



October 2021 GUIDELINES TO MANAGING CONTRACTUAL RISK

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Risk Management
MANAGEMENT AND BUDGET

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ESTABLISHING CONTRACTUAL RISK MANAGEMENT GUIDELINES

The State and its agencies enter into numerous contracts for goods and services. These include contracts for construction, professional services, nonprofessional services, delivered supplies, and leases. These contractual relationships ordinarily have some degree of risk associated with them - there can be potential harm to state property, employees, and members of the public.

Recognizing the risks associated with a contemplated contractual relationship and addressing them in the contract itself is the purpose behind these guidelines. This information is intended to assist State employees who procure goods, services, and leases on behalf of the state of North Dakota. These guidelines have been drafted in coordination with the State Procurement Office and Office of Attorney General to comply with the written directives of the Office of Management and Budget (OMB) related to procurement, [N.D.C.C. ch. 54-44.4](#), and [N.D.A.C. Article 4-12](#) as well as [N.D.C.C. § 32-12.2-17](#).

This document should be reviewed in conjunction with a thorough risk assessment – ***prior to preparing a bid or proposal***. Keep in mind that the dollar amount of the contract is not a good index to measure the level of risk. Instead, the overall potential for damage to property or personal injury should be analyzed, not just the loss of the contract expenditure itself. One important consideration in addressing risk is the potential for third party claims to be brought against the State for activities arising under the contractual relationship.

Ordinarily a person is not responsible for the negligent acts of an independent contractor or a vendor (goods or services). This principle is reinforced in the [State Tort Claims Act](#), which specifically excludes independent contractors from the definition of a “State employee”. However, the general rule that a person is not responsible for the negligent acts of an independent contractor has numerous exceptions and it is unclear to what extent such exceptions can be applied to the State. In addition, the State remains liable for any condition or use of property under circumstances in which a private party would be liable. As a result, work performed on the State’s behalf by a contractor could still result in a claim being brought against the State. The uncertainty for when a claim may be brought, coupled with a growing litigious society, has made it necessary to ensure that the State’s potential risk for third party claims arising from its contractual relationships is dealt with effectively. The Risk Management Fund is only funded to address exposures associated with State activities through its employees, not activities of contractors and vendors providing goods or services.

The following is a tool to assist with drafting indemnification and insurance clauses in State contracts. These guidelines represent the best practices to protect the State’s interests without unduly burdening contractors. For services contracts, indemnification requirements must be limited to the State’s potential vicarious liability, unless a more stringent level of indemnification is deemed appropriate and approved by OMB. Even more stringent indemnification should focus on derivative claims, where the contractor remains the primary or actively negligent/responsible party and should be primarily concerned with reinforcing agency policy decisions on what duties, activities, and responsibilities are delegated to a contractor. Insurance requirements should address the contractor’s ability to meet any indemnification obligations, as well as potential direct losses to the State.

Agencies should always consult with the agency's assigned Assistant Attorney General and/or the Risk Management Division when addressing indemnification and insurance requirements in State contracts.

Evaluate Contractual Relationship Both Factually and Legally

Every contract has risks that must be reviewed from the perspective of protecting the State's assets and interests. Remember, the dollar amount of the contract is not necessarily a good index of the level of risk associated with the contract. The following will help you manage those risks when you contract on behalf of the State. An inherent part of contract management is to:

1. Evaluate the risks involved;
2. Decide whether to avoid, transfer, or accept the risks; and
3. Implement appropriate risk transfer and/or risk financing mechanisms deemed necessary.

Read the contract thoroughly and anticipate events or situations that could happen within the scope of work outlined. Ask yourself:

1. Who are all the parties involved?
2. What kind of work is being done?
3. What type of accidents or losses could occur?
4. What is the worst-case scenario in terms of financial loss and/or injury to persons or property?
5. Are the responsibilities for the risks appropriately placed with those in the best position to control them?
6. What is each party's ability to manage the risks and absorb the losses?
7. Is the contract legal and enforceable?

