITY OBLIGATIONS**





# R. J. Marshburn & Associates

CertifiedRiskManagers.com

- a. Standard Insurance Services Office (ISO) Commercial General Liability (CGL) Policies contain coverage **for the Contractor** for liability assumed (Indemnification of Public Agency 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 (*the Public Agency*) 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.
  - 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.)
- c. The Effect—Contractor is liable & has no coverage to protect the Public Agency!

## 7. Employer’s Liability (Worker’s Comp) Indemnification—

- a. “Action Over” Lawsuits from a Contractor’s employee against the Public Agency is covered by the same ISO CGL definition of an “insured contract”

## 8. Beware of large Self Insured Retentions (SIRs) on the Contractor’s policy!

- a. The Contractor **must** pay the SIR first, or there is no coverage for defense or damages for the Public Agency as well! **Be very careful** of granting such high limit SIRs which must be paid by the named Insured contractor.





9. **Pass through provision – require that any Subs hired by the Contractor require the same coverage for the Public Agency**
  
10. **Completed Operations exposure (liability after work completed) for Construction, Repair, Maintenance, and Service Agreements:**
  - a. Require Contractor to maintain insurance for a minimum of 3-5 years (or more) following completion of the project.
  
11. **Amount of risk not necessarily consistent with size of job**
  - a. Purchase order used for small jobs? Example: “Action Over” Lawsuits
  
  - b. Most Public Agencies have services for which you 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.
  
    - ii. **The Scope of Work determines the coverage & limits required!** Discuss early on with Risk Management, not at the end when there is pressure to get the work done!
  
    - iii. Evaluate higher risk operations for Contract requirements with higher limits. Distinguish low & high risk; routine vs suspicious; normal vs



# R. J. Marshburn & Associates

CertifiedRiskManagers.com

hazardous or risky. Examples: kids, large crowds, high voltage, water, heights, ladders, scaffolding, pyrotechnics, flammable, etc

- iv. Special event & facility rentals; Boy Scouts vs 5k run; too much risk for Public Agency to take on their own. Some policies available for these. Contact your JPA or Insurance Broker for more info. It is dangerous to allow higher exposure and not transfer the risk.
- v. **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. Sample in reference section.
- vi. Surprising good coverage of small BOP policies.
- vii. **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. **Sample in Reference Section.**
- viii. 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!







**There are 2 primary ways to cover Contract obligations with Insurance**

1) **Review: Coverage as an Indemnified Party (You are the Indemnitee)**—

- a) Covered 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 “caused by” for Contractor coverage
  - ii) Does definition otherwise exclude or reduce Contractual Coverage
- c) **Policy exclusions or limitations** will also prevent coverage!

2) **Coverage by endorsement as an Additional Insured Party**

- a) By means of Additional Insured Endorsement – The Certificate of Insurance will **not** provide coverage without the actual policy Additional Insured Endorsement! Please see the ***Reference Section*** for many examples!
- 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 or after completion





(1) Completed Operations exposure for Construction, repair, and maintenance

ii) Does the form require the Contractor be at fault, i.e., “caused by”

iii) Does the policy itself have other exclusions or limitations that prevent coverage

**The NEW Additional Insured forms DO NOT provide coverage unless specifically required by Contract!**

1. **ALL** of the 2013 ISO Additional Insured Endorsements 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.

\*\*\*\*\*

**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
2. This endorsement is activated only if the named insured Contractor has agreed to these terms as required 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.”

### **BECAUSE OF THE NEW INSURANCE POLICY FORMS—**

1. Public Agencies must have the correct written requirements in their contracts! Otherwise the Insurance of Contractors will not provide the expected coverage!
2. 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.)
3. 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 is in the *Reference Section*.

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

- 1) Especially for Construction Contractors, some Insurance Companies actually specialize in Restricted Coverage policies, and other Companies have them as options. Many, if not most, Contractor polices now have special endorsements! If the Public Agency is named on a **policy with exclusions** or “wrong” coverage or no coverage—**there is no coverage** for the Contractor or the Public Agency as an Additional Insured or for Indemnity!





