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Contractual Risk Transfer **Indemnity & Insurance** **Requirements**

For:

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By:

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Risk Transfer in Contracts: **Indemnity & Insurance Requirements**

An Examination of General Liability Risks facing Hiring Entities and the Indemnity & Insurance Provisions in Contracts for Transferring those Risks to Contractors, Renters, Vendors, and others

Successful Risk Management involves 5 basic things we can do with Risk:

1. Avoid it
2. Prevent identified losses
3. Reduce the loss
4. Segregate through separation and duplication
5. Transfer: Give the Risk to others

Risk Transfer is an especially helpful action when the liability risk arises out of 3rd party vendor liability from contracting services, or supplies, or renting of your property to others.

This is especially true in states which allow joint and several (individual) liability where you can be liable for the actions of the Renter/Vendor/Contractor. This means each defendant can be held liable for the entire amount of damages regardless of the amount of responsibility.

This final method of **Risk Transfer** is what we will discuss in this workshop.

This Transfer of Risk is done through Contractual Agreement with the 3rd party renter, service provider, or contractor.

This Contractual Risk Transfer principally involves three steps:

1. IDENTIFICATION of potential risks connected to the Scope of Work (SOW)
2. REQUIREMENTS for clear and unambiguous financial responsibility for Contract Risk Transfer Liabilities—Including Insurance Requirements for such
3. VERIFICATION of COMPLIANCE for the specific Indemnity and Insurance Coverage for payment of the Contractor's liabilities assumed in the Contract.



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Contract requirements are often out of date, but need updating due to (1) changes in the newer Insurance Services Office (ISO) Commercial General Liability (CGL) Insurance coverage forms (the “Standard” used by approximately 90% of Insurance Companies) and (2) to help plug the Coverage gaps we commonly encounter in Contracts.

Transfer of Risk to Others Using Contracts

When you Contract with a Service, User of your premises, or Contractor, you can become liable for their work, for the entire amount of damages, regardless of the amount of your responsibility. More on this later...

- a. Hiring Entities have their own Liability plus responsibility and Liability for the actions of others they contract or hire (Vendors, General Contractors (GCs), Subs, Service Providers, Lessees, Users of Facilities, Special Events, etc)

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

- a. Proper use of Contract Agreements can transfer financial risk from the Hiring Entity (Owner, Developer, Public Agency, Landlord, GC, or any Entity) to the responsible party—the Renter, Vendor, Contractor, Service Provider, or their Subs doing the work and causing the risk and liabilities

3. Two Principal Ways to Transfer the Risk & Protect Hiring Entities

1. **Indemnity**—The Contractor agrees in a Contract to assume the Liability of the hiring Entity. The Contractor’s promise is “**insured**” in the Contractor’s Insurance policy by Contractual Liability coverage (the definition of “insured contract”) and obligates the Insurance Company to make covered payments for “liability assumed in a Contract or agreement” by their Named Insured, the Contractor.



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2. **Insurance**—The Hiring Entity is added to the Contractor’s policy as an Additional Insured by Endorsement(s). We will cover these in some detail later.

4. **Indemnification and Risk Transfer**

- a. What Indemnity is—One party agrees to assume another’s Liability
- b. 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.

5. **Types of Insured Liability that can be Transferred by Indemnity & Insurance**

- a. Negligent Tort Liability—1. Duty of Care; 2. Prudent Person standard; 3. Breach of Duty; 4. Resulting harm to person or property; Unintentional; Did not mean to harm; an Accident. This means the Party is negligent / liable.
 - i. Active Liability—What you did caused the harm, including partial and sole negligence (100% your fault); or
 - ii. Passive Liability—What you did not do, but could have, caused the harm; you could have prevented it – Most Common for Hiring Entities
 1. Passive examples: Failure to discover, supervise, inspect, or prevent the harm—an omission of a duty



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2. If you contracted with them, or it happened on your property, you will be at least partially responsible!
 - b. Vicarious Liability—Liability as a function of law regardless of the actions of the Hiring Entity. No Negligence is required to have vicarious Liability!
 - c. **Joint & Individual (Several) Liability** and its effect: All for one & one for all = deep pockets. You can become **liable for their work, for the entire amount of damages, regardless of the amount of your responsibility.**
 - d. Contractual Liability—Liability of others assumed by Contract; Liability agreed to in the Contract! **What the Contractor does to indemnify you!**

