

Contractual Risk Transfer & Insurance

The Basics For Public Agencies

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Learning Objectives

- **Understand process of transferring risk**
- **Identify risks peculiar to your services and activities**
- **Use the right insurance specification**
- **Verify compliance**

Risk Transfer – What Is It?

- **Shifting responsibility for loss or damage arising from the activities of a contract from one party to the other**
- **Hold harmless or indemnification clause**
- **Does NOT absolve you of liability**
- **Gives you a pocket from which to pay**
- **Only as good as the person making the promise – *that's* why you require insurance**

Risk Transfer – When To Do It?

- **Construction projects**
- **Professional services**
- **Outsourced functions**
- **Property leases**
- **Special events**
- **Permits**
- **Recreational activities**

Risk Transfer – Why Do It?

- **Can be liable for damages – have risk**
- **Rely on the expert**
- **Place risks with those able to control**
- **Encourage safety**
- **Source for payment of claims**
- **Maintain project budget**
- **Maintain good loss history, lower premium**

Risk Transfer – How To Do It

- **ID & measure risk**
- **Use Hold Harmless**
- **Use proper insurance specs**
- **Require evidence of compliance**
- **Check for compliance**
- **Follow up until correct**
- **Keep good records**
- **Report claims promptly**

Identify & Measure Risk

- **Type of activity(ies)**
- **Who or what could be harmed? How bad?**
- **Crowds likely to be involved? Alcohol?**
- **Vehicles used, if any. Passengers?**
- **Professional liability exposure?**
- **Hazardous activities?**
- **Risk sufficient to reject bids not meeting specs exactly?**

Use Hold Harmless Transfer Responsibility for Payment

- **Defend and indemnify**
- **Any and all claims, suits, proceedings**
- **Costs paid as incurred**
- **Full extent as permitted by law**
- **Exception if transferor solely at fault or damages caused by his/her willful acts**
- **Apply to any subcontractors**
- **Do not mix with insurance requirements**

Hold Harmless Sample Language*

Hold harmless: contractor shall hold harmless, defend at its own expense, and indemnify Agency against any and all liability, claims, losses, damages or expenses, including reasonable attorney's fees, arising from all acts or omissions to act 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 Agency's sole negligence or willful acts.

*Use ONLY language approved by your attorney

Types of Hold Harmless Agreements

- Broad Form
 - Covers all acts or omissions with no exceptions.
Unenforceable in most states, including CA.
- Limited Form
 - Covers only negligent activities of contractor.
 - May also limit to property damage or bodily injury
- Intermediate Form (Type I)
 - Covers all acts or omissions except for your sole negligence or willful acts

Hold Harmless “Magic Words”

Hold harmless: contractor shall **hold harmless, defend** at its own expense, **and indemnify** Agency against **any and all** liability, **claims, losses, damages or expenses, including** *reasonable* attorney’s fees, **arising from all acts or omissions to act 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 **Agency’s sole negligence or willful acts.**

Hold Harmless for Public Entities

- Note:
 - The HH in any **construction contract** must also have an exception for your active negligence – e.g.
... excluding, however, such liability, claims, losses, damages or expenses arising from Agency's sole or **active negligence** or willful acts.
 - *Reference Civil Code 2782 (b)*

See Insurance Requirements in Contracts Manual, Appendix C

The Latest HH Restriction for Public Entities

- For Contracts with Design Professionals (DP)
 - as of January 1, 2007
- Limits the language for indemnity clauses
 - *“design professional services contracts that purport to indemnify, including the cost to defend, the public agency by a design professional against liability for claims against the public agency are unenforceable, **except claims that arise out of , pertain to, or relate to the negligence, recklessness or willful misconduct of the design professional.**”*
 - Civil Code 2782.8

DP Hold Harmless Restriction for Public Entities

- “Local Agency” is defined to include cities, counties, school districts, other districts, JPAs, etc (does NOT include the State of California)
- “Design Professional” is not defined, but is held to include licensed architects, professional engineers and professional land surveyors (Construction mgmt.? Inspectors?)
- Overlap between 2782 construction & 2782.8 design contract limitations
- **Does NOT address design-build contracts**
 - **Use separate HH for design & construction**