- 2) **Certificates of Insurance will not warn you of the restricted or excluded items!**  
**EXAMPLES are in the *Reference Section***

**VERIFICATION** of Coverage Compliance<sup>®</sup> 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—

- 1) **Waiver of subrogation endorsement for Workers' Compensation**
- 2) **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.)
- 3) **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.)
- 4) **Primary & non-contributory coverage** (Such as CG 20 01 04.13)
- 5) **\*\*A copy of the Declarations & Policy Endorsements page for the GL policy.**

(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.)

\*\*\*\*\*





R. J. Marshburn & Associates

CertifiedRiskManagers.com

**IF YOU DO NOT KNOW WHAT A CONTRACT MODIFICATION OR ENDORSEMENT OR VENDOR'S POLICY PROVIDES—GET HELP!**

- **Early communication with Risk Management by the Public Agency is most important to help avoid risks and have more time to help negotiate contracts.**
- **Establish Board policy and/or individual Public Agency policy to stipulate who is authorized to alter and sign off on modified Contracts**

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





## **APPLICATION OF KNOWLEDGE LEARNED**

- 1) Use the recommended 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! Sample in Reference Section.
  - 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) 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
- 4) 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.
- 5) 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
- 6) Involve Risk Management early in the process for Contract Indemnity and Insurance questions





# R. J. Marshburn & Associates

CertifiedRiskManagers.com

## 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 Public Agency 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](#)<sup>®</sup> 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, Public Agencies, carriers, developers, brokers, consultants, attorneys, industry & trade associations, and educational organizations.





# Reference Section

## Contracts & Indemnity – 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 your Contractor and Vendors are NOT enough!

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>





## **Types of Indemnity Agreements**

1. **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.
  - a. Exceptions: 1—Sole or 2—Willful Liability, including fraud
  
2. **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
  
3. **Type III**—Indemnification only for Passive liabilities caused by the indemnifying contractor, but not Passive liability caused by others
  
4. **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!
  - a. Reference for Types 1-3 & General Indemnity clause: *McCrary Construction Co. v. Metal Deck Specialists, Inc.*, 133 Cal. App. 4<sup>th</sup> 1528 (2005)
  
5. **Anti-Indemnity Public Agency restrictions for all construction related contracts:**
  - a. 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)





# R. J. Marshburn & Associates

CertifiedRiskManagers.com

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

b. **Professional Liability** - 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 i.e., limited to the proportionate percentage of fault

i. Type 1 & 2 is not allowable! Only Type 3 is OK

ii. **Senate Bill 496 effective January 1, 2018 applies this limitation to defense costs as well – “only to the extent” - Proportional**

iii. Professional liability Insurance usually excludes Contractual liability, as well as Additional Insured coverage for the Public Agency; usually only covered by the General Liability policy i.e., for BI and PD

iv. **Cyber & Tech liability – Loss or destruction of data is NOT tangible property damage and is not usually covered; Your Data can be endorsed onto the Professional’s Tech liability Policy, or onto the Professional Tech’s Cyber Policy**

## 6. SB474—effective 1-1-2013

a. **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





# R. J. Marshburn & Associates

CertifiedRiskManagers.com

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.

b. 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!**





## **Large Self Insured Retentions (SIRs) on the Contractor's policy**

1. The Contractor **must** pay the SIR first, or there is no coverage for defense or damages for the Public Agency as well!
  - a. **Be very careful** of granting such high limit SIRs which must be paid by the named Insured contractor.
  - b. With respect to a 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 Contractor pay the SIR
  - c. Have the Insurance Company amend the policy to provide that the Public Agency, not just the named Insured, can satisfy the SIR (in order to trigger coverage).
  - d. Include Contract requirements that—
    - i. Self-insured retentions (SIR) must be disclosed to Risk Management for approval and shall not reduce the limits of liability.
    - ii. 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 Public Agency.
    - iii. Public Agency reserves the right to obtain a copy of the Insurance policy and endorsements.