6. Elements of Indemnification—

- a. Promise to Hold Harmless, Defend, Indemnify, & Waive Subrogation rights.
 - i. Effect of Waiver of Subrogation by the Contractor = no right of recovery by the Insurance carrier from the Hiring Entity for partial or contributory negligence
 - ii. A Contractual waiver must be endorsed for the Work Comp policy, but is allowed by ISO carriers for the CGL policy & Business Auto, as well as most, but not all, Inland Marine policies, such as Builder's Risk.
 - iii. **SAMPLE WAIVER OF SUBROGATION Clause (aka Waiver of Rights of Recovery):** "The Contractor hereby grants to the Entity a waiver of any right to subrogation which any insurer of the Contractor may acquire against the Entity by virtue of the payment of any loss



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under such Insurance. Contractor agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether the Entity has received a waiver of subrogation endorsement from the insurer.”

- b. The Indemnity obligation must cover you both during the Contract **and** after the Contract is completed for liabilities that can occur later – especially in construction, maintenance, service, and repair operations. Examples: Deck collapses; property damaged by roof or windows leaking; subsidence, etc. This is also known as Construction Defect liability and is very costly!
 - i. Contract Indemnity should include a requirement it is the Contractor's responsibility that defense and indemnity obligations shall survive the termination of the agreement.
 - ii. The Contract should make clear that the defense and indemnification obligations are in addition to, and are not limited by, the Insurance obligations in the agreement.

7. 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 (for 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 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)



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- b. **BEWARE** of Insurance Policy 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 (other than a. through e.)
- c. The Effect—Contractor is liable but has no contractual coverage to protect YOU!
- d. **Do NOT allow this endorsement on your Contractor’s policy!**

See the following sample of the ISO CG 21 39...

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.



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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 for **your** Indemnification in the signed Contract 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.

Employer's Liability (Worker's Comp) Indemnification—

8. "Action Over" Lawsuits are on-job liability claims from an injured Contractor's

employee against YOU, 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!

9. 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 since Employer's liability for Workers'

Compensation is not covered by the CGL!)

10. Too many manuscript (Non-ISO) forms to cover. Counterfeit Money Example



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11. 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. (we'll see how to fix this SIR issue in the reference section, later)

12. *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 required of Contractor under this contract and shall also require its subcontractors provide endorsements (i) Naming Entity as an additional insured (ii) Agreeing that the subcontractor's coverage shall be primary and shall not require contribution from Entities's insurance or self-insurance program and (iii) Waiver of subrogation rights in favor of Entity and provide proof of such upon request to the Entity.”**

13. 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; and mixed commercial/residential usage)

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

- a. Purchase order used for small jobs? Example: “Action Over” Lawsuits



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- 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
 - i. 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.

13. 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
- b. Special events, leases, & facility rentals; too much risk for Hiring Entity to take on their own. Special risk and 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.

14. Put your “Indemnity & Insurance Requirements” on the Purchase Order (or Proposal, Memorandum of Understanding, Letter of Intent, etc. –whatever you use) and have them sign and date it with a statement that they have read, understand, and agree to comply with the Indemnity and Insurance requirements supplied with the Purchase Order. This will “trigger” the requirement for a “written Contract or Agreement” for coverage in most policies. **Sample in the Reference section.** (Examine later...)

15. Surprisingly good broad coverage for eligible small “Business Owner Policies” (BOPs, or Micro-BOPs) that are usually equal to or better than ISO CGL coverage in addition



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to having generally broad property & loss of earnings coverage – **but** pay attention to manuscript forms and endorsements that **may** limit or exclude standard coverage.

For RFPs: It is strongly recommended when distributing an RFP (proposal) or RFQ (qualification) to include a document containing a **Summary of your “Indemnity and Insurance Requirements”** that includes language to provide a copy of the requirements to their Insurance broker or insurer to confirm compliance. **Sample in Reference Section.** (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 & screens problems 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! **If vendors do not have the right Insurance, how can you expect them to afford to financially honor the contract?**

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

1) **REVIEW of Coverage of Entity as Indemnified Party (You are the Indemnitee)**—

- a) Indemnity is only promised by the Contractor’s assumption of it in the Contract. It is **“insured”** by Contractual Liability coverage in the definition of “insured contract” in the Contractor’s Insurance policy.
- b) Coverage is limited by the definition of “Insured Contract” in Contractor’s Policy



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- i) Does any amended definition limit, reduce, redefine, or exclude Contractual Liability Coverage?