Impact of New Law

- Prevents Type I HH clauses
- Now restricted to Limited Form HH
 - Can't use “all acts or omissions to act”
 - Must use “negligence, recklessness or willful misconduct”
- Does NOT prevent DP from having to defend or indemnify you for their errors
- Does NOT prevent you from collecting % of damages that are your fault from the DP, as long as you are not actively negligent

Suggested Revision to HH for DPs

- “...all claims ... ***that arise out of, pertain to, or relate to, directly or indirectly, in whole or in part, the negligence, recklessness, or willful misconduct of Consultant, any Sub consultant, anyone directly or indirectly employed by them, or anyone that they control, except ...***“

Recommendation

- Update bid documents & Hold Harmless with help from legal counsel
- Draft contract language that closely tracks the statutory language
- Specify that plans meet all codes, conform to all other plans, etc.
- Be specific regarding the work to be performed and the standard to be used.
- Make it clear you are relying solely on their expertise for the design and for compliance with applicable codes.

And Remember the Question ...

- At what point will you be so exposed that the proposed indemnity clause is too risky?
- To answer: Focus on the **RISK**, *before* the indemnification, *before* the insurance.
- Start from the best case for you and work your way backward.
- Involve others - staff, experts and/or legal counsel in review of risk and language.
- Final result is a combination of perceived risk, your options, and how much you want to press your bargaining power –you've got the money

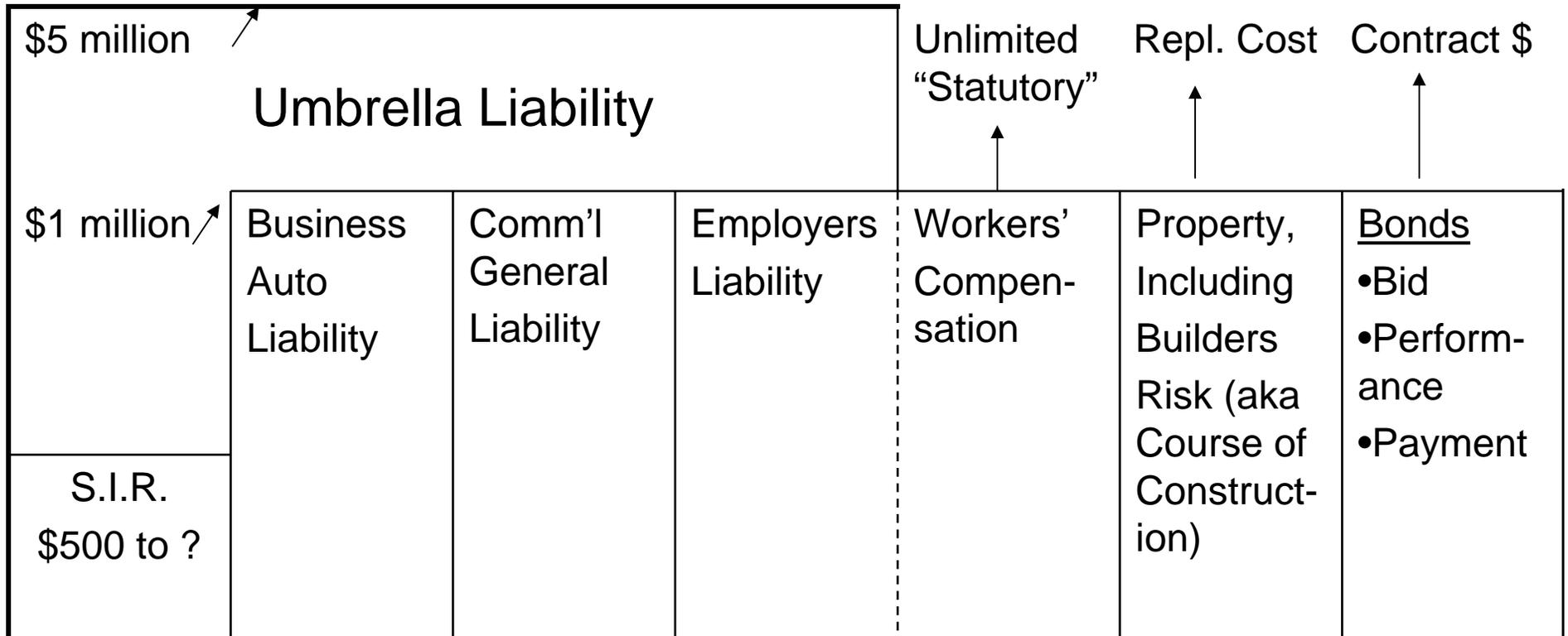
Why Require Insurance?

