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Avoiding Mistakes That Lead To Denials and Legal Expenses

In Risk Transfer & Insurance for Third Party Contracts

For

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An Analysis of the Mistakes That Lead To Denials and Legal Expenses In Risk Transfer & Insurance requirements for Third Party Contracts

Examination of General Liability Risks facing Hiring Entities and the Indemnity & Insurance Provisions in Contracts for transferring those Risks To your Contracted Vendors & Contractors

An **Overview of important concepts** for liability in Insurance Contract Issues:

1. Contract requirements need to be updated due to the newer Insurance Services Office (ISO) Commercial General Liability (CGL) insurance coverage forms (considered to be the “Gold Standard” and used by approximately 80-90% of Insurance Companies) – and how to avoid the denials of claims and help plug the Coverage gaps we commonly encounter in Contracts.
 - a. These Policies now **require** specific, explicit, unambiguous Contract language Requirements to activate coverage to apply in your contractor’s Insurance Policy
2. **When you Contract with a Vendor/Contractor, or if you allow them on your property, you become liable for them and their work!**
 - a. **Party best able to control the risk should be responsible—the Contractor, not the Entity**– Proper use of Contract Agreement Requirements can transfer financial risk away from the Hiring Entity (Owner, Developer, Public Agency, Landlord, GC, or any Business) to the responsible party—the Vendor, , Service Provider, tenant, Special event organizers, Contractor or their Subs doing the work and causing the risk.
3. Joint & Several (Individual) Liability – and its effect: All for one & one for all – deep pockets - Your 5% Responsibility may make you liable for 100% of the liability your contractor caused!



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Two principal ways to Transfer the Risk & protect Hiring Entities

1. **Indemnity**—Contractor agrees in a Contract to assume the Liability of the hiring Entity. Contractor’s promise of is “**insured**” by Contractual Liability coverage (the definition of “insured contract”) in the Contractor’s Insurance policy that obligates the Contractor’s Insurance Company to make covered payments for the Entity for liability assumed in a “Written Contract or agreement” by their Contractor.
2. **Insurance**—Insure the Entity by adding the Entity as “Additional Insured” Endorsements on the Contractor’s policy. We will cover these in some detail later.
3. **IN OVER 40 YEARS AS EDUCATORS, CONSULTANTS, AND EXPERT WITNESSES – THE FOLLOWING ARE THE MOST COMMON MISTAKES WE SEE THAT LEAD TO DENIALS AND LEGAL EXPENSES:**

Types of Liability to be Transferred by Indemnity & Insurance

1. **Negligent Liability** — Can be Active or Passive liability:
2. Most Common liability for Hiring Entities involves the **Passive Liability**—Not what you did (Active liability), BUT What you did **not** do, but could have, that contributed to or caused the harm; you could have prevented it – Passive examples: Failure to discover, supervise, inspect, or prevent the harm—an omission of a duty
 - a. If you contracted with them, or it happened on your property, you will be at least partially responsible! (Even up to 100%!)



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

- c. Professional Liability—Covers financial loss from an error or omission—Different from General (tort) Liability in that it includes Financial Harm even if no Bodily Injury or Property Damage happens
 - i. Design & other Professionals: Consultants, Engineers, Medical, etc

 - ii. Physical & Sexual Abuse – not accidental or unintentional—so Usually not insured under the CGL, or insured with a low CAP on limits. Separate Specialty Policies available cover this!

I. FIRST, INDEMNIFICATION RISK TRANSFER

NOTE: Allowable Indemnity Provisions Vary Dramatically in Different States Due to so called “Anti-Indemnity” Provisions, Even within the same State for Different Exposures!

For this Discussion **Example** We use the **California Model** for Type 2 for **Construction Contracts**. See Reference Section for Other Indemnity Types, Details and Examples!

This Indemnity is—One party (the Contractor) agrees to assume the Entity’s Passive Liability—but only for their passive (Type 2), not active liability (Type 1)

In California, the Legislature has codified the definition of indemnity as follows:
"Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or some other person." California Civil Code § 2772.



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Contractor's INSURANCE COVERAGE for INDEMNITY OBLIGATIONS

- a. Standard Insurance Services Office (ISO) Commercial General Liability (CGL) Policies contain coverage **for the Contractor** for Liability assumed by the Contractor (Indemnity for the Hiring Entity) in an “Insured contract.”
 - f. “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 Hiring Entity*] to pay for "bodily injury" or "property damage" to a third person or organization.” (Definition “f.” of the “insured contract” CGL definition)
- b. **BEWARE** of endorsements restricting or excluding the Contractual Liability coverage or other endorsements changing the “insured contract” definition that provides this coverage. Example:
 - i. ISO CG 21 39 deletes this “f.” portion of the definition clause above and results in no coverage for most Contracts
- c. The Effect—Contractor is liable but has no Insurance coverage to protect the Hiring Entity!
- d. **Do NOT allow this endorsement on your Contractor's policy**
- e. **SEE a sample of the ISO CG 21 39 in the Reference Section**



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2. THIS ALSO APPLIES to Employer's Liability (Worker's Comp)

Indemnification—

- a. “**Action Over**” **Lawsuits** are on-job liability claims from an injured Contractor's employee against the Entity hiring the Contractor (not the Workers' Compensation claims against their own employer that you hired) and are covered by the ISO CGL definition of an “insured contract” as a “carve back” **exception to** the Contractor's CGL exclusion for Employer's Liability – another reason to be sure definition “f.” has not been deleted!
- b. Beware of Company-specific (Non-ISO) forms that change this coverage!
Example: *"Any insurance provided to the additional insured shall only apply with respect to a claim made or a “suit” brought for damages for which you are provided coverage."* (This is **Deceptive legal speak** at its best!)
- c. There are Too many manuscript, Company Specific (Non-ISO) forms to cover. That's like trying to examine all the types Counterfeit Money Rather than studying the real thing!



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MISTAKES related to the Elements of Indemnification—

1. **4 Elements**: to Hold Harmless, Defend, Indemnify, & Waive subrogation rights.
 - a. Effect of waiver of subrogation (aka Waiver of Rights of Recovery)—no right of recovery by the Insurance carrier of the Hiring Entity for contributory negligence by Entity.
2. **MISTAKE: FAILURE TO REQUIRE** 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. Examples: Later the Deck collapses; property is damaged by roof or windows leaking, subsidence, etc.
3. **MISTAKE: FAILURE TO REQUIRE** Contract indemnity to include requirement that defense and indemnity obligations shall survive the termination of the agreement
4. **MISTAKE: FAILURE TO REQUIRE** the Contract to make clear that the defense and indemnification obligations are in addition to, and not limited by, the insurance obligations in the agreement.

II. SECOND, ADDITIONAL INSURED ENDORSEMENT **RISK TRANSFER**

Being an indemnified party does NOT grant Additional Insured status – they are separate & distinct!

The Contractor's Insurance policy identifies persons or organizations who qualify as additional insureds based on their relationship to the Hiring Entity. Common Additional Insured Mistakes are discussed next:



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1. **MISTAKE: FAILURE FOR CONTRACT TO CLARIFY** Indemnity is NOT limited by the minimum Insurance requirements in the Agreement.
2. **MISTAKE: Failure to Provide that** Additional insured endorsements DO NOT relieve any Indemnity obligation under the agreement.
3. **MISTAKE: Failure to Provide** Specific Unambiguous Requirements Necessary for activation of policy Coverage Requirements—NOT simply requiring to be named an Additional Insured!
4. **MISTAKE: Failure to Provide** these Requirements be used for RFPs and Bids!
5. **At a minimum** use these requirements to be sure that you have included the necessary activation elements in order to trigger coverage.
6. **FAILURE TO INCLUDE requirements** regarding Self-Insured Retentions (SIRs) and coverage and limits.
7. **FAILURE TO REQUIRE Excess policies requirements**, THEY ARE NOT “TRUE following form”! Require they be ENDORSED WITH FOLLOWING FORM ENDORSEMENT.
8. **FAILURE TO REQUIRE** Contractors Pass through the requirements to Subcontractors
9. **Always use language** such as "at least as broad as" NOT as “comparable coverage”
10. **INSURANCE REQUIREMENTS ARE BASED UPON SCOPE OF WORK.**
11. **FAILURE TO REQUIRE** Obligations survive termination or completion of the agreement.
12. **In the case of any conflict**, the broader requirements shall prevail!
13. **Use the correct additional insured requirement, for Subs—NOT** the CG 2033, unless there is a direct Written Contract or Agreement” with that Subcontractor!
14. **FAILURE TO REQUIRE:** Compliance with insurance requirements does not relieve contractor of any other obligations under the agreement, including indemnification.
15. **Include signed acknowledgment language** and agreement from the Contractor to be bound by these provisions. Failure to comply constitutes a material breach of contract See Reference Section for Details and Examples
16. **BE AWARE! Unknown Policy endorsements, NOT shown on the Certificate of Insurance that limit, reduce, redefine, or Exclude Coverage!**