 - c) Are there **other Policy** exclusions or limitations that will prevent coverage? (We will discuss more examples later and how to verify these matters)

 - d) Being an Indemnified party does **not** grant Additional Insured status – they are separate & distinct!
- 2) **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 the Indemnity hold harmless Contractual agreement requirements.

 - b) The Contractor’s Insurance policy identifies persons or organizations who qualify as additional insureds based on their relationship to the Hiring Entity.

 - c) The Certificate of Insurance is not enough by itself and will **not** provide coverage without the actual policy Additional Insured Endorsement! Many examples shown later in the **Reference Section!**

 - 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,



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Landlords with tenants, and permit and licensing functions. Coverage is limited by the relationship and which form is used for the Additional Insured Endorsement.

- 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 are **conditional** Automatic endorsements, and do not list individual additional insureds, but rather a specific description of the circumstances that must be met for another party to automatically qualify as an additional insured.

- g) Additional insureds added by endorsement to a Liability policy have the same right to coverage as a Named insured, subject to the endorsement coverage 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 conditional 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”. (We will discuss this important aspect later...)



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- iv) Does the form require the Contractor be at fault, i.e., “caused by” (since 2004), rather than the previous editions that paid “arising out of” the Contract
- v) **The REFERENCE SECTION shows common Additional Insured Endorsements and their usage!**
- vi) Does the policy itself have other exclusions or limitations that prevent coverage

NONE of the ISO 2013 and later Additional Insured forms provide coverage UNLESS Specifically REQUIRED in a written Contract or agreement!

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)**

***How do we fix this problem? 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!**



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***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.

SUMMARY of DIFFERENCES for Common Additional Insured (AI) Endorsements

(For ease of understanding, we show ISO Edition dates with a dot between month & year i.e., 10.01; ISO uses a space i.e., 10 01; some simply omit the space i.e., 1001)

1. CG 2010 11.85 & 2026 11.85 Edition covered “your work” including both Ongoing & Completed Operations Liability. Additional Insured and locations are scheduled on the endorsement; or filled in “as required by written contract or agreement.” Later editions of the CG 2010 covered only ongoing operations Liability.
2. CG 2033 Automatic Additional Insured Status (so-called “blanket”) coverage (only if required in a written Contract or agreement) for only Ongoing Operations Liability. This automatic coverage is not effective unless the Contract requiring the coverage is “with you” i.e., the Sub of a Contractor cannot cover you since the Sub’s agreement is with the Contractor (not you). This is known legally as Contractual “Privity”
3. CG 2037 Covers only Completed Operations Liability specifically named, unless it fills in the form and says “As required by written contract or agreement”

Later edition date Coverage changes occurred as follows:

4. 10.01 editions were the last to cover Liability “arising out of” (rather than “caused by” the Insured’s work) as the trigger to activate coverage for the Additional Insured.
5. 07.04 editions: **All** AI forms, scheduled or automatic, required that Liability be “caused in whole or in part” by the Named Insured in order to cover the Additional Insured
6. 04.13 editions: **All** AI forms, scheduled or automatic, restricted **coverage and limits** to only what is required in a written Contract or agreement; as well as only what is “caused in whole or in part” by the Named Insured (first begun in the 07.04 editions)



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- CG 2038 04.13: First time ISO form granting **Automatic Ongoing Operations** “Blanket” coverage introduced for a Sub to cover you as an Additional Insured even if they have no Contract (Privity) “with You” but the Additional Insured Endorsement **is required** through a flow-down provision requirement in your Contract with the Contractor you hired (with Privity) who is hiring the Subs.

NEWEST 12.19 Additional Insured Endorsements:

NOTE: Prior Additional Insured forms, i.e. 2010, 2037 etc. with the new 12.19 date are the same as the 04.13 forms but recognized facts may change policy limits available & removed 4 words: reference to limits "shown in the Declarations" that may be impacted by coverage limit endorsements, depletion of aggregate limits, etc.