- HH Agreement gives you a pocket to pick
- Insurance increases chance there will be money in the pocket
- Viability of contractor
- Want protection of the insurance policy
 - **Policy amended to provide extra protection**
 - **Additional insured status**
 - **Contractor's insurance primary**
 - **Waiver of Subrogation**

Types of Insurance

- Commercial general liability
- Auto liability
- Excess or umbrella liability
- Professional Liability
- Workers' compensation and employer's liability
- Surety bond – for performance/payment

Typical Contractor Insurance Program



Commercial General Liability

- Includes the following types of coverage:
 - Bodily injury
 - Property damage
 - Personal injury (libel, slander, defamation)
 - Advertising injury (trademark)
 - Products & completed operations – must have for any product liability or construction defect exposures.
 - May not have for some service exposures, such as a teacher for a recreation class.

Excess or Umbrella Liability

- This type of policy “lies above” primary liability policies to provide higher limits
- It provides coverage in excess of reduced or exhausted underlying limits
- Umbrella will provide some coverage not found in the CGL, AL, or EL. Excess coverage will not.
- Typical example = \$4MM xs \$1MM, provides total of \$5MM

Professional Liability

- “Errors & Omissions” (E&O) insurance
- Architects, engineers, attorneys, medical, insurance, finance, public officials
- “Claims made” vs. “Occurrence” trigger
 - Policy in force on date **claim is made** (vs. date of occurrence causing damage) pays for loss
 - Consider requiring insurance for 2-5 years after completion for large projects

Workers' Compensation & EL

- Coverage A:
 - Statutory benefits – no limit
 - Critical that all subcontractors have
 - N/A to sole proprietor
- Coverage B:
 - \$ 1,000,000 limit common
 - Covers “dual capacity” and other exceptions to exclusive remedy of workers’ compensation
 - This is NOT Employment Practices Liability

Use Proper Insurance Specs

- See samples and reference manual
 - Contractor, Consultant, Construction
 - Instructor, Special Events
- Contractor or consultant most often used
- Start with consultant to rule out E&O
- Construction risks
 - “Builders risk” or course of construction normally provided by contractor, but PLAN can provide
 - O&CP Insurance – limited cover for Agency or prime contractor only. Use only if aggregate limit or additional insured status a problem

What to Ask For

- Certificate of Insurance (“proof” of ins.)
- Endorsement(s) or in the policy language:
 - **Additional insured status**
 - **Contractor insurance is primary**
 - **Waiver of subrogation** – Work Comp, too
- Deductible or SIR declared/approved
- A.M. Best rating – A:VII or better, *or otherwise acceptable*

Require Evidence of Compliance

- Notify of requirements early, at bid stage
- Obtain before work begins, but no waiver if not received
- Certificate of insurance
- Additional insured endorsement
- Agency-supplied endorsement

Insurance Certificate Sample

- See handouts with sample with notes
- For information ONLY – does not amend, extend or alter the policy coverage
 - See Sections 2 & 5 of the certificate
- Adding the Agency as additional insured in Section 9 does not endorse the policy!
- Crossing out “endeavor to” in the cancellation provisions, located in Section 11, will not amend the policy

