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New Additional Insured Forms

Require Contract Revisions!

by

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New Additional Insured Forms Require Contract Revisions!

NOTE: In this workshop we discuss revisions needed to effectively transfer risk and satisfy standard policy provisions to obtain maximum protection for the Public Entity.

We strongly recommend updating your Contracts with changes needed as a result of the new Insurance coverage forms. Without these Contract revisions, due to the restrictions of the new Additional Insured forms, the Public Entity will not have the expected coverage.

Major changes in the new ISO forms require Contract changes!

1. ISO has introduced significant coverage changes affecting indemnity, insurance, and contract requirements! These changes will begin appearing in commercial liability renewal policies from now on.
2. **ALL** of the new 2013 ISO Additional Insured Endorsements with the edition date of 04.13 contain provisions limiting and restricting their Insurance coverage for the Additional Insured to ONLY the requirements in the written contract (or agreement) between the parties.
3. The Contract must explicitly require the limits and extent of coverage or there is NO coverage! No clear Contract requirement = NO COVERAGE!
4. Even if your Contractor's policy contains broader coverage or higher limits of liability than your contract requires, they will NOT apply in behalf of the Additional Insured or Indemnified Party (Indemnitee) unless it is required in the contract!





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The following are the major changes affecting the new and revised Additional Insured forms that require accurate understanding and careful contract wording to obtain the expected coverage—

The major changes for the new forms provide that the Insurance—

1. Shall only apply to the extent permitted by law; AND
2. Will not be broader coverage than that required by the contract or agreement; AND
3. The maximum limits paid for the additional insured is the amount Required by the contract or agreement; or the Policy limit, whichever is less.
4. ISO has released a new Automatic (Blanket) Insurance coverage form
5. ISO has (finally) released a new form that specifically provides coverage on a primary and non-contributory basis.

The last two items, 4 and 5, are good news if used properly. The first 3 items for Additional Insureds can only bring reduced, not expanded, coverage.

NOTE—The following (1) Law, (2) Coverage, and (3) Limits language is in **all** the new Additional Insured Endorsements with the 04.13 edition date, including the commonly used CG 2010, 2033, 2012, 2026, and 2037 (as well as the new Additional Insured form 2038 discussed below).

1—THE LAW—Because of anti-indemnity provisions contained in California law that restricts the scope of permissible coverage for the additional insured's own negligence (including SB474 effective January 1, 2013) Additional Insured coverage will be limited to the extent the law allows, despite any apparent (or actual) broader wording of an Additional Insured Endorsement.

2—COVERAGE—Despite the actual wording provided by the additional insured endorsement, Insurance coverage for the additional insured will not be broader than required in the contract or agreement. ISO says this is to avoid giving an additional insured broader coverage than requested. Take care when drafting the contract to describe the desired coverage fully and accurately.

Contracts should Require that all coverage available to the named insured shall also be available and applicable to the additional insured.



3—LIMITS—If the contract requires limits of liability that are less than the policy limits, the lower limits in the contract will apply. This addresses the amount of coverage available to the additional insured Public Entity. If the contractor has limits of \$2 million, but you only require limits of \$1 million in the subcontract, you are walking away from \$1 million in coverage.

Contracts should Require that the full limits available to the named insured shall also be available and applicable to the additional insured.

Introduction of the new CG 20 38 provides broader coverage than the CG 20 33 and Reduces Risk.

1. The **CG 20 33** is the ISO so-called Blanket Additional Insured Endorsement provides "Additional Insured—Owners, Lessees or Contractors—Automatic Status for Other Parties When Required in Written Construction Agreement **with You**" but has been found in some instances to include as additional insured only those parties with which the downstream party entered a direct contract or agreement.
2. The purpose of the **new CG 20 38** endorsement is to include not only those persons or organizations the downstream party has directly contracted with as an additional insured but also any other person or organization the downstream party is required to add as an additional insured by the terms of any direct agreement with an upstream party. It provides "AUTOMATIC STATUS FOR OTHER PARTIES WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT" and deletes the requirement that the Agreement be "**with You**" to trigger coverage.