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- 17. CREATE A BOILERPLATE AGREEMENT that includes the above Indemnity and Insurance Obligations can be used 5 WAYS as Discussed later before the Reference Section**
- 18. VERIFY, VERIFY, VERIFY the actual policy, NOT just the Certificate of Insurance!!**

ADDITIONAL INFORMATION FOR SOME OF THESE ITEMS FOLLOW:

- 19. 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 Contractor or the Hiring Entity as well! **Be very careful** of granting such high limit SIRs which must be paid by the named Insured contractor. (see how to fix this SIR issue in the reference section, later)
- 20. *Flow down (aka Pass through) provision – require that any Subs hired by the Contractor require the same coverage for the Hiring Entity**
- a. “The Contactor shall contractually require and verify that all subcontractors maintain insurance applicable to their scope of work meeting all the Indemnity and Insurance requirements stated herein and provide proof of such upon request to the Entity.
- b. If desired by Contractor – Entity can verify Sub Compliance with Coverage requirements for a cost \$30 per subcontractor per year.”
- 21. Completed Operations exposure (for Liability after work completed) for Construction, Repair, Maintenance, Service Agreements, and others:**
- a. Require Contractor to maintain insurance for a minimum of 3-5 years (or more) following completion of the project or work in the Contract.
- b. Residential construction usually requires minimum of 10 years after completion. (including City Redevelopment; mixed usage)



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22. Amount of risk not necessarily consistent with the size of the job

- a. Purchase order used for small jobs? Example: “Action Over” Lawsuits
- b. Most Hiring Entities have services for which they do NOT require a Contract for less than a certain amount; i.e., Contracts under \$2,500, or \$5,000, etc

23. Balance needed to not require overly cumbersome, strict, unreasonable, onerous, 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.

24. **The Scope of Work determines the coverage & limits required!** Discuss early on with Risk Management, not after the bid is awarded when there is pressure to get the work started and done in time! For example:

- a. Evaluate higher risk operations for Contract requirements for higher limits. Distinguish low & high risk; routine vs suspicious; normal vs hazardous or risky. Examples: the size of the project, kids, large crowds, high voltage, water, heights, ladders, scaffolding, pyrotechnics, flammable, medical, etc

25. **Special events**, leases, & facility rentals; too much risk for Hiring Entity to take on their own. Special event policies are available. Contact your Broker, Association, or JPA for more info and “special event” coverage. It is dangerous to allow high exposure and not transfer the risk.

26. **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” Coverage to comply with the “written Contract or



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Agreement” requirement for coverage in most policies. **Sample just before the Reference section.** (We will examine later...)

27. Surprisingly good coverage for eligible small “Business Owner Policies” (BOPs, or Micro-BOPs) that are usually equal to or better than ISO CGL coverage in addition to having generally broad property & loss of earnings coverage – **but** pay attention to manuscript forms and endorsements that **may** limit or exclude standard coverage.
28. **For RFPs:** It is strongly recommended when distributing an RFP (Bid proposal) or RFQ (qualification) to include a document containing a **Summary of your “Indemnity and Insurance Requirements”** **Sample in Reference Section.** (we will review later...)
- a. 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.

This provides advanced information sooner to identify coverage deficiencies & problem screening with Contract requirement issues. It can also trigger coverage if Contracts are executed late (or if there is no Contract) by satisfying the “written Contract or agreement” provision necessary to trigger activation of policy coverage!



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- 1) **NEXT: Coverage by “Additional Insured” Endorsement on Contractor’s policy**
 - a) Additional Insured Endorsements under the Contractor’s insurance policy are used for the Hiring Entity’s coverage & payment of Contractual Risk Transfer in addition to and separate from the Indemnity hold harmless Contractual agreement requirements.
 - b) The Certificate of Insurance is not enough and will **not** provide coverage without the actual policy Additional Insured Endorsement! Please see the *Reference Section* for many examples! (later...)
 - c) Additional Insured Endorsements are so common that the insurance industry has developed an assortment of standard endorsements that address the most typical circumstances and relationships in which additional insured status must be provided.
 - d) Some individual insurers have developed Additional Insured language of their own (aka manuscript or Company specific)—usually more restrictive, sometimes broader than the coverage of standard endorsements, or tailored to the requirements of a specific business or exposure for which no standard endorsement exists.
 - e) Among these relationships are those between the Hiring Entity for construction and services with the contractors they hire, Entities hiring design professionals, Landlords with tenants, and permit and licensing functions. Coverage is limited by the relationship and which form is used for the Additional Insured.
 - f) Can be on a scheduled basis, OR provide the coverage automatically as long as there is a contractual requirement to do so. These Endorsements are called “Automatic” but are sometimes referred to as “blanket” additional insured endorsements. They do not list individual additional insureds, but rather a generalized description of the circumstances in which another party will qualify as an additional insured.



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- g) Additional insureds added by endorsement to a Liability policy have the same right to coverage as a Named insured, subject to the endorsement and any policy provisions. Claims can be made directly to the Insurance Company. The basis of the additional insured's coverage under the policy is the same as the named insured's, but the scope of that coverage may be narrower or broader. Exclusions may apply specifically only to an Additional Insured; or only to the named insured.
- h) The issues that vary for different Additional Insured Endorsements are:
- i) Scheduled basis; or Automatic so-called “Blanket” basis
 - ii) When does Liability coverage apply, i.e. during operations or after completion
 - (1) Completed Operations exposure for Construction, repair, maintenance, etc
 - iii) Is there a Contract between the parties? This is known legally as “Contractual Privity”. (More on this later...)
 - iv) Does the form require the Contractor be at fault, i.e., “caused by” (since 2004)
 - v) **SEE REFERENCE SECTION** for common Additional Insured Endorsements and charts
 - vi) Does the policy itself have other exclusions or limitations that prevent coverage

NONE of the 2013 and later Additional Insured forms provide coverage UNLESS Specifically REQUIRED in a WRITTEN CONTRACT OR AGREEMENT!



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1. **ALL** of the 2013 and 2019 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, scope, or broadness 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 on behalf of the Additional Insured or Indemnified Party (the Hiring Entity Indemnitee) unless it is required in the contract!
 - a. *You can **increase available limits by requiring ISO form CG 2503 or 2504 – Aggregate Limits to apply per project (2503), or location (2504)**

For an Analysis of different Additional Insured Endorsements and their application – See Reference Section for Details and Examples

***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 carried by or available to the Named Insured; whichever is **greater** in order to overcome reductions on the limits of coverage.

How does the Insurance Broker get a copy of the insured’s contract? Train them to provide this before, not after they sign it! Some forms may no longer be available!

“We cannot provide Additional Insured Endorsements unless we receive a copy of your Contract specifying which ones are required in the Contract.”

The Scope of Work and Potential Exposure determines the Contract Requirements – Use Coverage Checklists



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***SAMPLE NOTICE to Contractors & Bidders for Indemnity & Insurance Requirements (or Purchase Orders):
Always have your Attorney and Risk Management Consultant review and approve for your specific matter!***

SAMPLE INDEMNITY AND INSURANCE REQUIREMENTS

1. These are the Indemnity and Insurance Requirements for parties (Contractors) having an agreement with **Name of Entity** (Entity). By agreeing to perform the agreement 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, and if a conflict occurs, the broader requirements shall prevail.
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 of Insurance carried by or available to the Contractor 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 either: 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. Self-insured retentions (SIRs) of the CGL and any policy, including Excess liability policies, must be disclosed to and approved in writing by the Entity and shall not reduce the limits of liability. Policies shall NOT contain any self-insured retention (SIR) provision that limits the satisfaction of the SIR to the Named Insured and shall provide, or be endorsed to provide, that the SIR may be satisfied by either the Named Insured or the Entity. Any and all deductibles and SIRs shall be the sole responsibility of Contractor or subcontractor(s) who procured such insurance and shall not apply to the Indemnified or Additional Insured Parties. Entity may deduct from any amounts otherwise due Contractor to fund the SIR/deductible. All policies, including Excess policies, must also provide that Defense costs, including the Allocated Loss Adjustment Expenses, will satisfy the SIR or deductible.
4. If any Excess or Umbrella Liability policies are used to meet the limits of liability required by this agreement, then said policies shall be true "following form" of the underlying policy coverage, terms, conditions, and provisions and shall meet all of the insurance requirements stated in this document, including but not limited to the additional insured, SIR, and primary insurance requirements stated therein. No insurance policies maintained by the indemnified parties or Additional Insureds, whether primary or excess, and which also apply to a loss covered hereunder, shall be called upon to contribute to a loss until all the primary and excess liability policies carried by or available to the Contractor are exhausted.



