

Contractual Risk Transfer Guide

When entering into any contract with a third party, it is important to ensure that proper and consistent risk transfer procedures are in place to help protect your entity from potential liability or damage caused by that contractor or service provider. If these procedures are not in place or followed consistently, your entity could be responsible for any losses if the responsible party does not have adequate insurance coverage. This guide is intended to help outline the steps needed to prevent or limit liability to your entity when entering into contractual agreements.



Step #1- Assign Responsibility

Determine which department or employee/s will manage the contract review and risk transfer process.

It is recommended that this process be centralized so that insurance requirements, waivers, etc., are being collected consistently. Some larger entities have in-house Legal departments, Procurement Managers, Purchasing Managers, etc, while some smaller communities rely on the City/Town Manager or Superintendent to review and approve contracts. In other cases, if a contract is under a certain dollar threshold, the applicable department head is authorized to approve contracts. No matter who is authorized to approve contracts, they must ensure that consistent risk transfer procedures are adhered to, even for one-time and ongoing contracts. If a decentralized process is used for smaller contracts, with department heads, for example, then a copy of each contract should be reviewed and maintained periodically to ensure procedures are followed.

As a reminder, all new contracts and service agreements should be reviewed by legal counsel to make sure they comply with local law and do not expose your entity to any additional liability.

Step #2- Review Current Practices

Evaluating where you stand with contractual risk transfer can be time-consuming, but necessary to get a full understanding of where you may have gaps in your protection.

Create a list of all active contracts and service agreements for each department and determine where you are currently obtaining Certificates of Insurance, naming yourself as an additional insured, obtaining hold harmless agreements, and ensuring the insurance policy limit and expiration date are acceptable. Consider creating a form like the example included in this guide.



Step #3 Review Contracts

Once you have a complete list of your contracts, you can determine which ones are not consistent with your risk transfer procedures and make adjustments as needed. Standard risk transfer protections could include Certificates of Insurance (COI), Hold Harmless/Indemnification Agreements, and Waiver of Subrogation Clauses/Areas of Concern.

Certificates of Insurance (COI)

A COI from the contractor's insurance provider serves as evidence of what current insurance is in place. This helps ensure that their insurance policy will respond first.

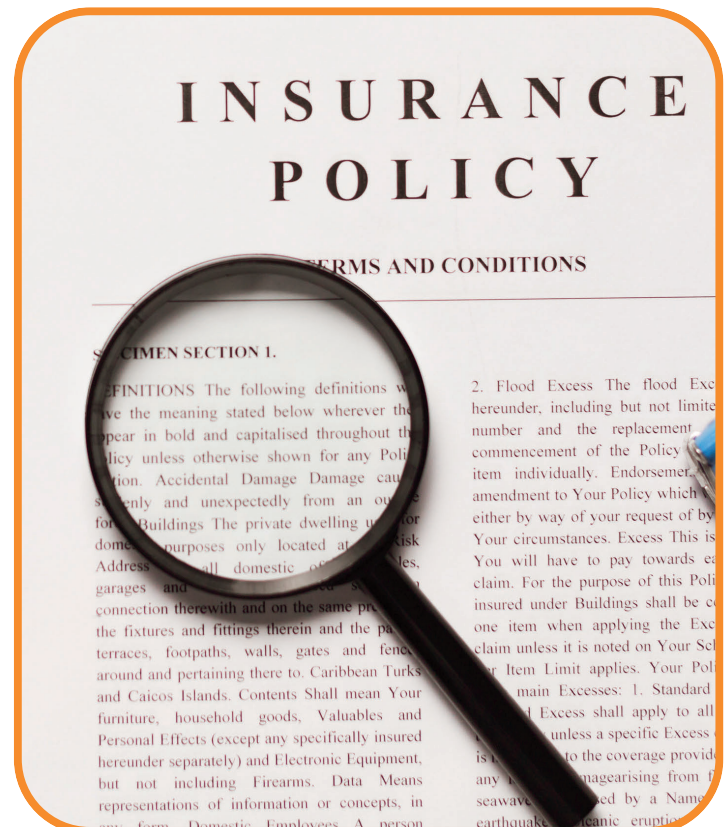
Verify the COI contains the following:

- A signature from the contractor's insurance representative.
- The appropriate type of coverage is typically General Liability, Auto Liability, and Workers' Compensation. Other coverages may be needed based on the type and scope of the contract.
- Policy limits and deductibles that meet your requirements.
- The Policy Period does not expire during the expected contract period, and they are required to notify you of any changes to the policy within 30 days.
- **Most Importantly, name your entity as an additional insured on their policy in the event their policy is canceled and you are not notified. Obtain an endorsement to their policy that verifies you have been named as an additional insured.**

Please see the attached example of a sample request for a Certificate of Insurance.