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3. If a subcontractor is required in the general contractor/subcontractor agreement to add the Public Entity as an additional insured, the NEW CG 20 38 would include the Public Entity even though the subcontractor has no direct contractual relationship with the Public Entity.
4. **Make sure your Contract requires it!** How—To receive the automatic blanket provisions of the CG 20 38 04 13 endorsement or coverage “at least as broad” (do not say “equivalent”) include a provision for such in your Contract.
5. The certificate of insurance, despite what it may say, is not enough! Be sure they provide proof to you (a copy and/or listing on the policy declarations or endorsement page) of the actual CG 20 38 policy endorsement that changes the coverage on the policy.
 - a. You will **not** be named on the CG 20 38 endorsement since it provides Automatic (Blanket) Status, **but ONLY for the parties specifically named and required in the written Contract or Agreement!**
6. **With this new CG 20 38 04 13 we see no reason to use the CG 20 33 form once the CG 20 38 form is available to your contracting party.**

FOLLOWING ARE THE NEW SAMPLE FORMS OF THE CG 20 38 & CG 20 33 WITH HIGHLIGHTING AND NOTES TO SHOW THE DIFFERENCES



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

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:

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.

HIGHLIGHTS ADDED TO THE FORM

Color Font Added to the Form

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

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.

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.

HIGHLIGHTS ADDED TO THE FORM

Color Font Added to the Form



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

1. This is a new endorsement that expressly states that the coverage is provided to an additional insured Public Entity on a “primary and non-contributory” basis,
2. This endorsement is activated only if the named insured Contractor has agreed to these terms in a written contract or agreement.
3. **Make this a requirement in all your Contracts!**
4. **Excess Insurance**—What happens when you require a Contractor to include you as an additional insured on a primary and noncontributory basis not only on their primary CGL but also on their excess or umbrella liability policy?
 - a. Imposing primary and noncontributory requirements on excess or umbrella policies is challenging; the “other insurance” condition of most excess or umbrella policies usually contains language that requires horizontal exhaustion of all limits (including the Public Entity’s) before any excess policy applies.
 - b. Include language that requires the umbrella or excess Insurance to provide coverage on a primary and non contributory basis.

FOLLOWING IS THE NEW SAMPLE CG 20 01 ENDORSEMENT WITH NOTES



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PRIMARY AND NONCONTRIBUTORY – OTHER INSURANCE CONDITION

This endorsement modifies insurance provided under the following:

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

The following is added to the **Other Insurance** Condition and supersedes any provision to the contrary:

Primary And Noncontributory Insurance

This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:

- (1) The additional insured is a Named Insured under such other insurance; and

- (2) You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.



MAJOR EFFECTS OF THESE 2013 CHANGES—

1. The first thing the Insurance Company will look for to deny coverage is the underlying Contract! **Your Contract becomes an endorsement to the policy!**
2. Even if the Contractor's policy contains broader coverage or higher limits of liability they will NOT apply in behalf of the Additional Insured / Indemnified Party (Indemnitee) unless it is required in the contract!
3. Unless agreements between "friendly parties" (both parties are Public Entities) contain clear written requirements, you will have no Insurance coverage at all from your Insurance carrier for anything in excess of the Self Insured Retention limits!
4. Contractors and Subs need to be careful that their Insurance covers their contract obligations! Otherwise they may agree to obligations not insured, be in breach of contract, and personally liable.
5. Public Entities need the correct written requirements in their contracts! Otherwise the Insurance of Contractors will not provide the expected coverage!
6. Attorneys—Nearly every loss of any substantial size will likely be contested and litigated by Insurance Companies trying to find a weakness in the contract requirements!
7. In my experience, **most** underlying contracts or **agreements are not models of clarity** as respects the extent of additional insured coverage required. Many agreements simply require a party to the contract to be an "additional insured" or simply "an insured." What, then, is the scope of coverage agreed upon? (Negligence or "Caused by" requirement, Active, Passive, Vicarious, etc.)
8. 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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ADDITIONAL

2013 SAMPLE

FORMS



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

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
MUST LIST ALL ENTITIES PRECISELY! IF NOT LISTED, THEY ARE NOT COVERED!	ALL LOCATIONS FOR XYZ ENTITY(IES)
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
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.

C. 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.

HIGHLIGHTS ADDED TO THE FORM

RED CAPS WORDING ADDED TO THE FORM

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

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
MUST LIST ALL ENTITIES PRECISELY! IF NOT LISTED, THEY ARE NOT COVERED!	ALL LOCATIONS FOR XYZ ENTITY(IES)

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.