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5. Contractor shall furnish the Entity with original Certificates of Insurance including all required amendatory and Additional Insured endorsements (or copies of the applicable policy language affecting coverage required by this clause) **and** a copy of the Declarations and Endorsements Pages of the policies listing all policy endorsements shown below under “ADDITIONAL ENDORSEMENTS REQUIRED” to Entity before work begins. Entity reserves the right to require full-certified copies of all Insurance policy coverage and endorsements.

6. The Contactor shall contractually require and verify that all subcontractors maintain insurance applicable to their scope of work meeting all the Indemnity and Insurance requirements stated herein and provide proof of such upon request to the Entity. If desired, Contractor can have the Entity verify Compliance with Contract requirements.

I. INDEMNIFICATION:

COPY YOUR INDEMNITY REQUIREMENTS HERE – Type 1, 2, 3, or Design Professional – See Reference Section for Details and Examples

II. INSURANCE COVERAGE AND LIMITS:

Coverage shall be at least as broad as Insurance Services Office (ISO) CGL Policy CG 00 01, with no endorsements that may restrict, or limit, or exclude coverage from the unmodified policy.

COPY YOUR INSURANCE REQUIREMENTS HERE, including all Coverages and Limits required for your specific Scope of work and Contract exposures. For example:

23. General liability - \$2,000,000 each occurrence / \$4,000,000 Aggregate, (or substitute other limits as appropriate to the risk and scope of work). If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project or location (ISO CG 25 03 or 25 04) or the general aggregate limit shall be twice the required occurrence limit.

24. Worker’s Compensation – Statutory Coverage and #1,000,000 Employer's Liability or **ISO form(G 2504)**

25. Auto liability - \$2,000,000 Each Occurrence, Symbol 1, All autos

26. Professional Liability – Errors and omissions coverage If performing Professional Services - \$2,000,000,Each Occurrence

ADD ANY OTHER Coverages and Limits required for your specific Contract exposures. For example:

27. Pollution or Remediation Coverage – Limits determined by the Exposure and Scope of Work

28. Garage liability if servicing Entity vehicles (covers CGL liability with NO auto liability exclusion)

29. Garage Keepers liability – for the full value of all your vehicles that may be in the care, custody, or control of a garage at any one time

ADD OTHER REQUIREMENTS – If it is not covered under the standard CGL, and a specific policy is available for it – ADD the Coverage and Limits Here. Use Checklists for your specific exposure.



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ADDITIONAL POLICY ENDORSEMENTS REQUIRED:

1. A “Primary and Non-Contributory” coverage endorsement at least as broad as the ISO CG 20 01 or CG 24 04 endorsement that the coverage is provided to an Additional Insured Entity on a Primary and Non-Contributory basis
2. A Waiver of Subrogation (aka Waiver of Rights of Recovery) endorsement for Workers' Compensation.
3. Additional Insured Endorsement for “Ongoing Operations” at least as broad as ISO CG 2010 scheduled, or automatic CG 2038. **(The CG 2033 should be avoided since coverage from Subs would not apply unless they have a Contract “with you”).**
4. Additional Insured Endorsement for “Completed Operations” (exposures such as construction, service, repair, or maintenance operations) at least as broad as ISO CG 2037 scheduled, or automatic CG 2040. **(The CG 2039 should be avoided since coverage from Subs would not apply unless they have a Contract “with you”).**
5. ****A copy of the Declarations & Policy Endorsements pages for the CGL policy.**
6. **A complete copy of any and all Excess/Umbrella liability policies with all endorsements.**

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: _____

Printed Name _____



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FROM OUR EXPERIENCE AS INSURANCE CONSULTANTS, EDUCATORS, AND EXPERT WITNESSES, a Boilerplate Form for “Indemnity and Insurance Requirements” can apply (with your legal advisor’s approval) to every bid and contract to identify and correct many issues that may otherwise deny or reduce benefits for third party insurance claim policies to provide coverage“ but only to the extent required in a written contract or agreement,” for specific requirements to activate coverage.

There are at least 5 ways in which this can be done:

You can use your customized “Indemnity and Insurance Requirements” in at least 5 ways:

1. For ALL RFP bids, Purchase Orders, Bills of sale, etc when the service is “too small” for a Contract, or other items you may have for contracting for services

2. For disclosure to vendors and contractors, including their agreement to comply with the requirements. This protects the Entity (1) from financial charges for change orders and/or allegations of nondisclosure regarding the necessity of these coverages for agreements with the Public Entity, and (2) also triggers coverage activation until an actual contract is executed.

3. As a standalone document to provide and trigger activation of Insurance Coverage Requirements Where no other actual contract or agreement will be executed (such as when using a Purchase Order or where the job is deemed too small by the Entity to require a Contract), or when the job begins before the contract has been finalized. This is NOT designed to replace all of the elements of a legal agreement, but rather to simply satisfy the “written contract or agreement” requirement to trigger activation of the insurance coverage! Small contracts can have large liabilities!

4. ALL Contracts or Agreements as an Addendum to be sure necessary policy activation elements are included and close the gaps created by Insurance companies. In the case of any conflict, the addendum wording is structured to apply the provisions and requirements of either this Addendum or the written contract or agreement to which it is attached, whichever is BROADER.

5. As a guideline to incorporate all of the elements from this document into the written contract or agreement by the attorneys, IF they do not want to use the document as an Addendum.

We strongly recommend using these “Indemnity and Insurance Requirements” for every occurrence of items 1 through 4 to provide stronger coverage and help avoid gaps. Even if your professional or legal advisors choose item 5 rather than item 4 and do not use this type of boilerplate form as an Addendum to the finished contract or agreement, we strongly recommend that it still be used for items 1-4!

If the boilerplate is not used as an Addendum, then be sure to heed the advice of item 4 to incorporate all the elements of the “Indemnity and Insurance Requirements” into the finished contract or agreement to help avoid the many gaps, loopholes, and conditions that insurance companies use to avoid paying claims based upon missing or arguable ambiguity in the requirements of your “written contract or agreement”!

Remember! Coverage will be provided per the policy terms and conditions, “but only to the extent required in a written contract or agreement.” Just ONE missing or ambiguous requirement is all the insurance company needs to deny or reduce a claim!



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

1. Especially for Construction Contractors, some Insurance Companies specialize in Restricted Coverage policies, and other Companies have them as options. Many, if not most, Contractor policies now have special endorsements that may offer deceptively inferior insurance that reduces or excludes coverage!
2. If the Hiring Entity is named on a **policy with exclusions**, or “wrong” coverage, or no coverage—**there is no coverage** for both the Contractor and the Hiring Entity for Additional Insured or Indemnity!
3. Certificates of Insurance will not warn you of the restricted or excluded items! More detailed EXAMPLES are in the *Reference Section*...

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**:

1. A Waiver of Subrogation (aka Waiver of Rights of Recovery) endorsement for Workers' Compensation.
2. Additional Insured Endorsement for “Ongoing Operations” at least as broad as ISO CG 2010 scheduled, or automatic CG 2038. **(The CG 2033 should be avoided since coverage from Subs would not apply unless they have a Contract “with you”).**
3. Additional Insured Endorsement for “Completed Operations” (exposures such as construction, service, repair, or maintenance operations) at least as broad as ISO CG 2037 scheduled, or automatic CG 2040. **(The CG 2039 should be avoided since coverage from Subs would not apply unless they have a Contract “with you”).**
4. Primary & non-contributory coverage (at least as broad as the CG 20 01)
5. ****A copy of the Declarations & Policy Endorsements pages for the CGL policy.**
6. A **complete copy of any and all Excess/Umbrella liability policies with all endorsements.**

(Item #5 and 6 are necessary to help identify “Restricted Coverage” policies and endorsements and verify if limitations or exclusions have been added to the policy – the policy provisions and endorsements will be listed here.)