## **New ISO CG 20 38 “Blanket” Endorsement**

The **new ISO CG 20 38** endorsement provides “Automatic” Blanket coverage for the Additional Insured for “ongoing operations” liability coverage (but not for “completed operations liability) 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.

1. The CG 20 33 previously available provides this coverage for only the Contractor you hire and not any of his Subs. In this case the Subs must name you individually.
  - a. **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 (or 20 33 if no Subs will be used) 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.**





## 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)	Covers “arising out of”; not just “caused by” for Type 1, 2 or 3	Covers only “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)	Covers “arising out of”; not just “caused by” Insured	Covers only “caused by” Named Insured to trigger coverage. <u>ALL</u> 07.04 & 04.13
Named AI- CG 2010 & 2026#—All editions	CG 2010 & 2026# <b>11.85 Edition only</b>	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”**

- 1) Some Companies actually specialize in Restricted Coverage policies, and other Companies have them as options. Many, if not most, Construction related Contractor polices now have special endorsements!
- 2) **Certificates of Insurance will not warn you** of the restricted or excluded items!
- 3) **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!**







# R. J. Marshburn & Associates

CertifiedRiskManagers.com

---

- 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) – Removes coverage for Property Damage liability!**
  
  - g) **Contractor’s Endorsements – the catch all!** One Company underwriter said ‘we put all the bad stuff in that one endorsement hoping they won’t notice.’
- 4) If the Public Agency is named on a **policy with exclusions** or “wrong” coverage or no coverage—**there is no coverage** for the named Insured Contractor, **OR** the Public Agency as an Additional Insured, or for Indemnification!





R. J. Marshburn & Associates

CertifiedRiskManagers.com

**NOTE RE: Wrap Up Policies (OCIPs, CCIPs, etc)**

**Wrap Up policies (OCIPs, CCIPs, etc) – can be very good; or very, very bad**

**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!**





# R. J. Marshburn & Associates

CertifiedRiskManagers.com

*Sample Notice to Bidders regarding Indemnity and Insurance Requirements (may also be use with Purchase Orders)*

## **SUMMARY OF INDEMNITY AND INSURANCE REQUIREMENTS**

1. These are the Indemnity and Insurance Requirements for Contractors providing services or supplies to **Public Agency** (Entity). By agreeing to perform the work or submitting a proposal, you verify that you comply with and agree to be bound by these requirements. If any additional Contract documents are executed, the actual Indemnity language and Insurance Requirements may include additional provisions as deemed appropriate by Entity.
2. You should check with your Insurance advisors to verify compliance and determine if additional coverage or limits may be needed to adequately insure your obligations under this agreement. These are the minimum required and do not in any way represent or imply that such coverage is sufficient to adequately cover the Contractor's liability under this agreement. The full coverage and limits afforded under Contractor's policies of Insurance shall be available to Entity and these Insurance Requirements shall not in any way act to reduce coverage that is broader or includes higher limits than those required. The Insurance obligations under this agreement shall be: 1—all the Insurance coverage and limits carried by or available to the Contractor; or 2—the minimum Insurance requirements shown in this agreement, whichever is greater. Any insurance proceeds in excess of the specified minimum limits and coverage required, which are applicable to a given loss, shall be available to Entity.
3. Contractor shall furnish the Entity with original Certificates of Insurance including all required amendatory endorsements (or copies of the applicable policy language effecting coverage required by this clause) and a copy of the Declarations and Endorsement Page of the CGL policy listing all policy endorsements to Entity before work begins. Entity reserves the right to require full-certified copies of all Insurance coverage and endorsements.

### **I. INDEMNIFICATION:**

**COPY YOUR INDEMNITY REQUIREMENTS HERE.**

### **II. INSURANCE**

**COPY YOUR INSURANCE REQUIREMENTS HERE.**

I have read and understand the above requirements and agree to be bound by them for any work performed for the Entity.

Authorized Signature: \_\_\_\_\_ Date: \_\_\_\_\_