Within the contract, risk transfer is accomplished through a combination of indemnification, hold harmless, and waiver of subrogation clauses. Insurance is commonly required as a means of providing the financial support to back the indemnitor's obligation to hold the indemnitee harmless. ***Remember, the purpose of risk transfer is not to make a contractor or vendor assume the State's liability for its own actions, but rather to reinforce the responsibilities the contractor has over risks it controls or has been delegated pursuant to the contract.***

The State's goal is to establish contract guidelines for insurance coverage that can be consistently applied with few exceptions. To ensure the continued success of the State's contract review program, once insurance requirements have been set, they must be communicated in all solicitations for bids or proposals **prior** to awarding the contract. The program will not be successful if the insurance is negotiated *after* the contractor has been selected. Also, a change in bidding requirements, such as changing the insurance requirements, could result in a protest of the award by the unsuccessful bidders.

This section provides several methods of dealing with contractual risk. The Risk Management Fund recommends these procedures be followed by any person involved in procurement and drafting contracts for the State. The discussion will include **1)** screening contractors; **2)** safety requirements for bid specifications and contracts; **3)** contractual risk transfer through indemnification/hold harmless clauses; and **4)** insurance requirements.

PLEASE NOTE: Use of the following recommended clauses and forms does not ensure that all contracts and agreements will be adequately drafted to protect the State's interests. **Each entity's legal counsel should review all contracts and agreements before they are executed.**

Screening Contractors

There simply is no substitute for dealing with a safety-conscious contractor who prevents or minimizes damages and injuries through safe work practices. Keep in mind that for every dollar of loss prevented, there is perhaps an additional dollar of frictional and "soft" costs saved (legal fees, claims handling costs, lost employee productivity, and so on).

Screen your contractors carefully before entering into any contract. Screening is probably the simplest and yet most effective method of controlling contractual risk. Suggested steps include:

- Deal only with reputable firms.

There are several ways to check the reputation of contractors. For example, a clause could be inserted into the bid solicitation mandating contractors explain their safety program and safety problems or violations over the past five years. The agency could also talk with agency employees or review records from other projects performed by that contractor for the agency.

- Check references.

The bid solicitation should require the contractor to disclose the name, address and telephone number of at least 3 people who have hired the contractor to do a similar job in the past five years. The bid solicitation should also provide that the State may contact each reference for additional information.

- Check records of safety violations through OSHA and the Secretary of State's records.

The OSHA office in each state maintains records regarding safety violations by various contractors including construction contractors. For example, under 40 U.S.C. Section 333, the Secretary of Labor, who oversees OSHA, is required to investigate and hold hearings regarding safety violations by construction contractors. The Secretary of Labor ultimately may send a list of contractors who have engaged in safety violations to the Comptroller General and that list is circulated among federal agencies.

State agencies can obtain information on safety violations by a contractor who has done business in North Dakota by contacting [OSHA in North Dakota](#), 521 East Main Avenue, Suite 200, Bismarck ND 58501; telephone (701) 250-4521.

In addition, pursuant to [N.D.C.C. ch. 43-07](#), the North Dakota [Secretary of State](#) regulates contractors and maintains public records regarding their activities. The records include information on the contractor's experience and qualifications, liability insurance, workers' compensation coverage, unemployment coverage, and other information regarding the applicant's fitness to act in the capacity of a contractor. The records may also show the level of activity the contractor is authorized to engage in, the type of work the contractor engaged in over the past year, whether the contractor abandoned a contract without legal excuse, diverted funds, engaged in fraudulent acts, or made a false statement. Information concerning construction related contractors can be obtained from the Secretary of State's office at (701) 328-3665.

- Monitor compliance with contract terms.

Care should be exercised by the State to determine if contractor's activities are consistent with each part of the contract. The State should not monitor contracts by retaining control over the means, method and manner of producing the result because that blurs the line between whether the contractor is actually an independent contractor, for which the State ordinarily would have no liability, or an employee, for which the State may have much greater liability.

Safety Requirements for Bid Specifications and Contracts

A key step in a major construction project is preparing the bid specifications, outlining the scope, and requirements of the project. Safety requirements should be a vital part of the bid specifications. For example, we recommend the following language be incorporated into all construction contracts:

Safety Requirements: The Contractor shall keep informed of and comply with all federal, state, and local laws, regulations, and other legal requirements governing the safety, health, sanitation, and performance of the contract in general. In addition, the Contractor shall provide, inspect and maintain all safeguards, safety devices, protective equipment, safety programs and other needed actions the Contractor determines necessary to reasonably protect the life, health and property of the Contractor, subcontractors, the State, the public and each of the employees, officers, assigns and agents of the Contractor, subcontractors and the State, in connection with the performance of work resulting from or arising out of the contract.