If vendors will not or cannot afford to carry the right insurance, how can you expect them to be able to financially honor the contract?



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EXAMPLES & QUESTIONS

1. **Words matter, they affect coverage! Analyze, understand, and apply the material and correct forms discussed in this workshop.**
2. **Is the form an actual copyrighted ISO form number? Or... does it say “Includes copyrighted material from Insurance Services Office?”**
3. **Old Contract language – do not ask for a cross suits endorsement!**
 - a. **Used to mean to cover the Entity – Now it means exclude the Entity!**

IF YOU DO NOT KNOW WHAT A CONTRACT MODIFICATION, MANUSCRIPT POLICY, or POLICY ENDORSEMENT MEANS—GET HELP!

- **Early communication with Risk Management is most important to help avoid risks and have more time to help negotiate contracts.**

COMMON OBJECTIONS

- **“We've never had this problem with anyone else before!”**
 - **“Many insureds or even their Brokers are unaware of these provisions.”**
- **After explaining Contract Insurance issues, they say **“We would never do that.”****
 - **“Of course not, and this Contract wording needs to make that clear before a claim happens, to avoid paying expensive litigation costs later.”**
- **Establish internal policies and procedures to stipulate a knowledgeable person 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! Get at least a copy of the Declarations & Endorsements pages with the Certificate of Insurance to spot and obtain copies of any “suspect endorsements”.



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EVIDENT'S AUTOMATED INSURANCE VERIFICATION™ (AIV) SOLUTION:

Evident's AIV Solution has embedded and exclusively licensed decades of Bob Marshburn's experience, expertise, and work as an expert witness and the Contributing Editor to the IRIC manual for over 10 years

The Risk Transfer Automated Insurance Verification® (AIV) Solution is a proprietary platform designed to streamline and automate setting up, verifying, and managing third-party insurance compliance for organizations. It provides a comprehensive risk management solution by automating document collection, verification of coverages, and communication with vendors and contractors.

KEY FEATURE BENEFITS AND ANSWERS TO MANY COMMON QUESTIONS

END-TO-END INSURANCE COMPLIANCE AUTOMATION:

- Sets up requirements according to your Contract specifications.
- Automates document collection and verification.
- Compares policies to your Contract Requirements and flags deficiencies.
- Sends automated emails to vendors for specific necessary corrections.
- Manages renewals in advance of policy expirations.
- Provides real-time compliance status visibility.

ENHANCED RISK MANAGEMENT and LIABILITY REDUCTION:

- Identifies gaps in coverage and ensures activation of third-party insurance.
- Helps reduce an entity's own liability insurance costs.
- Ensures compliance with indemnity and insurance requirements.
- Flags limitations and exclusions for review.

OPERATIONAL EFFICIENCY and COST SAVINGS:

- Eliminates manual follow-ups and document chasing.
- Provides risk management continuity despite personnel changes.
- Offers automated guided coverage prompts for precise compliance.
- Reduces administrative costs with significant efficiency.

CUSTOMIZATION and FLEXIBILITY:

- Allows modifications to contract requirements individually or globally at any time.
- Enables user control over unusual issues or policy exceptions.
- Ensures that annual renewals are handled automatically per schedule.

The AIV System acts as your Expert Risk Management Assistant, ensuring compliance, reducing liability costs, and enhancing efficiency—all at a fraction of the cost of manual verification.



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Through special arrangements with Bob and Certified Risk Managers LLC
Evident is now offering a FREE Snapshot Audit of your personal Certificates of Insurance and Contracts!

To Qualify for the Snapshot Free Audit:

Use the link below and in the last box on the bottom of the request form BE SURE to tell them that you were referred by Bob Marshburn (or Certified Risk Managers)
<https://suppliaudit.evidentid.com/>

To see an **actual sample** of the free audit Click on the following Link:
<https://suppliaudit.evidentid.com/report.>



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SUMMARY & APPLICATION OF KNOWLEDGE LEARNED

- 1) Use 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 identify problems earlier, trigger coverage, and make the process simpler & quicker! ***See last page of Reference Section.***
 - a) Having this **signed** “Summary” triggers available “written” coverage provision for:
 - i) **Indemnity** for Contractual Liability coverage (“Insured Contract” definition) **and** “action over” Employer's Liability claims (employee sues Entity, not employer)
 - ii) **And Automatic Additional Insured Endorsements** (*Example: \$5 million claim*)
- 3) Focus on high-risk operations for higher limits. Awareness level training to: Distinguish low & high risk; routine vs suspicious; normal vs hazardous or risky. Examples: the size of the project, kids, large crowds, high voltage, water, heights, ladders, scaffolding, pyrotechnics, flammable, medical, etc.
- 4) **Verification of requirements** –***Require the Declarations & Endorsements pages with the Certificate of Insurance.** Review Endorsements Schedule & Evaluate Yellow flags (Need more info—could be a problem) and Red flags (Prohibited endorsements). It saves time, expedites questions & moves delays to an earlier, manageable time process.
- 5) Pay special attention to the Schedule of Policy endorsements for—
 - a) Contractual Liability, “Insured Contract”, or other definition changes or exclusions
 - b) The correct Additional Insured Endorsements per your relationship & requirements
 - c) Policy exclusions, limitations, and reductions in coverage – Yellow & Red Flags
- 6) Start contract process early for Contract Indemnity, Insurance, & Verification questions



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BIOGRAPHICAL PROFILE—Robert J. Marshburn, CRM, CIC, ARM, CRIS, CISC, CCIP Founder and CEO of Certified Risk Managers LLC



In independent industry evaluations, Mr. Marshburn is consistently rated one of the nation's top Risk Management Consultants and Educators. He is the Founder and CEO of Certified Risk Managers LLC, an independent risk consulting and educational firm. He has

been in risk management over 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 taught. He served as the Senior Educational Consultant and Instructor for 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 is the contributing editor of the Insurance Requirements Contract Manual for Public Agencies.

He is the founder and creator of the [Coverage Compliance Verification](#)[®] Program including the [Automated Insurance Verification](#)[™] Solution and specializes in the challenges posed in Construction Risk, including Construction Contracts, Contractual Liability Analysis & Design, Insurance Policy Coverages & 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.

(Automated Insurance Verification[™] is a Registered Trademark with the United States Patent Office)



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Reference Section

RESTRICTED COVERAGE POLICIES: Risk Transfer Coverage Verification

Some Companies specialize in Restricted Coverage policies, and other Companies have them as options. This is especially true for Contractor policies that often have special endorsements that may offer deceptively inferior insurance at a cheaper price that reduces or excludes coverage!

After you set up your Risk Transfer provisions and the Contractor has agreed to assume and pay for the risks, you MUST verify the Contractor's Insurance coverage to determine that it complies with your Insurance requirements and will provide the expected coverage!

Certificates of Insurance from your Contractors and Vendors are NOT enough! **They will NOT warn you of restricted or excluded coverage items!**

At one professional graduate educational insurance workshop I conducted, the chief nationwide claims executive told a stunned group of insurance brokers: "**Brokers need to understand that we don't expect to ever pay a claim under this type of policy. All they are getting is paper to allow them to get on the job.**"

But, you say, we rely on Certificate of Insurance to verify insurance! But there are many things NOT shown on Certificates of Insurance (COIs, Certs) that 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!
Examples:

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 often 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!