**APPENDIX B:
COMMON INSURANCE INDUSTRY FORMS**

Reproduction of ACORD, Inc. Form

ACORD™ CERTIFICATE OF LIABILITY INSURANCE DATE (MM/DD/YYYY)

PRODUCER **1** *This block identifies the Agent or Broker.*

INSURED **4** *The insured is your entity's contractor or lessee.*

2 *This notice confirms the provisions of the California Insurance Code, §384. Other states have similar provisions. It states that the policy, not the certificate governs coverage.*

INSURERS AFFORDING COVERAGE **3** NAIC #

INSURER A: _____
INSURER B: _____
INSURER C: _____
INSURER E: _____

3 *The insurer will be identified here. The insurer letter appears again near the left margin at "3" to show which insurer provides which coverage.*

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSURER	TYPE OF INSURANCE	POLICY NO.	POLICY EFFECTIVE DATE	POLICY EXPIRATION DATE	LIMITS
*3	GENERAL LIABILITY COMMERCIAL GENERAL LIABILITY CLAIMS MADE <input type="checkbox"/> OCCUR <input type="checkbox"/>	5	6	7	PER OCCURRENCE \$
	GEN'L AGGREGATE LIMIT APPLIES PER POLICY <input type="checkbox"/> PRO. <input type="checkbox"/> LOC. <input type="checkbox"/>				PERSONAL & ADV. INJURY \$
3	AUTOMOBILE LIABILITY ANY AUTO ALL OWNED AUTOS SCHEDULED AUTOS HIRED AUTOS NON-OWNED AUTOS	5	6	7	GENERAL AGGREGATE \$
	GARAGE LIABILITY ANY AUTO				PRODUCTS-COMPO/PROP AGG \$
3	EXCESS UMBRELLA LIABILITY OCCUR <input type="checkbox"/> CLAIMS MADE <input type="checkbox"/>	5	6	7	COMBINED SINGLE LIMIT (CSL) \$
	DEDUCTIBLE \$ RETENTION \$				LISURY (P) \$
3	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below OTHER	5	6	7	EJURY (P) \$
					EJURY (M) \$
3		5	6	7	TY-DAMAGE (M) \$
					LY-EA ACCIDENT \$
3		5	6	7	MAN \$2' EA ACC \$
					CURRENT \$
3		5	6	7	AGGREGATE \$
					AGGREGATE \$

6 *These sections show the type of coverage provided through the agent or broker identified in "1" above. If the insured uses more than one broker, this certificate will not identify all existing.*

7 *These two columns show inception and expiration dates for policies identified. Pay special attention that coverage does not expire before or during your project or lease.*

8 *This column identifies limits per occurrence and aggregate for each type of coverage afforded. Pay special attention to low aggregate limits for public works-type contractors. Losses on other jobs may reduce your coverage.*

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS

9 *This section will usually be used to restrict coverage to a specific job or lease. Watch for restrictions that would omit the coverage required by your specifications.*

11 *Cancellation provisions as written guarantees nothing. Some brokers will cross out the words "endeavor to" but this still does not amend the policy.*

CERTIFICATE HOLDER **10** *Certificate holder is your entity.*

CANCELLATION **12** *The authorized representative of the insurer should be an employee, unless the agent or broker is specifically authorized to sign on behalf of the company.*

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL _____ DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE _____

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Insurance Certificate Sample

- The certificate holder should always be the Agency or entity contracting for services. Do not limit the coverage to a department or subsidiary.
- The certificate should be signed

Certificate of Insurance Verification

- Named insured correctly identified.
- Dates should cover the entire period.
- Check in the policy limits, including aggregate
- Make sure there is a policy number. “TBD,” to be determined, is not sufficient.
- Check A.M. Best rating on Internet or reference guide) or request from broker.
- Also check Standard & Poors.