AUTOMATIC COMPLETED OPERATIONS Additional Insured Endorsements:

- CG 2039 12.19** — NEW **Automatic Completed Operations** coverage version of, and designed to work with, the CG 2033 that provides automatic Ongoing Operations coverage to the hiring Contractor. As noted above, this must be required in a written contract or agreement “with you” (i.e., Privity) to trigger the automatic AI coverage **for you – not** a Contract with another Contractor such as a GC you hired who hires the Sub.
- The Automatic 2033 for Ongoing Operations & 2039 for Completed Operations does not give any upstream coverage from any Subs of your Contractor – coverage applies only if they have a contract with YOU!**
- CG 2040 12.19** — NEW **Automatic Completed Operations** coverage version of, and designed to work with, the CG 2038 that provides automatic Ongoing Operations coverage to additional insureds even if they have no Contract Privity “with you”, but it is required in writing by the Contractor hiring them to cover YOU.

NEW 12.19 Endorsements for NO Privity with & NO Work For the Additional Insured:

- CG 20 42 & 20 43** — NEW endorsements when no work is being done for the AI but the AI wants coverage for an Automatic or Designated operation endorsement:

Additional Insured Forms: Insured Relationship to AI Required to Trigger Coverage:

Insured Relationship to AI for Coverage	Doing Work For AI with a Contract requirement regardless of Privity		Doing Work For AI with Privity**, but <u>NO</u> Subs	No Contract “With You” (No Privity) & <u>No Work For</u> Additional Insured	
	Scheduled	Automatic*	Automatic**	Automatic*	Designated
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 from ISO	NONE from ISO



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* 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”**

***ALL Automatic forms must be required in a “written contract or agreement” or there is NO Additional Insured coverage!**

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, including Excess Policies!**
SAMPLE: “The Additional Insured coverage under the Contractor’s policies 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 and unambiguous** respecting 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”, Active, Passive, Vicarious, Ongoing operations, Completed operations, etc.)
3. Require that Contractors provide coverage **“at least as broad”** (not just “equivalent”) as the specific ISO forms listed in your Insurance requirements. Make provisions to analyze whether “non-standard (non-ISO) forms” constitute coverage “at least as broad” since most, but not all Companies, use the ISO forms.



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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

Review later a reference Matrix chart of various ISO Indemnity and Additional Insured Endorsement forms for Other Parties and their appropriate application in the ***Reference Section***.

“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. Even standard ISO endorsement forms can be dangerous! Many, if not most, Contractor policies now have special endorsements that may offer deceptively inferior Insurance that reduces or excludes coverage, even on the standard ISO CGL coverage!!
2. This is especially true for Contractor policies placed in the non-admitted Excess & Surplus lines markets.
3. 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!

After you set up your Risk Transfer Indemnity and Insurance provisions and hire the Contractor who 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 are not enough! They will not warn you of the restricted or excluded items! More detailed EXAMPLES are in the *Reference Section*, and include:

1. Restricted coverages on CGL policies
2. Certificates of Insurance do not disclose the resulting CGL coverage concerns
3. Pitfalls of Excess Limits policies
4. Coverage Compliance Verification[®] of Contract Requirements
5. Sample Forms for Contract Indemnity & Insurance Requirements



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Generally speaking:

1. Whenever any endorsement is added to the CGL policy, it is wise to take a suspicious attitude that it may contain provisions detrimental to the expected coverage.
2. Ask yourself, WHY was the endorsement added?
 - a. Was it to add coverage such as Additional Insured Endorsements (**which can also be problematic if used incorrectly**) or primary and non-contributory endorsements; or
 - b. Was it to limit or reduce or exclude coverage, such as the following examples we will discuss
3. How does the endorsement differ from or amend the generally expected coverage of the standard unendorsed CGL?
4. There are untold numbers and examples of endorsements that restrict, limit, or exclude coverage on the CGL policy and new ones always on the way!
5. Some CGL endorsements are very direct and quite open as to what they do, while others are much murkier and deceptively titled and worded.

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” at least as broad as ISO scheduled CG 2037, or automatic CG 2040. **(for exposures such as construction,**



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service, repair, or maintenance operations. 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 ISO CG 20 01
5. ****A copy of the Declarations & Policy Endorsements pages for the CGL policy.**
6. **A complete copy of all Excess/Umbrella liability policies with all endorsements.** (These red bold items are necessary to help identify “Restricted Coverage” policies and endorsements and verify if limitations or exclusions have been added to the policy – all of the policy provisions and endorsements will be listed here.)