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3. Restrictions, Exclusions, or Limitations for location, types of ongoing or completed operations, type of work, residential, # of units, etc—No coverage if the excluded work is what they are doing for you! Examples:
 - a. Limitation of Coverage to Designated Premises or Project (CG 21 44)—No coverage if the Designated Project is not yours!
 - b. Exclusion—Designated Ongoing Operations (CG 21 53)—No coverage if the Operations or the work they are doing for you is designated as excluded!
4. Exclusions or limitations for **Contractual** Liability coverage, changes to the “**Insured Contract**” definition, or Vendor/Contractor employee “action over” Employee Liability Exclusions for the Hiring Entity—all of which result in no coverage for your Indemnification on very expensive matters!
5. Exclusions for Subcontractor’s work for Property Damage Liability for Construction Defects normally covered by the standard CGL policy:
 - a. Exclusion—Damage to Work Performed by Subcontractors on Your Behalf (CG 22 94 & 95) – Removes coverage for Property Damage Liability (Construction Defects) for work done by Subcontractors. This is a commonly used exclusion you want to avoid!
6. Certs will NOT show Prior Work Exclusions, including:
 - a. Montrose exclusions, Continuous injury coverage exclusions, Modification of Occurrence definition, various 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 for both (1) Additional Insured Endorsements and (2) Contractual Liability indemnity coverage—The 2 principal methods of covering the Entity!
7. “Contractor’s endorsements” that change or exclude coverages that are otherwise included in standard policy provisions!
 - a. One Company underwriter said “We put all the bad stuff in that one endorsement hoping they won’t notice.”
 - b. These are completely customized and manuscripted endorsements that change policy provisions – occasionally for good, but usually for bad.



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8. Certs will NOT show waiver(s) of subrogation – unless they are attached as actual copies of policy endorsements.
9. Certs will NOT show if coverage is primary for Underlying & Excess policies – unless they are attached as actual copies of policy endorsements.
10. Certs will NOT show specific Additional Insured Endorsements & Compliance for ongoing and completed operations – unless they are 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 you as the Additional Insured or Indemnified Party. See the later section below covering *Large Self Insured Retentions (SIRs) on the Contractor's Policy*.
12. Certs will NOT show verification of Insurance for any Subs hired by your Contractor.
13. Non-standard Additional Insured Endorsements: These usually provide less coverage, or have unreasonable limitations or conditions
14. Most Recent Additional Insured forms (including ISO forms) require that your Contract must specifically and explicitly 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!
*For more information see:
<http://www.certifiedriskmanagers.com/ISO0413forms.htm>
15. If the Entity is named on a **policy with exclusions** or “wrong” coverage or no coverage—**there is no coverage** for both the named Insured Contractor and the Entity for Indemnification or as an Additional Insured!
16. While there are exceptions, there are many, many policies & endorsements for Contractors that can limit or exclude coverage. A non-standard (non-ISO) policy may provide broader coverage (very seldom), or, as is usually the case, narrower coverage.



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17. Remember: Even with a standard policy such as the ISO CGL, **endorsements** are put on for a reason – usually to narrow or exclude coverage, not expand it! **Read them carefully and critically to understand them and figure out the difference from the standard unmodified forms!**

The solution to these issues and to help identify and correct “Restricted Coverage” policies, endorsements, limitations, or exclusions is to require in your Agreement:

****A copy of the Declarations & Policy Endorsements pages for the CGL policy; AND**

****A complete copy of any and all Excess/Umbrella liability policies with all endorsements.**

This is because Excess policies are NOT standardized and many of these Exclusions may be built into the policy itself, rather than as an endorsement to the standard general liability policy like the ISO Commercial General Liability policy, the CGL.

With this information and using the Coverage Compliance© issues we have discussed, you will be able to recognize and correct the substandard coverage.

Contractors should not fight you about these reasonable, industry-standard requirements... but should thank you that you have done a review of their Insurance and advised them to have the correct Insurance not only for you, but for all of their other jobs!

If they simply do not want to correct the deficiencies, it is usually for of 3 reasons:

1. They know the problems and are simply trying to get around them; or
2. They (and likely their broker) are ignorant of the potential severity of these issues; or
3. They don't want to pay the premium to properly protect your interests as their client.



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See the following sample of the ISO CG 21 39...That EXCLUDES CONTRACTUAL COVERAGE!

COMMERCIAL GENERAL LIABILITY
CG 21 39 10 93

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CONTRACTUAL LIABILITY LIMITATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

The definition of "insured contract" in the DEFINITIONS Section is replaced by the following:

"Insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

- b.** A sidetrack agreement;
- c.** Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d.** An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e.** An elevator maintenance agreement.

NOTE: a. through e. of this endorsement is identical to the standard ISO CGL definition EXCEPT COVERAGE DEFINITION "f." that provides the Contractual coverage HAS BEEN DELETED by THIS FORM and no longer provides the coverage that was in the original, unmodified STANDARD POLICY DEFINITION (Shown below):

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.



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

1. The ISO CG 20 01 endorsement expressly states that the coverage is provided to an Additional Insured Entity is 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!**
SAMPLE: “The Additional Insured coverage under the Contractor’s policy shall be “primary and non-contributory” and will not seek contribution from the Entity’s insurance or self-insurance and shall be at least as broad as ISO CG 20 01.”

BECAUSE OF THE NEWER INSURANCE POLICY FORMS—

1. *Hiring Entities **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? (“Arising out of” requirement, Negligence or “Caused by” requirement, Active, Passive, Vicarious, Ongoing operations, Completed operations, etc.)
3. Require that Contractors provide coverage **“at least as broad”** (DO NOT SAY “equivalent” as this just gives the attorneys a subject to dispute and define) 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.
4. Also effective 12.19, ISO introduced an automatic “blanket” Subrogation Waiver endorsement CG 24 53 12.19 as an alternative to the scheduled waiver CG 24 04



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5. A reference Matrix chart of various ISO Indemnity and Additional Insured Endorsement forms for Other Parties and their appropriate application is in the *Reference Section*
6. Especially for Construction Contractors, some Insurance Companies specialize in Restricted Coverage policies, and other Companies have them as options. Many, if not most, Contractor policies now have special endorsements that may offer deceptively inferior insurance that reduces or excludes coverage!
7. If the Hiring Entity is named on a **policy with exclusions**, or “wrong” coverage, or no coverage—**there is no coverage** for both the Contractor and the Hiring Entity for Additional Insured or Indemnity!
8. Certificates of Insurance will not warn you of the restricted or excluded items! More detailed EXAMPLES are in the *Reference Section*...

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 attached** endorsements shown in the **INDEMNITY AND INSURANCE REQUIREMENTS sample shown below...**

Continue in the Reference Section below for Details, Explanations and Examples of the Additional Insured Endorsements



Additional Insured—Owners, Lessees or Contractors—Scheduled Person or Organization (CG 20 10)

CG 20 10

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations
Specified Entity Name or “As required by written contract or agreement”	Specified Location(s) or “As required by written contract or agreement”
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. Section II. Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.



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However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does **not apply** to "bodily injury" or "property damage" occurring **after**:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered **operations** has been **completed**; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Additional Insured—Owners, Lessees or Contractors— Automatic Status When Required in Construction Agreement with You (CG 20 33)

CG 20 33

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Section II – Who Is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.

However, the **insurance** afforded to such additional insured:



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1. Only applies to the extent permitted by law; and
2. **Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.**

A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This **insurance does not apply to:**

1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:
 - a. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - b. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or the failure to render any professional architectural, engineering or surveying services.

2. **"Bodily injury" or "property damage" occurring after:**
 - a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered **operations** has been **completed**; or
 - b. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

The **most we will pay** on behalf of the additional insured **is the amount of insurance:**

1. **Required by the contract or agreement** you have entered into with the additional insured; **or**
2. Available under the applicable **Limits of Insurance shown in the Declarations;**

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.



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Additional Insured—Owners, Lessees or Contractors— Automatic Status for Other Parties When Required in Written Construction Agreement (CG 20 38)

CG 20 38

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS FOR OTHER PARTIES WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Section II – Who Is An Insured is **amended** to include as an **additional insured**:

1. Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy; and
2. **Any other person or organization you are required to add as an additional insured under the contract or agreement described** in Paragraph 1.above.

Such person(s) or organization(s) is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

- a. Your acts or omissions; or
- b. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.

However, the **insurance** afforded to such additional insured described above:

- a. Only applies to the extent permitted by law; and
- b. **Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.**

A person's or organization's status as an additional insured under this endorsement ends when your operations for the person or organization described in Paragraph 1. above are completed.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This **insurance does not apply to:**



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1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:
 - a. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - b. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of, or the failure to render, any professional architectural, engineering or surveying services.