HIGHLIGHTS ADDED TO THE FORM

RED CAPS WORDING ADDED TO THE FORM

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF INSURED CONTRACT DEFINITION

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;
- 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, **provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. However,** such part of a contract or agreement shall **only be considered an "insured contract" to the extent your assumption of the tort liability is permitted by law.** Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

07 04 Red Type above added

04 13 Yellow highlight above added

Paragraph f. does **not include** that part of any contract or agreement:

- (1) That indemnifies a **railroad** for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad **property** and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an **architect, engineer or surveyor** for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability **for** an injury or damage arising out of the insured's rendering or failure to render **professional services**, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

HIGHLIGHTS ADDED TO THE FORM



WHY DOES THIS FORM NOT SAY LIKE THE OTHER 04.13 FORMS THE INSURANCE "Will not be broader than that required by the contract" AND 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.



Transfer of Risk Using Contracts

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

- a. Public Entities & GCs have their own liability plus responsibility and liability for the actions of others they hire (Contractors and Subs)
- b. All parties need to have correct Insurance for both the liabilities they have, and the liabilities they assume in a Contract

2. Party best able to control the risk should be responsible—Who is that?

- a. Liability flows upstream
- b. Proper use of Contract Agreements can transfer financial risk back to the responsible party—Public Entity Transfers risk to the Contractor or his Subs doing the work and directly causing the risk
- c. The Contract specifies the requirements and responsibilities of each party and therefore the liabilities they assume

3. Two principal ways to transfer the cost to protect the Company

1. Insurance—Insure the Upstream Party by Additional Insured Endorsement(s) on the Contractor's policy. We just covered those.
2. Indemnity—Insured (paid for) by Contractor and by means of the definition of “insured contract” in Contractor's Insurance policy





4. **First** look at what contracts require, or should require—then examine the coverages that will pay for it.

5. **Indemnification and Risk Transfer**

- a. What it 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.

6. **Types of liability to be Transferred**

- a. Vicarious liability—liability as a function of law regardless of the actions of the Hiring Party
 - i. Negligence is not required to have vicarious liability
- b. Negligent Tort liability—Duty of Care; Prudent person standard; Breach resulting in harm = Negligence
 - i. Active liability—What you did caused the harm
 - ii. Passive liability—What you did not do, but could have, caused the harm; you could have prevented it; Failure to prevent a known danger may be considered “Active” negligence



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1. Passive examples: Failure to discover, supervise, inspect; prevent; an omission of a duty
 - iii. Strict Liability—no negligence required, only causation; Products, etc
- c. Contractual Liability—Liability of others assumed by Contract; Liability because the Contract says so!
 - i. Amount of indemnity transferred varies with each agreement
- d. Joint & Individual (Several) Liability and its effect = deep pockets
- e. Professional Liability—Different from General (tort) Liability in that it includes Financial Harm even if no Bodily Injury or Property Damage happens; a financial loss from an error or omission

7. Types of indemnity agreements:

- a. Type I Contractual Indemnity— Allows indemnification for the Public Entity's Liability for damages from any tort liability, including Active or Passive, whether or not caused by the contractor or within his scope of work.
 - i. Exceptions: 1—Sole or 2—Willful Liability, including fraud
- b. Type II—Indemnification for the Passive, but not Active Liability of the Public Entity regardless of who caused it, i.e. whether or not caused by the indemnifying contractor; Indemnifies passive liability caused by others





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- c. Type III—Indemnification only for Passive liabilities caused by the indemnifying contractor, but not Passive liability caused by others

- d. General Indemnity clause does not specifically address how much of the Public Entity's negligence is indemnified. At most, only Passive, not Active liability, is indemnified. May be tossed out of Court entirely!
 - i. Reference for Types 1-3 & General Indemnity clause: *McCrary Construction Co. v. Metal Deck Specialists, Inc.*, 133 Cal. App. 4th 1528 (2005)

8. Elements of Indemnification—

- a. Hold Harmless, Defend, Indemnify, & Waive subrogation.
 - i. Is Contractual waiver allowed by Insurance carrier for CGL policy, Auto, & Work Comp?

 - ii. Effect of waiver of subrogation—no right of recovery

- b. Contractual Duty to defend can stand separate from the duty to Indemnify
 - i. *Crawford v. Weather Shield Mfg., Inc.*(July 2008): Duty to defend arises immediately upon a proper tender of defense by the Owner regardless of actual negligence of the Contractor.

 - ii. Review and update Defense obligation in contracts!





- c. Length of obligation—During construction, or including after completion – Why later—Construction Defect
 - i. Currently, How long is allowed by law?
- d. Is Indemnity regardless of or limited by insurance coverage?