Other Certificate of Insurance considerations

- For professional liability coverage, endorsements are required for policies for contractual liability coverage and defense and indemnification of your entity and its directors (elected and appointed officials) by the contracting party.
- For a self-insured contractor and those with high retention limits, the organization should require a recently audited financial statement to ensure the financial stability of the organization to meet its obligations should a loss occur. The organization's financial officer should review the audited financial statement, and any comments should be included in the work file. Any and all questions as to the financial stability of the vendor based upon this review should be acted upon promptly.



COI Retention

Retain the COI on file for your state's record retention period or your state's statute of limitations plus one year, whichever is longer. For example, if the statute of limitations is two (2) years, keep COI on file for three (3) years. If a claim is involved, it should be kept with the claim file indefinitely. There are several reasons why the statute of limitations could be extended such as the vendor has gone out of business or the injured party is a minor. With an incident that involves a minor, the statute of limitations is extended. Entities should consider holding onto COIs for three years beyond the age of majority in those known instances. Having a buffer helps ensure the records will be available if needed.

Hold Harmless/Indemnification Agreements & Clauses

Hold Harmless Agreements or Indemnification Agreements are separate from a COI and are documents or clauses in larger contracts. The agreements help protect against claims that could arise from the negligence of the contractor's work or service.

State contract laws vary in the specific language to make hold harmless and indemnification clauses enforceable. Some jurisdictions allow for exculpatory clauses, which allow parties to contract away liability for their negligence. Review by the entity's legal counsel is, therefore, a must.

Care must be given to ensure the language in the contract conforms to the state law paying close attention to the following:

- Jurisdictionally required language to make the agreement enforceable.
- The parties to be held harmless/indemnified: The public entity and its directors (elected and appointed officials).
- The party providing the protection: The contractor.
- The type of protection offered: The activities of the contractor and its employees, agents, and subcontractors.



Waiver of Subrogation Clauses

Standard construction contracts presented to public entities may contain a Waiver of Subrogation provision. It contains the following:

The owner and contractor waive all rights against:

- Each other and any of their subcontractors, sub-subcontractors, agents, and/or employees of each other.
- The architect, architect's consultants, and separate contractors. These provisions attempt to limit the ability of your insurance carrier to collect or bring subrogation actions that can recover damages that result from negligent acts and/or poor workmanship of contractors, architects, and/or subcontractors.

These provisions should be reviewed by legal counsel and be removed from the contracts.

With this provision in place, increased exposure to losses can be caused by the following:

- Inadequate or lack of proper contractual agreements and addendum clauses are not in place.
- Failure to utilize qualified and financially sound subcontractors, suppliers, and manufacturers.
- Failure to adequately supervise subcontractors, suppliers, and manufacturers
- Failure to keep and maintain proper and adequate records.
- Faulty workmanship.
- Inadequate, improper, and/or unreliable testing and inspections. (Documented.)

To prevent losing these options, you must have all contractual agreements reviewed by your attorney before signing. Waiver of Subrogation language should be deleted and agreed to before approval and final signature. Please note that some contractors and/or subcontractors may alter standard provisions through "Supplementary General Conditions" or "Addenda" to the contract.

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SAMPLE REQUEST FOR CERTIFICATE OF INSURANCE

REQUESTED BY:		DEPARTMENT:	
PLEASE ISSUE A CERTIFICATE OF INSURANCE CONTAINING THE FOLLOWING INFORMATION:			
ISSUE TO:			
EFFECTIVE DATE (NEVER BEYOND POLICY EXPIRATION):			
EXPIRATION DATE:			
CANCELLATION NOTICE:			
MINIMUM LIMITS REQUIRED:			
ADDITIONAL LIMITS AND/OR OTHER SPECIAL CONDITIONS (ONLY WHEN NECESSARY):			
REASON FOR CERTIFICATE:			
NOTE: THIS CERTIFICATE CANNOT BE PROCESSED UNLESS AN AGREEMENT, CONTRACT, LICENSE OR OTHER DOCUMENT TO SUPPORT THIS REQUEST IS ATTACHED.			
SIGNATURE:			
DATE:			

RISK MANAGER

RET: OFFICE OF RECORD 3 YR.

FOLLOWING EXPIRATION SUBJECT TO CONTRACT AND GRANT REQUIREMENTS OTHER 1 YR.

FOLLOWING EXPIRATION SUBJECT TO CONTRACT AND GRANT REQUIREMENTS.



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