For additional information, and to see how you can automate this entire process, please see www.AutomatedInsuranceVerification.com

EXAMPLES & QUESTIONS

1. Words matter, they affect coverage! Analyze, understand, and apply the material and correct forms discussed in this workshop.
2. Outdated 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.”**



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- “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 understands and 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”.



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 before the last page of the 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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The Automated Insurance Verification® Solution®

THE REALITY IS while Contractual Risk Transfer is vitally important, it is time-consuming to do even with expert knowledge. Studies show:

1. 75% of the Certificates of Insurance for Insurance Contract requirements are not properly verified, due either to internal workloads, or Vendor/Contractor delays or non-Compliance

Even with those that are “verified” with a Certificate of Insurance, they do NOT:

2. Contain the correct explicit written Insurance Contract requirements necessary to trigger the activation for the liability coverage of the Contractor’s insurance; or
3. The Contractor’s policy contains endorsements, limitations, or exclusions of coverage that are not shown on the Certificate of Insurance resulting in limited or no coverage!

For years we have been asked to create and simplify the Complexity of Contractual Risk Transfer and Verification of Coverage Compliance®.

We have now utilized Advanced Technology and created a powerful, user-friendly online service combined with our expertise in designing Optimized Insurance Contract Requirements® with Enhanced Activation Procedures® to automatically help: Develop, Verify, Expose, Correct, and Activate Coverage Compliance at a fraction of the manual time and expense. Details are at: www.AutomatedInsuranceVerification.com

This exclusive, proprietary system helps provide all of the following:

- Find and correct many Gaps and written requirements necessary to trigger and activate coverages as discussed above and shown in the Reference Section below.
- Provide Risk Management Continuity during personnel changes
- Documentation for reduction of the Entity’s own liability Insurance costs
- Unlike COI Management Programs that Only Verify Documents, Not actual Coverage, the Automated Insurance Verification® system also provides Indemnification provisions.
- AIV acts as an expert Assistant Risk Manager advisor to initiate and email to your contractor all of your contract and insurance requirements.



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- It obtains the information and documentation you need and automatically follows up as necessary to be sure that it was all done as required.
- It analyzes their documentation and then automatically makes decisions you previously authorized and can customize at any time in the setup and communicates with the contractor of any necessary corrections for your approval to transfer and reduce your risk.
- It asks for your decision about any unusual issues or questions that arise and then communicates and obtains approval from the contractor regarding them.
- At all times during the entire process you can quickly and instantly check to see the status and documentation.
- Annual Renewals are automatically initiated and handled in the same way without any need for involvement by you, unless of course you want to do so.
- At all times you are able to track the progress and status of the process.
- AIV Activates Warranty Coverage Requirements to help comply with Policy Warranty coverage requirements for your Contractor from his Subcontractors
- Flags Limitations & Exclusions
- Provides at-a-glance Status for all Contracts
- Provides automated Guided Coverage Prompts
- Simple and user friendly, but contains precise triggering requirements and language necessary to activate 3rd party insurance coverage.
- Provides Cost Savings to JPAs whose members are compliant!
- Provides documentation so you DEFINITELY can PROVE that you specifically REQUIRE, VERIFY, and have CORRECT INDEMNITY as well as ADDITIONAL INSURED COVERAGE for ALL HIRED CONTRACTORS AND SERVICES.

Please go to: www.AutomatedInsuranceVerification.com for details or to arrange a personalized demo of the service for your needs.

You simply will not believe how comprehensive, time saving, and user-friendly the Automated Insurance Verification® System is at such a dramatically reduced cost compared to doing it manually!



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



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 serves 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 California Public Agencies.

He is the founder and creator of the proprietary [Automated Insurance Verification](#)[™] program that helps develop, verify, expose, correct, and activate coverage compliance with Insurance Contract Requirements. He 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)



Reference Section

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.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and



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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:

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.**



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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 FOLLOWING...



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.



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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.

CG 20 40 12 19

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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.



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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 even on standard ISO CGL policies!

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!
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! (Just the contractor's office?)



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- 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!
 - c. There are many manuscript Company specific endorsements...
 - d. Be careful of Definitions such as Condos, Mixed use, Apartment to Condo Conversions, Occurrence definition, Completed Operations, etc.
 - i. Condos can mean single family homes as long as they are in a Homeowners Association, etc
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.
 - a. You expect this coverage from Subs due to the “Flow down” provision requirement in your Contract.
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!