9. INSURANCE COVERAGE FOR INDEMNITY OBLIGATIONS

- a. Standard ISO CGL Policies contain coverage **for the Named Insured** for your liability assumed (Indemnified) in an “Insured contract.”
 - i. “That part of any other contract or agreement pertaining to your business under which you (*the Named Insured*) assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization.” (definition “f.” of “insured contract”)
 - ii. This wording covers the contractor’s indemnification of liability for you regardless of whether it is the contractor’s fault! (Type 1, 2, or 3)
- b. ISO CG 24 26 *Amendment of Insured Contract Definition* adds the phrase... “provided the “bodily injury” or “property damage” is caused, in whole or in part, by you or those acting on your behalf”. (See page prior to Page 9))
 - i. This wording covers contractor’s indemnification but **only** if the liability is “caused... by” the named insured Contractor! (Type 3 **only**)





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ii. What if this is the contractor's coverage, but your indemnity clause requires contractor to indemnify without limitation to only when it is contractor's negligence or fault (Type 1 or 2)?

1. Contractor is still liable under the contract, but has no coverage; if he cannot pay personally, may be in Breach of contract.

c. **BEWARE** of endorsements amending Contractual Liability or excluding or changing the "insured contract" definition that provides coverage **for the Named Insured** for Liability assumed (Indemnified) by Contract.

d. Do Insurance requirements prohibit "modification of the standard ISO Contractual liability definition of an "insured Contract"?"

i. CG 21 39 deletes the "f." portion of the definition clause above and results in no coverage for most Contracts (other than a. through e.)

1. Clue—If a CG 20 09 Additional Insured form is used, it indicates there is no contractual coverage

e. Effect on indemnification provisions—Contractor liable & no coverage

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

a. "Action over" employee liability suit against Public Entity

b. Employee lawsuit of Public Entity is indemnified by Employer's coverage provided under the same ISO CGL definition of an "insured contract"





11. What about high deductibles/SIRs? What's the difference?

- a. Danger of large SIRs (not deductibles)
 - i. Forecast Homes Inc. vs. Steadfast Insurance Company—Carrier not obligated to provide coverage to Additional Insureds where the Named insured failed to pay the SIR. The Additional insured could not satisfy the SIR on behalf of the Named insured in order to trigger coverage.
 - ii. Be very careful of granting such high limit SIRs which must be paid by the named Insured. Remember, a policy with a deductible (not SIR) requires that the Insurance Company perform their duties (defense and coverage) with out prior payment such as is the case with SIRs.
 - iii. With respect to a Contractor that has a very high SIR – Do your due diligence. Require financials, collateral, Letter of Credit, security, etc sufficient to pay the SIR. Require a Contract provision that the Contractor pay the SIR
 - iv. Have the Insurance Company amend the policy to provide that the Public Entity, not just the named Insured, can satisfy the SIR (in order to trigger coverage).

12. Pass through or Pass down provision

13. Completed Operations exposure for Construction Agreements

- a. **Require Insurance coverage continue for X years after project.**





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

- d. Purchase order used for small jobs? Example: Tank Maintenance—built scaffold and EE injured
- e. Worker's comp "action over" liability for Public Entity from Contractor's or Sub's Employees
- f. For those services for which you do NOT require a Contract, 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. This will "trigger" the "written Contract or Agreement" requirement for policy coverage.
- g. **For RFPs:** It is strongly recommended when distributing an RFP (proposal) or RFQ (qualification), include a document for "*Summary of Indemnity and Insurance Requirements*" which includes verification of coverage compliance by their Insurance broker with your requirements. Have them sign and return the form with their proposal.

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

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

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

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





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

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

SB474—effective 1-1-2013

- b. NO MORE Type 1 indemnity—For contracts executed on or after 1-1-2013, Indemnification for active liability will no longer be allowed in any construction related contract
 - i. Limitation also applies to defense for the Public Entity's active negligence—may now obtain only defense proportionate to the extent of damage caused by the subcontractor.
- c. Does NOT apply to non-construction related contracts
- d. To avoid overly broad indemnity provisions, use qualifying language

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





There are 2 primary ways to cover Contract obligations with Insurance

1) **Coverage as an Indemnified Party (Indemnitee)**—

- a) Covered by means of Contractual liability coverage
- b) Coverage is limited by definition of “Insured Contract” in Contractor’s Policy
 - i) Is definition amended to require named insured contractor’s fault
 - ii) Does definition otherwise exclude or reduce Contractual Coverage
- c) **Policy** exclusions or limitations will also prevent coverage!