The Contractor shall submit to the State a copy of the written safety program to be used as guidelines and direction for the Contractor's and subcontractors' activities. This program must meet all federal, state and local laws, regulations and other legal requirements and include the following minimum provisions: (1) a worksite safety policy and mission statement; (2) assigned responsibilities among management, supervisors and employees; (3) a system for periodic self-inspections, including inspections of job sites, materials, work performance and equipment; (4) a thorough accident and injury reporting and investigation process; (5) a safety orientation program including first aid, medical attention, emergency facilities, fire protection and prevention, housekeeping, illumination, sanitation, personal protective equipment, and occupational noise exposure; and (6) a safety training program including safety "tool box" meetings and other systems for ongoing training and also including training for employees on the recognition, avoidance and prevention of unsafe conditions.

It will be a condition of the contract and shall be made a condition of each subcontract entered into pursuant to that contract, that the State is assuming no liability relating to its receipt and review of the Contractor's safety plan or activities. Safety remains the responsibility of the Contractor. Furthermore, the right of the State to receive and review the safety plan or activities shall not give rise to a duty on the part of the State to exercise this right for the benefit of the Contractor or any other person or entity.

Spoliation (Notice of Potential Claims) Clause

The Risk Management Division recommends a clause entitled Spoliation (Notice of Potential Claims) be added to State lease agreements and service contracts. Spoliation is defined as **the destruction or severe modification of evidence**.

Court decisions have held that the action of merely cleaning the scene of an accident before the accident can be adequately investigated and the loss and cause of loss documented can be a breach of a legal duty giving rise to potential liability.

While the State has a concern to preserve evidence, consideration must also be given to the need to appropriately secure or clear the site to mitigate any immediate safety threat.

To ensure the State is afforded an opportunity to adequately investigate and document losses that pertain to contracts to which the State is a party, it is recommended the following clause be included in an agreement. This clause has been incorporated in the [Attorney General Office's Contract Drafting & Review Manual](#) and contract template.

- Contractor (or Landlord) agrees to promptly notify State of all potential Claims which arise from or result from this agreement. Contractor (or Landlord) further agrees to take all reasonable steps to preserve all physical evidence and information which may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and to grant to the State the opportunity to review and inspect such evidence, including the scene of the accident.

Contractual Risk Transfer Through Indemnification/Hold Harmless Clauses

Contractual risk is generally transferred with an indemnification/hold harmless clause. The purpose of the clause is to define who pays when a third party makes a claim for damages arising out of the work performed under the contract. The party that exercises the most control over the activities governed by the contract is in the best position to enforce safety and loss control practices and should, therefore, generally be responsible for injuries or damages arising from those activities.

Future agency contributions to the Risk Management Fund are based on actual losses incurred as well as costs incurred to defend any losses. This, of course, includes losses and costs related to claims arising from services provided by contractual agreements. By not implementing an in-depth analysis of all agency agreements and incorporating the appropriate indemnification language into the agreement, the agency may adversely impact its required contributions.

Any person contracting on behalf of the State must know that the Risk Management Fund cannot, by law, defend or pay settlements or judgments on behalf of any parties other than the State, a State

entity, or a State employee. Therefore, **agencies must remember that if the agency were to sign a contract agreeing to indemnify a private third party, the Risk Management Fund would not be able to defend or pay any settlement or judgment on behalf of that third party.** Any such cost would be the sole expense of the contracting agency raising issues of whether or not the agency has appropriation authority to pay such costs and if by signing such an agreement the employee would be determined to not be acting within the scope of his or her employment. See also the discussion concerning limiting the liability of vendors within these Guidelines.