2. **"Bodily injury" or "property damage" occurring after:**

- a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered **operations** has been **completed**; or
- b. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance**:

The **most we will pay** on behalf of the additional insured **is the amount of insurance**:

1. **Required by the contract or agreement** described in Paragraph **A.1.**; or
2. Available under the applicable **Limits of Insurance shown in the Declarations**;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

NOTE: THIS FORM 2038 DOES NOT REQUIRE THAT THE WRITTEN CONSTRUCTION AGREEMENT BE "WITH YOU"... IT CAN BE REQUIRED IN THE GC Contract WITH THE Sub AND STILL APPLY THE Additional Insured PROVISIONS TO YOU on an AUTOMATIC "BLANKET" BASIS.



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Additional Insured—Owners, Lessees or Contractors—Completed Operations (CG 20 37)

CG 20 37

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location And Description Of Completed Operations
Specified Entity Name <u>or</u> "As required by written contract or agreement"	Specified Location & Description <u>or</u> "As required by written contract or agreement"
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits Of Insurance:

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.



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Additional Insured—State or Governmental Agency or Subdivision or Political Subdivision—Permits or Authorizations (CG 20 12)

CG 20 12

ADDITIONAL INSURED – STATE OR GOVERNMENTAL AGENCY OR SUBDIVISION OR POLITICAL SUBDIVISION – PERMITS OR AUTHORIZATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

State Or Governmental Agency Or Subdivision Or Political Subdivision:

Specified Name of Entity or “As required by written contract or agreement”

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Section II – Who Is An Insured is amended to include as an additional insured any state or governmental agency or subdivision or political subdivision shown in the Schedule, subject to the following provisions:

1. This insurance **applies only with respect to operations performed by you** or on your behalf **for which the state or governmental agency or subdivision or political subdivision has issued a permit or authorization.**

However:

- a. The insurance afforded to such additional insured only applies to the extent permitted by law; and
- b. If coverage provided to the additional insured is required by a contract or agreement, the **insurance** afforded to such additional insured **will not be broader than that which you are required by the contract or agreement to provide** for such additional insured.



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2. This **insurance does not apply to:**

- a. "Bodily injury", "property damage" or "personal and advertising injury" arising out of **operations performed for the** federal government, state or **municipality**; or
- b. "Bodily injury" or "property damage" included within the **"products-completed operations hazard"**.

B. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits Of Insurance:

If coverage provided to the additional insured is required by a contract or agreement, the **most we will pay** on behalf of the additional insured **is the amount of insurance:**

1. **Required by the contract or agreement; or**
2. Available under the applicable **Limits of Insurance** shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.



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Additional Insured—Designated Person or Organization (CG 20 26)

CG 20 26

ADDITIONAL INSURED – DESIGNATED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):

Specified Name of Entity or "As required by written contract or agreement"

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:

1. In the performance of your ongoing operations; or
2. In connection with your premises owned by or rented to you.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured **will not be broader than that which you are required by the contract or agreement to provide** for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance**:

If coverage provided to the additional insured is required by a contract or agreement, the **most we will pay** on behalf of the additional insured **is the amount of insurance**:

1. **Required by the contract or agreement**; or
2. Available under the applicable **Limits of Insurance** shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.



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EXAMPLES of Standard Additional Insured Endorsements...

The Additional Insured Endorsements can be on a scheduled basis, OR for additional insured endorsements that provide the coverage automatically as long as there is a contractual requirement to do so. These Endorsements are termed Automatic (when required by a Contract) but are commonly referred to as “blanket” additional insured endorsements. They do not list individual additional insureds, but rather a generalized description of the relationship and circumstances in which another party will qualify as an additional insured.

Additional insureds added by endorsement to a Liability policy have the same right to coverage as a **named** insured, subject to any policy provisions. While the basis of the additional insured's coverage under the policy is the same as the named insured's, the scope of that coverage may be narrower. Exclusions may apply specifically only to an Additional Insured; or only to the named insured.

The most common examples are **shown in red by an ***, with “Automatic” forms underlined:

*** CG 20 01, Primary and Noncontributory--Other Insurance Condition**

CG 20 03, Additional Insured--Concessionaires Trading Under Your Name

CG 20 05, Additional Insured--Controlling Interest

CG 20 07, Additional Insured--Engineers, Architects, or Surveyors

*** CG 20 10, Additional Insured--Owners, Lessees or Contractors-- Scheduled Person or Organization**

CG 20 11, Additional Insured--Managers or Lessors of Premises

*** CG 20 12, Additional Insured--State or Governmental Agency or Subdivision or Political Subdivision--Permits or Authorizations**

CG 20 13, Additional Insured--State or Governmental Agency or Subdivision or Political Subdivision--Permits or Authorizations Relating to Premises

CG 20 15, Additional Insured--Vendors

CG 20 18, Additional Insured--Mortgagee, Assignee, or Receiver

CG 20 23, Additional Insured--Executors, Administrators, Trustees or Beneficiaries



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CG 20 24, Additional Insured--Owners or Other Interests from Whom Land Has Been Leased

* **CG 20 26, Additional Insured--Designated Person or Organization**

CG 20 27, Additional Insured--Co-Owner of Premises

CG 20 28, Additional Insured--Lessor of Leased Equipment

CG 20 29, Additional Insured--Grantor of Franchise

CG 20 30, Oil or Gas Operations—Non-operating Working Interests

CG 20 32, Additional Insured--Engineers, Architects or Surveyors Not Engaged by the Named Insured

* **CG 20 33, Additional Insured--Owners, Lessees or Contractors--Automatic Status When Required in Construction Agreement with You**

CG 20 34, Additional Insured--Lessor of Leased Equipment--Automatic Status When Required in Lease Agreement with You

* **CG 20 37, Additional Insured--Owners, Lessees or Contractors--Completed Operations**

* **CG 20 38, (Introduced in 04.13) Additional Insured--Owners, Lessees or Contractors--**

* **Automatic Status for Other Parties only When Required in Written Construction Agreement**

INTRODUCED IN 12.19...

* **CG 20 39 12 19 — Additional Insured – Owners, Lessees Or Contractors – Automatic Status When Required In Written Construction Agreement “With You” (Completed Operations)**

[Designed to use with the CG 20 33 that applies only to Ongoing Operations]

* **CG 20 40 12 19 — Additional Insured – Owners, Lessees Or Contractors – Automatic Status For Other Parties When Required In Written Construction Agreement (Completed Operations) –**

[Designed to use with the CG 20 38 that applies only to Ongoing Operations]

SAMPLES of the 12.19 Automatic Completed Operations forms FOLLOW...



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COMMERCIAL GENERAL LIABILITY
CG 20 39 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT WITH YOU (COMPLETED OPERATIONS)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

- A.** Section II – Who Is An Insured is amended to include as an additional insured any person or organization for whom you have performed operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" performed for that additional insured and included in the "products-completed operations hazard".
- However, the insurance afforded to such additional insured:
1. Only applies to the extent permitted by law; and
 2. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.
- B.** With respect to the insurance afforded to these additional insureds, the following additional exclusion applies:
- This insurance does not apply to:
- "Bodily injury" or "property damage" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:
1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 2. Supervisory, inspection, architectural or engineering activities.
- This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the rendering of or the failure to render any professional architectural, engineering or surveying services.
- C.** With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits Of Insurance:
- The most we will pay on behalf of the additional insured is the amount of insurance:
1. Required by the contract or agreement you have entered into with the additional insured; or
 2. Available under the applicable limits of insurance;
- whichever is less.**
- This endorsement shall not increase the applicable limits of insurance.

CG 20 39 12 19

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COMMERCIAL GENERAL LIABILITY
CG 20 40 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS FOR OTHER PARTIES WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT (COMPLETED OPERATIONS)
DOES NOT SAY “WITH YOU”**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

A. Section II – Who Is An Insured is amended to include as an additional insured:

1. Any person or organization for whom you have performed operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy; and
2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph 1. above.

Such person(s) or organization(s) is an additional insured only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" performed for the additional insured described in Paragraph 1. or 2. above and included in the "products-completed operations hazard".

However, the insurance afforded to such additional insured described above:

- a. Only applies to the extent permitted by law; and
- b. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusion applies:

This insurance does not apply to:

"Bodily injury" or "property damage" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
2. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the rendering of, or the failure to render, any professional architectural, engineering or surveying services.

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- C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

The most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement described in Paragraph A.1.; or

2. Available under the applicable limits of insurance;

whichever is less.

This endorsement shall not increase the applicable limits of insurance.