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

- a) By means of Additional Insured Endorsement – not just Certificate of Insurance!
- b) Limited by which coverage form is used for Additional Insured
- c) When does coverage apply, i.e. during ongoing operations or after completion
- d) Does the form require the contractor’s fault to trigger coverage
- e) Does the policy itself have other exclusions or limitations that prevent coverage





- 3) **VERIFICATION**—THIS IS THE MOST IMPORTANT PART OF THE ENTIRE PROCESS! It should be **standard practice** (authorized in and required by your Contract) that you **require a Certificate of Insurance with the following attached**—
- i) **Waiver of subrogation endorsement for Workers' Compensation**
 - ii) **Additional Insured Endorsement for “ongoing operations”** (i.e., CG 20 10, CG 20 33, or CG 20 38. Do not use the CG 20 33 if Subs may be involved. Phase out usage of the CG 20 33 as the CG 20 38 becomes available.)
 - iii) **Additional Insured Endorsement for “completed operations”** for construction, repair, or maintenance operations (i.e., CG 20 37 if scope of work makes it applicable due to completed operations exposure.)
 - iv) **A copy of the declaration page or endorsement page listing all policy endorsements for the GL policy.** (This will help **identify “Restricted Coverage”** policies and endorsements to easily verify if limitations or exclusions have been added to the policy.)

IF YOU DO NOT KNOW WHAT AN ENDORSEMENT OR POLICY PROVIDES OR CONTAINS—GET HELP! THE BEST CONTRACT REQUIREMENTS ARE USELESS UNLESS VERIFIED FOR COVERAGE COMPLIANCE!

Online sample of service for actual verification of Contract Coverage Compliance© (not just tracking for Certificates of Insurance) is at www.CoverageCompliance.com
Use Logon RiskManager@CertifiedRiskManagers.com with password “compliance” to see how it works. Disclaimer: I am building out this service and have a financial interest in it. I welcome your input as to what you would like to see included for your needs.

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





ISO COVERAGES for Parties Other than the Named Insured

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

Ongoing Operations (During Construction)	Completed Operations (After Construction)	REGARDLESS if “caused by” Named Insured Type 1, 2 or 3	REQUIRES “caused by” Named Insured to cover <u>only</u> Type 3 indemnity
Standard ISO “Insured Contract” definition in CG 00 01	Standard ISO “Insured Contract” definition in CG 00 01	Standard ISO “Insured Contract” definition in CG 00 01	CG 24 26 07 04 & 04.13+ AMENDMENT OF INSURED CONTRACT DEFINITION
CG 21 39 deletes “f.” NO COVERAGE	CG 21 39 deletes “f.” NO COVERAGE	CG 21 39 deletes “f.” NO COVERAGE	CG 21 39 deletes “f.” NO COVERAGE

BEWARE of endorsements amending, excluding, or changing the Contractual Liability or the “insured contract” definition that provides the Contractual Liability coverage for Indemnification of others (upstream parties) assumed by Contract by the Named Insured.

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

Ongoing Operations (During Construction)	Completed Operations (After Construction)	REGARDLESS if “caused by” Named Insured	REQUIRES “caused by” Named Insured to trigger coverage. <u>ALL</u> 07.04 & 04.13
CG 2010—All editions	CG 2010 11.85 Edition only	YES—all except 07.04 & 04.13*+	CG 2010 07.04 & 04.13*+
CG 2033 All editions & 2038 04.13*+	CG 2033 & 2038 04.13*+ = NO Coverage	YES—all except 07.04 & 04.13*+	CG 2033 07.04 & CG 2038 04.13*+
CG 2037 = NO Coverage	CG2037 ALL editions	YES 10.01; NO 07.04 & 04.13*+	CG 2037 07.04 & 04.13*+

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

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

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

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

No clear Contract requirement = NO COVERAGE!





APPLICATION OF KNOWLEDGE LEARNED

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





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



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

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

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 Manager's program teaching advanced Risk Management courses leading to qualification for the CRM professional designation. He also served as a consultant in developing the CRM program on the Curricula Advisory Committee.

He authored Graduate courses and teaches workshops in Indemnification & Additional Insureds, Contractual Liability & Insurance Coverage, Construction Defect issues, Wrap-Up Policies, and Ethics.

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

Mr. Marshburn is a nationally recognized expert in the field of Contractual risk transfer, including indemnity and insurance requirements for risk management. He specializes in the challenges posed in Construction Risk, including Construction Contracts, Contractual Liability Analysis & Design, Insurance Policy Coverages and Endorsements, Wrap Policies (OCIPs, CCIPs, etc), Construction Defect Liability, and Coverage Disputes.

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