Indemnification/hold harmless clauses assist agencies in addressing potential exposures and should be used in conjunction with insurance clauses. There are three basic forms of indemnification/hold harmless provisions that can be used in State contracts:

1. **No Indemnification of Liability** provision: Each party agrees to assume the liability and expenses (e.g., defense and investigation costs) for their own acts. This is essentially the same as the liability that would exist under common law, but it is specified in the agreement. Ordinarily, there is no need to have this type of clause in most contracts. A modified comparative fault indemnification clause, however, may be considered if the contract will be performed in a jurisdiction that retains joint and several liability.
2. **Limited Vicarious Liability** provision: *Pursuant to N.D.C.C. § 32-12.2-17, this indemnification provision is to be the default form for State service contracts requiring indemnification.* While this provision results in having each party assume its own direct liability, it provides additional protection for the State in that the Contractor agrees to be responsible for any liability alleged against the State resulting from the Contractor's sole actions and provides defense for the State to resolve those allegations.

Remember, **an agreement between the State and a Political Subdivision** may not contain a provision that requires one party to assume the liability of the other or the liability of a third party or to bear the costs of defense of actions against the other or against a third party. However, contractors for political subdivisions can be required to indemnify the State. (See, N.D.C.C. § 32-12.2-13 and N.D.C.C. § 32-12.2-17)

3. **Intermediate** provision: Requires Contractor to be responsible for its own liability and the joint liability of the Contractor and the State. This provision will be allowed only after the OMB Director's designee has determined the contract presents a high-risk scenario that requires an indemnification provision more stringent than the [*Limited Vicarious Liability form*](#). (See N.D.C.C. § 32-12.2-17). Except in rare circumstances, agencies should not focus on seeking to have a contractor indemnify an agency for its own active acts of negligence. Rather, the focus should remain on potential derivative claims where the contractor is the primary/actively negligent party. The indemnification clause reinforces the executive decisions made on what activities and responsibilities are delegated to the contractor.

Insurance Requirements for Contractors

Insurance requirements are designed to ensure that contractors can meet their financial obligations in the event their activities cause property damage, personal injury, or other non-contractual losses. While insurance can be complicated, the guide for recommended insurance requirements is simply

to ask what could go wrong under the contract and then making sure that the contractor can financially meet its obligations to address those losses. In most circumstances, a contractor should be required to maintain reasonable insurance coverage and provide written proof of this protection.

▪ **Commercial General Liability Insurance**

Virtually all businesses maintain some form of Commercial General Liability insurance. This insurance is designed to cover claims involving bodily injury and property damage arising out of the insured contractor's premises, operations, products and completed operations, as well as certain personal and advertising injury claims. Standard Commercial General Liability policies also have contractual liability provisions which are designed to cover a contractor's indemnity obligations as well as mechanisms to make those that engage the services of the contractor an additional insured for claims that arise out of the contractor's work under the contract.

When the activities contemplated under a contract pose some realistic risk of personal injury or property damage, the contractor should generally be required to maintain Commercial General Liability insurance at levels sufficient to meet the identified potential losses. When the risk of loss to the State involves being held responsible for the actions of the contractor, the contractor should be required to maintain levels of insurance that meet or exceed the State's statutory limits of liability.¹ For projects with considerable loss exposure, higher aggregate limits or project specific limits should be considered to mitigate the potential of policy limits being eroded from claims arising from other activities of the contractor. Activities of a contractor that take place in another state can also give rise to greater risk of loss that may necessitate significantly higher limits of insurance.

▪ **Automobile Liability Insurance**

As with an individual's personal automobile insurance, a commercial Automobile Liability Insurance policy is designed to cover claims arising from the operation of motor vehicles.

Generally, the need to specify minimum levels of auto liability insurance only arises when the contractual relationship contemplates driving on behalf of the State in furtherance of the contractor's obligations and responsibilities under the contract.

Incidental driving that is not directly in furtherance of contractual obligations and responsibilities, such as an ordinary commute from a business location to an agency location to begin work,

¹ Pursuant to 2021 House Bill 1057, the statutory caps on State liability (N.D.C.C. § 32-12.2-02) will increase each year starting July 1, 2022 through July 1, 2026.