Types of Indemnity Agreements (California Examples)

1. **Type I Contractual Indemnity**— Requires indemnification for the Entity’s Liability for damages from any tort Liability, including Vicarious, **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**—Requires Indemnification for the **Passive**, but **not Active**, Liability of the Entity regardless of who caused it, i.e. whether or not caused by the indemnifying contractor; Indemnifies passive Liability of the Entity caused by others (“arising out of” the Contract, not just “caused by” the Contractor)
3. **Type III**—Indemnification only for **Passive** liabilities of the Entity “caused in whole or in part by” the indemnifying contractor, but **not Passive Liability caused by others**
4. A **General Indemnity** clause does not specifically address how much of the Entity’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. 4th 1528 (2005)
5. **Anti-Indemnity Entity restrictions for all construction-related contracts:**
 - a. Type 1 (Active liability Indemnity) is not allowable! Type 2 & 3 are ok



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- 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. Types 1 & 2 are not allowable! Only Type 3 is OK
 - ii. **California Senate Bill 496 effective January 1, 2018, applies this limitation to defense costs as well – “only to the extent” – it is Proportional**
 - iii. ***Professional Liability Insurance usually excludes Contractual Liability, or Additional Insured coverage** for the Entity; This is usually only covered by the General Liability policy i.e., for BI and PD; In some Large cases it may be available.
 - 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, or onto the Cyber Policy**

California SB474—effective 1-1-2013

- c. **NO MORE** Type 1 indemnity—For **construction-related contracts** executed on or after 1-1-2013, Indemnification for active Liability of the Hiring Entity is no longer allowed.
- i. The Limitation also applies to defense for the Hiring Entity's active negligence—may now obtain only defense proportionate to the extent of damage caused by the contractor.



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- d. The above limitation does NOT apply to NON-construction related contracts (leases, use of premises, landlord/tenant, contract services, etc.)
- e. To avoid overly broad indemnity provisions, use qualifying language such as:
 - i. Expansive benefit of this statement – “To the fullest extent...”
 - ii. Limiting benefit of this statement – “allowed by law...”

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

Following are samples of Indemnity Hold Harmless language for the above Types from the “Insurance Requirements in Contracts” (IRIC) Manual produced for Public Entities by Alliant and PRISM (Public Risk Innovation, Solutions, and Management) for which I have served as the Contributing Editor for over 10 years.

You may download a current complete copy of the “Insurance Requirements in Contracts” (IRIC) Manual at the following link:

<https://alliant.com/news-resources/article-insurance-requirements-in-contracts-iric-manual/>



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Sample Hold Harmless Indemnity language – Type 1 (Broadest)

Note: Contracts do not label Indemnity types. You must decide based on the wording. Always have your Attorney and Risk Management consultant review and approve any language to be sure it applies to your case.

Broadest 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 and 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**. These defense and indemnity obligations shall survive the termination or completion of this agreement and are in addition to, and not limited by, the insurance obligations in the agreement.

NOTE: As discussed above, Special limitations apply to Contracts in any way related to Construction agreements (including service, maintenance, and repair)



Sample Hold Harmless language – Type 2 (Intermediate)

Note: Contracts do not label Indemnity types. You must decide based on the wording. Always have your Attorney and Risk Management consultant review and approve any language to be sure it applies to your case.

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. These defense and indemnity obligations shall survive the termination or completion of this agreement and are in addition to, and not limited by, the insurance obligations in the agreement.

Design Professional hold harmless following...



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Sample Hold Harmless language – Design Professionals

Note: Contracts do not label Indemnity types. You must decide based on the wording. 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:

To the fullest extent permitted by law, 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 Entity; **and does not apply to any passive negligence of the Entity unless caused at least in part by the Design Professional**. These defense and indemnity obligations shall survive the termination or completion of this agreement and are in addition to, and not limited by, the insurance obligations in the agreement.

NOTE: 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: (1) This sample for Design Professional Liability, and (2) 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.



Sample Hold Harmless language – Type 3 (Limited)

Note: Contracts do not label Indemnity types. You must decide based on the wording. Always have your Attorney and Risk Management consultant review and approve any language to be sure it applies to your case.

Example of Type 3 - Limited Form Indemnity

To the fullest extent permitted by law, Contractor agrees to protect, defend, 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. These defense and indemnity obligations shall survive the termination or completion of this agreement and are in addition to, and not limited by, the insurance obligations in the agreement.

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

This Type of language may be necessary due to negotiations based on decreased bargaining power for the Entity due to unique, more cost effective, exclusive, or sole-source providers, etc.



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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 Contractor or Entity as well! Usually does not allow the Entity to pay it!
 - a. **Be very careful** of granting such high limit SIRs which must be paid by the named Insured contractor.
 - b. For a Contractor that has a very high SIR – Do your due diligence. Require financials, collateral, Evergreen Letter of Credit, Bond, 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 Entity, not just the named Insured, can satisfy the SIR (to trigger activation of the coverage).**

2. Include Contract requirements that—
 - a. Self-insured retentions (SIR) must be disclosed to Risk Management for approval and shall not reduce the limits of liability.
 - b. Policies shall NOT contain any self-insured retention (SIR) provision that limits the satisfaction of the SIR to the Named Insured. (Carrier may only be willing to provide a specific, rather than broad, exception, so...)
 - c. (... in the alternative...) Policies containing any self-insured retention (SIR) provision shall provide, or be endorsed to provide, that the SIR may be satisfied by either the Named Insured or the Entity.



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d. Entity reserves the right to obtain a full certified copy of all Insurance policies and endorsements. (Example: \$10 million SIR; Tire Leasing for Transit Agency... and Product Liability Coverage was Excluded!)

3. ****SAMPLE Policy language requirement:** “The CGL and any policy, including Excess liability policies, may not be subject to a self-insured retention (“SIR”) or deductible that exceeds \$25,000 (fill in the amount for your comfort level for the specific Contractor and job – it could be much higher, or in the case of a very little exposure with a very small Contractor, you might want it lower) unless approved in writing by Entity. Any and all deductibles and SIRs shall be the sole responsibility of Contractor or subcontractor who procured such insurance and shall not apply to the Indemnified Additional Insured Parties. Entity may deduct from any amounts otherwise due Contractor to fund the SIR/deductible. ***Policies shall NOT contain any self-insured retention (SIR) provision that limits the satisfaction of the SIR to the Named Insured [OR in the alternative: Any and all SIRs must be susceptible of being satisfied under the CGL or Excess liability policies through payments made by additional insured, co-insurers, and/or insured other than the First Named Insured.]*** The policy must also provide that Defense costs, including the Allocated Loss Adjustment Expenses, will satisfy the SIR or deductible. Entity reserves the right to obtain a copy of the Excess Insurance policy and endorsements.”



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ISO CG 20 38 “Automatic” Additional Insured Endorsement

The **ISO CG 2038** endorsement provides Automatic coverage for the Additional Insured for **“ongoing operations”** Liability coverage (but not for “completed operations Liability) for the Entity from the Contractor you hire **as well as for Subs he may hire** (Contract must require, but does not have to be “with You”) on an automatic basis **provided it is required in the Contract.**

1. The automatic CG 2033 previously available provides this coverage for only a Contract “with you” and not any of his Subs since you do not have a Contract with them (Privity). 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 2038 endorsement or coverage “at least as broad” (do **NOT** say “equivalent” as this just gives the attorneys a subject to dispute and define) 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 Entity upon request.

For **Automatic “Completed Operations”** Additional Insured Endorsements:

2. ***If using the CG 2033 “Automatic” Additional Insured Endorsement form for Ongoing Operations (NO Subs involved), you can use the new CG 2039 12.19 Additional Insured Automatic Completed Operations form.**
3. ***If using the CG 2038 “Automatic” Additional Insured Endorsement form for Ongoing operations (Subs may be involved), you can use the new CG 2040 12.19 Additional Insured Automatic Completed Operations form. You require the coverage for Subs hired by your Contractor, but do not have a Contract with the Subs, i.e., no Contractual Privity.**

REMEMBER: The certificate of insurance, despite what it may say in the comments section, is not enough! Be sure they provide proof to you and a copy of the policy Declarations and Endorsements pages of the actual “Automatic” Additional Insured Endorsements that provide the coverage on the policy itself.



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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!