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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.
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 expose and correct “Restricted Coverage” policies, endorsements, limitations, or exclusions is to require in your Contract:

****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 understand and manually correct the substandard coverage.

THE REALITY IS while Contractual Risk Transfer is vitally important, it is time-consuming to do even with expert knowledge. Studies show:

4. 75% of the Certificates of Insurance for Insurance Contract requirements are not properly verified, due either to internal workloads, or Vendor/Contractor delays or non-Compliance

Even with those that are “verified” with a Certificate of Insurance, they do NOT:

5. Contain the correct explicit written Insurance Contract requirements necessary to trigger the activation for the liability coverage of the Contractor; or
6. The Contractor’s policy contains endorsements, limitations, or exclusions of coverage that are not shown on the Certificate of Insurance resulting in limited or no coverage!



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. **Senate Bill 496 effective January 1, 2018, applies this limitation to defense costs as well – “only to the extent” - Proportional**
 - iii. ***Professional Liability Insurance usually excludes Contractual Liability**, as well as Additional Insured coverage for the Entity; usually only covered by the General Liability policy i.e., for BI and PD
 - iv. **Cyber & Tech Liability – Loss or destruction of data is NOT tangible property damage and is not usually covered; Your Data can be endorsed onto the Professional's Tech Liability Policy, or onto the Cyber Policy**

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 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:
 - “To the fullest extent allowed by law, Contractor shall...”
 - 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 California Public Entities by Alliant and PRISM (Public Risk Innovation, Solutions, and Management) for which I am the Contributing Editor.

You may download a complete copy of the 2024 “Insurance Requirements in Contracts” (IRIC) manual at <https://www.alliant.com/news-resources/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, showing the prohibited limitation shown in bold for **sole negligence or willful acts** 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 Construction related agreements and Design Professionals for which sample language follows...



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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...



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** for Design Professionals **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.



Additional Insurance Requirements in your Contract for IT Vendor or IT Professional Services

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

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



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Additional Insurance requirements in your Contract for the use of Drones (UAVs)

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

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

MINIMUM SCOPE AND LIMIT OF INSURANCE

Coverage shall be at least as broad as:

Aviation Liability Insurance-on an “occurrence” basis, including products and completed operations, property damage, bodily injury with limits no less than \$1,000,000 per occurrence, and \$2,000,000 in the aggregate (**or substitute other limits as appropriate to the risk and scope of work**).

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

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



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 Entity as well!
 - 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 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 or Additional Insured Parties Insured and shall provide, or be endorsed to provide, that the SIR may be satisfied by either the Named Insured or the Entity. Entity may deduct from any amounts otherwise due Contractor to fund the SIR/deductible. 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 full copy of all liability policies 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”) 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 regardless of Privity		Doing Work <u>For</u> AI with Privity**, but <u>NO</u> Subs	No Contract “With You” (No Privity) & No Work <u>For</u> Additional Insured	
	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.

We are seeing more of these issues since many Owners and upstream Contractors are requiring higher limits and this requirement is often done with Excess policies.

- 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. Any other Exclusions, Terms, Limitations, or Conditions – that are part of, or have been added to, the Excess Policies compared to the underlying policy can vary creating serious gaps
 3. Definitions – Condos, Mixed use, Conversions, Occurrence, Completed Operations, etc
 4. Defense provisions – Same inside/outside defense limits provisions for Excess policies attachment point limits (erode limits or pay in addition to limits)
 5. Is defense an obligation; or the “right, but not the duty” to defend
 6. Are Additional Insureds on the primary policy covered on the Excess
 7. Are Automatic Additional Insureds enrolled when required by Contract, or
 8. Must Additional Insureds be advised or endorsed on to the Excess
 9. Is the Excess Policy Primary & Non-Contributory for an AI (can be by endorsement)
 10. Are the Contractual liability provisions that cover Indemnity the same as the primary
 11. Is the “Insured Contract” Definition the same or is it modified
 12. Is there a Waiver of Subrogation (aka waiver of Rights of Recovery)
 13. Has the definition of “Occurrence” been modified
 14. Extension for PD liability for Construction Defect litigation for Wraps
 15. Is there a “Prior Work” limitation or exclusion (see Restricted Coverage Policies above)
 16. 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 coverage
 17. Excess policies should usually be flat premium – not auditable
- 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



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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 examine all of the pages to analyze and understand the differences! Some are twice as many pages as the entire standard ISO CGL.