- 7/1/22: \$375,000 per person, \$1 million per occurrence
- 7/1/23: \$406,250 per person and \$1,625,000 per occurrence
- 7/1/24: \$437,500 per person and \$1,750,000 per occurrence
- 7/1/25: \$468,750 per person and \$1,875,000 per occurrence
- 7/1/26: \$500,000 per person and \$2,000,000 per occurrence
- 7/31/27: Act becomes ineffective and will require legislation making future adjustments or making past adjustments permanent.

ordinarily does not require minimum levels of automobile insurance to be included in the contract.

Contracts that involve the movement of people, goods, materials or driving between multiple work sites generally should require minimum automobile limits consistent with the State's limits of liability. If the policy has split limits the contract should specify that any per person limit must meet the per person statutory cap. Policies with a combined single limit should have coverage limits consistent with the per occurrence statutory cap.

In situations when a contractor is relying upon a personal automobile policy, an agency should take additional steps to ensure that the contemplated driving activities are not excluded as a business use.

- **Professional Liability Insurance**

This insurance provides coverage for errors and omissions in the provision of professional services.

Contracts that involve specialized intellectual services should consider the need for Professional Liability Insurance. Contracts for attorneys, health care providers, design professionals, accountants and some technology services may require some type of Professional Liability Insurance.

A primary focus should be on agency's ability to detect and correct errors before damages can occur. In those cases when the professional negligence may remain undetected even after the contractual relationship has ended, agencies should include an Extended Reporting Endorsement requirement in the contract.

- **Workers Compensation and Employers Liability/Stop Gap Coverage**

Workers Compensation laws and corresponding coverage requirements vary by state. In most jurisdictions, coverage is secured through commercial insurance policies.

Most standard commercial workers compensation policies include a separate Employers Liability coverage part for liability an employer has to employees for work-related injury that is not imposed by the workers compensation laws. In states that have monopolistic state administered funds such as North Dakota, Employers Liability is not provided through the state administered fund. This Gap in coverage is addressed through a "**Stop Gap Endorsement**" to the Commercial General Liability policy or the Workers Compensation policy if the employer has operations in states that do not operate a monopolistic fund.

Workers compensation coverage generally only applies to business entities that have employees. Sole proprietorships and other business entities that do not have employees are generally not required to secure workers compensation coverage, although optional voluntary coverage may be available. Personal service contracts and other contracts for which workers compensation coverage is not required should be evaluated to determine whether optional voluntary coverage should be required or whether a waiver of liability provision should be included in the contract.

▪ **Other Insurance**

Other types of insurance may be warranted depending on the unique risks that arise from the contractual relationship. For example:

- Contracts that involve vendor hosting of confidential or sensitive information may call for the vendor to maintain a Cyber Liability policy covering third-party claims as well as first party notification and remediation costs following a data breach.
- Building construction contracts may call for an Owners and Contractors Protective Liability coverage and Builder Risk Insurance.
- Construction contracts should always be carefully reviewed by legal counsel.
- When leasing space, it is critical that the contract specifically require the Landlord to maintain property insurance on the building and contents and agree to a waiver of subrogation or release in favor of the State.
- Contracts that involve a reasonable possibility of pollution-related claims should require pollution coverage. If a spill or other source of contaminant may not be immediately and readily discovered, the policy should be written on an occurrence basis or contain a long tail or extended reporting period to cover the time in which the pollution event may remain undiscovered. Attempts to limit coverage to sudden and unexpected events should generally be rejected.

Certificates of Insurance

The primary means of ensuring that a contractor has the insurance required in a contract is through a Certificate of Insurance that is issued by the contractor's insurance agent or broker. A Certificate of Insurance is not part of and does not amend the underlying insurance policies, but rather is simply an indication of the insurance that is in place at that moment in time.

It is impermissible to ask for language on a Certificate of Insurance that does not reflect the actual insurance coverages that are in place.

When an agency is made an additional insured pursuant to a blanket additional insured endorsement, the Certificate of Insurance should indicate that the State is an additional insured to the extent required by contract or other appropriate description.

Contracts that extend beyond the coverage period specified in a Certificate of Insurance should be evaluated to determine whether the Contractor should be required to provide updated current Certificates of Insurance throughout the term of the contract. In many contracts requiring the Contractor to provide updated Certificates only in the event of any changes in coverage is adequate.