Contractual Liability Insurance covering Named Insured (Indemnitor) for Entity Indemnification
BEWARE of endorsements amending, excluding, or changing Contractual Liability coverage or the “insured contract” definition (such as CG 21 39 deleting “f.”) that provides the liability coverage for the Named Insured for Indemnity obligations assumed by Contract (Contractual Liability).

ADDITIONAL INSURED Forms: **Insured Relationship to AI Required to Trigger Coverage:**

Insured Relationship to AI for Coverage	Doing Work <u>For</u> AI with a Contract requirement		Privity** & Work <u>For</u> AI, <u>no</u> Subs	No Contract “With You” (Privity) & No Work <u>For</u> AI	
	Scheduled	Automatic*	Automatic**	Automatic*	Designated
Type of Endorsement					
Ongoing Ops Form #	20 10	20 38	20 33	20 43	20 42 & 20 26
Completed Ops Form #	20 37	20 40	20 39	NONE	NONE

* ONLY if required in a written contract or agreement ** ONLY if required in a written contract “With You” (Privity)
For Automatic Status, Form Numbers 20 38 and 20 40 should be required rather than the 20 33 and 20 39

**Use form 20 33 and 20 39 ONLY when you are SURE there are NO Subs being used that have NO Contract “With You”

ADDITIONAL INSURED ENDORSEMENT Forms: **Edition Date Coverage Comparison:** (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 coverage. <u>ALL</u> 07.04, 04.13 & 12.19
Named AI- CG 2010 & 2026#—All editions	CG 2010 & 2026# 11.85 Edition only	YES—all except Editions after 07.04	CG 2010 & 2026# 07.04, 04.13* & 12.19*
Automatic CG 2033 All & 2038 4.13* & 12.19*	CG 2033 & 2038 All editions = NO Coverage	YES—all except Editions after 07.04	CG 2033 07.04 & CG 2038 04.13* & 12.19*
Named AI - CG 2037 & Automatic AI 2039 & 2040 = NO Coverage	CG2037, 2039 & 2040 ALL editions*	YES 2037 10.01 only; NO for 07.04 & 04.13* & 12.19*	CG 2037 07.04, 04.13* & 12.19*

- 1- EXAMINE CAREFULLY** Non-ISO Additional Insured Endorsements to see how they differ from the above for coverage in each of the categories in the 4 columns and 3 rows (like Counterfeit Money).
- 2- #2026** (or 2011) covers “Designated” Additional Insured for rental of premises; 2012 = AI for Permits.
- 3-** Automatic forms require a specific “written contract or agreement” to trigger policy coverage!
- 4- *ALL** of the 04.13 & 12.19 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!**



The Myth of “Following Form” Excess Limits Insurance Policies

Most so-called “Following Form” Excess Insurance policies that provide additional higher limits after exhaustion of the underlying policy(ies) are not true following form. **It is NOT true that “covered on the underlying means covered on the Excess”!** You need to work through the entire policy to determine the extent to which it follows the underlying policy, any differences, and how those differences affect the desired coverages to comply with your Contract requirements.

- Most Excess policies have additional provisions that apply instead of the underlying policy in case of a conflict! Carefully check if the following are the same as the Underlying Policy:
 1. General Provisions – the correct schedule of the underlying policy, limits, and effective dates are the same as listed in the Excess Policy
 2. Defense provisions – inside or outside limits (erode limits or pay in addition to limits)
 3. Is defense an obligation; or the “right, but not the duty” to defend
 4. Are Additional Insureds on the primary policy covered on the Excess
 5. Must Additional Insureds be advised or endorsed on to the Excess
 6. What about Automatic Additional Insureds when required by Contract
 7. Is the Excess Policy Primary & Non-Contributory for an AI (can be by endorsement)
 8. Are the Contractual liability provisions that cover Indemnity the same as the primary
 9. Is the “Insured Contract” Definition the same or is it modified
 10. Is there a Waiver of Subrogation (aka waiver of Rights of Recovery)
 11. Has the definition of “Occurrence” been modified
 12. Is there a “Prior Work” limitation or exclusion (see *Restricted Coverage Policies* above)
 13. Are there any other exclusions or limitations that are part of, or have been added to, the Excess Policy compared to the CGL
 14. Does the primary/underlying policy have a Self-Insured Retention (SIR) that can only be satisfied by the named insured and that, if not, would prevent triggering the Excess
- It is much easier to spot these changes on the ISO CGL policy since the policy is standardized and any changes from the unmodified policy must be made by endorsement. **There is no “standard” Excess Policy** in the industry and limitations or exclusions can be in the text of the policy itself and not only be endorsements! (ISO has an Excess (CX 00 01) & Umbrella (CU 00 01), but they are not the industry standard like the CGL). Commercial Umbrella policies are not the same as Excess Policies! While both types of policies are designed to be additional layers of coverage above primary insurance policies, the Umbrella can be used to cover some losses for which there is no insurance after an SIR for the Insured. The Excess form only covers losses for higher limits of liability that are covered by other insurance policies that exist as primary insurance. The overwhelming majority of policies are Excess only, not Umbrellas.
- **True** “following form” Excess policies will be around 4 pages or less! If more, you must carefully wade through all of the pages to analyze and understand the differences! Some are twice as many pages as the entire standard ISO CGL.



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If a "Following Form" Excess Policy is not a true "Following Form", it can sometimes be endorsed back to be such with language similar to the following from an actual excess policy:

FOLLOW FORM ENDORSEMENT

It is agreed that this **policy** will follow the exact warranties, terms, conditions, exclusions and limitations contained in the Followed Policy listed in the Declarations

But be careful! Some carriers have following form endorsements that will say something similar to the above but then add "...except for any other endorsement added to this policy" or similar language to continue to exclude coverage!

If the Excess Policy is not 4 pages or less, or does not have a "clean" following form endorsement with no exceptions, it will no doubt read similar to the following actual example:

EXAMPLE:

The following was on an Excess Policy with a following form endorsement – but with an additional Exclusion for PD Liability. This Excess Policy is NOT a TRUE Following Form:

On Page 5 of the excess policy it states:

"If an inconsistency or contradiction exists between an Exclusion of this policy and an Exclusion of the "controlling underlying insurance" the Exclusion of this policy will apply." The Exclusions section reads (**emphasis added**):

Exclusions

The EXCLUSIONS sections of the "controlling underlying insurance" are made part of this policy. **If an inconsistency or contradiction exists** between an Exclusion of this policy and an Exclusion of the "controlling underlying insurance" **the Exclusion of this policy will apply.** However, in no case will coverage be excluded by the "controlling underlying insurance" and not excluded by this policy.

Translation: The broader exclusion of either policy is what will apply!

Sample Contract language to require true following form Excess policies:

“EXCESS/UMBRELLA LIABILITY INSURANCE – If any Excess or Umbrella Liability policies are used to meet the limits of liability required by this agreement, then said policies shall be true “following form” of the underlying policy coverage, terms, conditions, and provisions and shall meet all of the insurance requirements stated in this document, including the additional insured, SIR, and primary insurance requirements stated therein. No insurance policies maintained by the Additional Insureds, whether primary or excess, and which also apply to a loss covered hereunder, shall be called upon to contribute to a loss until the Contractor’s primary and excess liability policies are exhausted.”



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NOTES 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 usually 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!

While there are some exceptions, generally speaking, residential projects can have much worse than the standard ISO CGL coverage, for which there is a need to be very careful and get help; whereas carefully designed commercial project Wraps may have broader than the standard coverage.

Be especially careful with Residential City Redevelopment or Mixed Use Projects, even if they include a mix of residential and commercial elements since the stricter residential standards may be required and have worse coverage!

There are so many complexities and differences from the CGL standards and coverages we have discussed here that this is a completely separate workshop!

NOTE: ISO has issued a new 12.19 Wrap exclusion, CG 21 31 12 19, that may provide broader coverage, since this exclusion is more limited and does not apply if the Wrap “has been cancelled, nonrenewed or otherwise no longer applies for reasons other than the exhaustion of all available limits”. This could provide coverage in those cases specified that the old CG 21 54 01 96 Wrap Exclusion would not.

However, this exclusion does not apply if the "controlled (wrap-up) insurance program" in which you are enrolled with respect to the "bodily injury" or "property damage" described in Paragraph **A.1.** above at the location(s) described in the Schedule of this endorsement has been cancelled, nonrenewed or otherwise no longer applies for reasons other than the exhaustion of all available limits, whether such limits are available on a primary, excess or on any other basis.