Additional Insured Endorsement

- “This endorsement modifies insurance provided under the following”:
- Insurer endorsement – may or may not be on ISO form – equivalent wording OK.
- Agency endorsement – often will sign endorsement provided in material. Or you can use as a checklist vs. what you receive.

Additional Insured Endorsement

- Must have endorsement or “blanket” policy language to cover you as an insured
- The most preferred insurer endorsement is Insurance Services Office (ISO) Form No. CG 20 10 11 85, covering damages arising from “your work”.
11 85 = revision date = Nov. 1985.
- Covers both “products and completed operations” as well as “ongoing operations”, with potential to cover your sole negligence as well.
- Newer forms may have to be accepted – rev. dates 10 01 or latest = 07 04.

Additional Insured Endorsement

- Newer endorsements forms that are acceptable, if CG 20 10 11 85 not available:
 - CG 2010 10 01 = “ongoing operations”
 - CG 2037 10 01 = “your work” – “products – completed operations hazard”
- Must have both to get the same coverage as the 11 85 form
- The 07 04 versions of the forms above attempt to eliminate coverage for your sole negligence

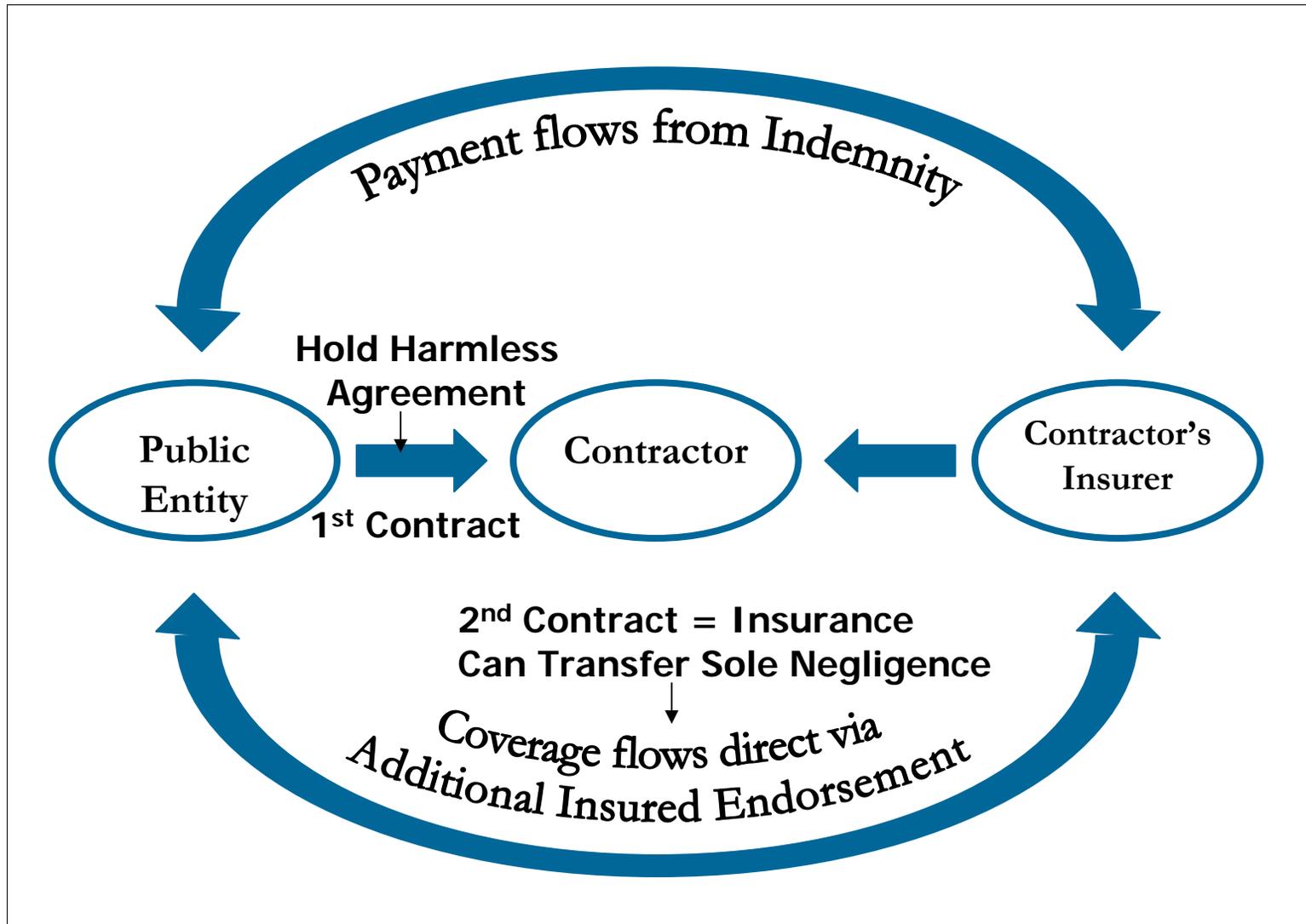
Additional Insured Endorsement

- **Direct rights to recovery under the policy**
 - General liability – most important
 - Auto liability – useful but not critical since most policies have “omnibus” wording
 - E&O – not appropriate but need written indemnity agreement
 - Workers’ Compensation – important only if contracted employees are under your direction or control (that’s rare)
 - Request Waiver of Subrogation

Hold Harmless vs. Additional Insured

- Hold Harmless = “insured contract”
 - Only agreement is with contractor
 - MUST go *through contractor* for ins. payment
 - More potential for dispute
- Additional Insured
 - Also have agreement with insurer
 - Can obtain reimbursement directly from ins.
 - Coverage is greater – duty to defend and, *until 07 04 revisions*, not limited to vicarious liability of Agency

Hold Harmless v. Additional Insured



Blanket Additional Insured “Magic Words”

- Must be required in written contract
 - Limits = policy or spec minimum
 - Products/completed ops
 - Contractual Liability