WHAT TO DO: 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 following form endorsements 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



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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.”

This language is necessary since so many Excess policies require Horizontal exhaustion of all other Insurance before the Excess policy will apply!

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 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 mixture 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!



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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.



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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!***

INDEMNITY AND INSURANCE REQUIREMENTS

1. These are the Indemnity and Insurance Requirements for Contractors providing services or supplies to **Name of Entity** (Entity). By agreeing to perform the work or submitting a proposal, you verify that you comply with and agree to be bound by these requirements. If any additional Contract documents are executed, the actual Indemnity language and Insurance Requirements may include additional provisions as deemed appropriate by Entity, 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 the minimum 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 insureds, SIRs, 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.
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



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coverage required by this clause) **and** a copy of the Declarations and Endorsement 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 required of Contractor under this contract and shall also require its subcontractors provide endorsements and proof of such upon request to the Entity (i) Naming Entity as an additional insured, (ii) Agreeing that the subcontractor’s coverage shall be primary and shall not require contribution from Entity’s insurance or self-insurance program, and (iii) Waiver of subrogation rights in favor of Entity.

I. INDEMNIFICATION:

COPY YOUR INDEMNITY REQUIREMENTS HERE – Type 1, 2, 3, or Design Professional

These Indemnification provisions are independent of and shall not in any way be limited by the Insurance requirements of this agreement.

II. INSURANCE COVERAGE AND LIMITS:

Liability coverage shall be at least as broad as Insurance Services Office (ISO) CGL Policy CG 00 01. No modifications or endorsements are allowed that would reduce, limit, restrict, or exclude coverage under the standard unmodified ISO CGL policy coverages. Entity acceptance or approval of Insurance required by this agreement does not in any way relieve the Contractor from liability under this agreement.

Minimum Coverage Requirements are:

COPY YOUR INSURANCE REQUIREMENTS HERE, including all Coverages and Limits required for your specific Contract exposures and the scope of work involved.

ADDITIONAL ENDORSEMENTS REQUIRED:

1. Waiver of Subrogation (Rights of Recovery) endorsement for Workers' Compensation.
2. Additional Insured Endorsement for “ongoing operations” at least as broad as ISO CG 2010 Scheduled form, or Automatic form CG 2038.
3. Additional Insured Endorsement for “completed operations” at least as broad as ISO CG 2037 Scheduled form, or Automatic form CG 2040.
4. Primary & non-contributory coverage (at least as broad as ISO CG 20 01)
5. ALSO: A copy of the Declarations & Policy Endorsements pages for the CGL liability policy.
6. ALSO: A complete copy of all Excess/Umbrella or other liability policies with all endorsements.

Failure to comply with these requirements shall be considered a material breach of contract.

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: _____

By: Contractor (Print Name) _____



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FINALLY, A PERSONAL NOTE...

Over the years and now in my mid-seventies I have wanted to pass on a legacy that would continue to serve our industry with this kind of important information after I am gone.

I have personally spent hundreds of hours, with special intensity in recent years, working with technology partners to automate the Coverage Compliance Expertise and practical experience from Certified Risk Managers into a simplified online Risk Transfer and Insurance Compliance Verification solution.

This goes far beyond Certificates of Insurance management services to help automatically develop and verify effective Risk Transfer Insurance Contract Requirements, as well as expose and revise non-compliant coverage.

As a result of our work and that of many others it is now possible to do automatically what we have previously done manually and taught to others for many years by using advanced technology simplified to be user-friendly.

We have now made our solution available to the industry at a dramatic reduction in the time and expense necessary when compared to doing it manually. If you are interested, you can see details or arrange a personalized online demo of the service by going to www.AutomatedInsuranceVerification.com

Thank you for the privilege of serving you these many years... I am confident you will find this powerful and user friendly service to be an extremely effective and cost saving tool in your risk reduction and transfer efforts. It has been our pleasure to develop it for you...

This is my gift to the industry I have served for over 50 years and is dedicated to the support, encouragement, and loving memory of my son, Jason Robert Marshburn, a true computer genius and visionary, without whom this service would not exist...

My very personal best to all of you...

Robert J. Marshburn, CRM, CIC, ARM, CRIS, CISC, CCIP
Bob@CertifiedRiskManagers.com