 - Primary coverage
 - Waiver of Subrogation
- Notice requirements
- “Caused in whole or in part by ...
v. “arising out of”

Check For Compliance

- Confirm name of insured
- Date(s) of coverage
- GL on occurrence basis
- Auto liability covers “any auto”
- Description of operations, locations correct
- Additional insured endorsement *equivalent* to CG 20 10 11 85 for general liability

Follow Up Until Correct

- If not supplied or wrong form, keep trying
- If do not have required coverage or endorsement, consider risk and options
- Special events or vendors/contractors insurance available
- If project lasts beyond policy expiration set reminder for 30 days prior and request if not yet received

Process of Issuing Documents

- Contract is awarded – Agency requests documents
- Contractor requests insurance documents from broker or agent
- Agent can issue and sign all documents
- Broker can issue certificate but may not have OK to endorse policy
- Underwriter reviews/approves/rejects
- Documents delivered to Agency/contractor

Keep Good Records - Indefinitely

- Original bid specs
- Original contract, addenda, support documentation
- Certificate(s) of insurance
- Additional insured endorsement
- Any other endorsements
- Copy of contractor's policy, if provided
- All correspondence concerning insurance or claims pertaining to the contract

Report Claims Promptly

- Never assume contractor will report
- Advise contractor of need to report to insurer and follow up for confirmation
- Can report to broker or insurer directly, especially if severe damage and/or Agency is an additional insured
- Report to own insurer if needed, particularly if contractor or insurer is unresponsive – they will process tender of claim and protect Agency
- Forward contract, certificates and endorsements

Process of Tendering Claim

- Claim occurs – notify insurer(s)
- Claim files vs. Agency
- Agency tenders to contractor via indemnity or hold harmless agreement
- Contractor refers to insurer
- Insurer accepts or rejects tender
- If have additional insured endorsement, Agency can tender directly to insurer

Questions?

Thank You!

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www.abag.ca.gov/plan

http://www.driveralliant.com/Files/IRIC%20v5.0a_3_2006.pdf