Additional Insureds

A common requirement in many commercial transactions is for one party to be made an Additional Insured on the other party's insurance, typically the commercial general liability policy and any

umbrella or excess policies. The purpose is to provide a direct right of access to defense and indemnity through the other party's insurance.

A party to a contract can be made an Additional Insured through a manual endorsement, whereby the party is specifically included as an Additional Insured by name on an endorsement to the policy or through a blanket Additional Insured endorsement typically whereby anyone the contractor is required by contract to include as an Additional Insured is automatically provided that coverage.

Most transactions that involve the State being made an Additional Insured will be through a blanket Additional Insured endorsement. This is perfectly fine in most transactions, but drafters should be aware that Additional Insured coverage through a blanket Additional Insured endorsement typically is limited to the contractor's ongoing operations and does not extend to completed operations.

Determining Appropriate Indemnification and Insurance Provisions

The first step when drafting a contract or a solicitation is to consider the potential risk associated with the contract being contemplated and select the appropriate clauses. For example:

1. **No Indemnification of Liability provision with Certificate of Insurance** should be used:
 - a) When contracting for intellectual services when the contractor will not be providing on-site services, or only limited on-site services presenting a low risk of harm. (Examples of professionals providing intellectual services would include attorneys, architects, engineers, accountants, insurance agents and brokers, appraisers, loss claims adjusters, tax consultants, risk investment brokers, and investment and divestiture consultants.)
 - b) When the services to be provided present a minimal threat to the safety, health and well-being of participants or third parties, has little potential to cause disruption of business schedule, financial loss/increased cost, or degradation of performance.
 - c) If the terms of the Lease do not require the landlord to provide snow and ice removal and maintenance on walkways and parking lots or to maintain common areas, or members of the public will not visit the leased property.
 - d) Most standard product purchases that do not involve ongoing on-site maintenance.

Obtain a certificate of insurance documenting required coverages are in place prior to executing or before beginning work under the contract.

2. **Limited Vicarious Indemnification with Additional Insured Endorsement – This is the default indemnification provision for State service contracts and leases.** When a contractual relationship poses some realistic risk of claims being brought against the State arising from the contractor's activities and operations, the contract should require the Contractor to indemnify the State. In most service contracts and leases, the indemnity obligation should be limited to vicarious claims - those brought against the State merely because of the business relationship between the contractor and the State, i.e. the damage occurred on a State project or property. In addition, the State must be made an additional insured on the Contractor's Commercial General Liability insurance, providing coverage for all claims that arise out the Contractor's work.

Obtain a certificate of insurance documenting required coverages are in place **prior** to executing or before beginning work under the contract. When a manual additional insured endorsement is required, it may take up to 90 days until the insurance carrier provides it. Make sure to verify receipt of the endorsement within 90 days.

3. **Intermediate Indemnification with Additional Insured Endorsement** – Requires the contractor to be responsible for its own liability and the joint liability of the contractor and the State. Use the intermediate indemnification clause if there is the potential that the contractor's activities present a high degree of risk over which the State has no supervision or control that could create liability for the State. Prior to requiring this level of indemnification in a contract, the State agency must obtain the approval of the OMB Director's designee.

The process a State agency or facility should use to obtain that approval is to complete [SFN 58571](#) form, the **Application to Require a More Stringent Indemnification Provision**. The form, along with a copy of the proposed contract should be filed with the Risk Management Division of OMB for processing unless the OMB director has determined an alternate designee to review the proposed contract. OMB, through Risk Management, will work with the agency to analyze the exposure presented by a proposed agreement and determine what level of indemnification would be appropriate.

The OMB Director has determined that it is appropriate that **State software contracts** contain indemnification requirements indemnifying and holding the State harmless from and against all third-party claims alleging the software infringes a United States patent or copyright, or any similar intellectual property right in the United States. This provision is normally a default in software vendor's license agreements. State agencies do not have to go through the SFN 58571 Application for approval to use this indemnification provision in an agreement.

4. **No Indemnification or Insurance Requirements** – should be used in contracts between state agencies and with political subdivisions if no subcontractor will be used. Where a contract with a political subdivision contemplates a subcontractor directly providing services on behalf of the State or on State property, the contract should require the subcontractor to indemnify the State and maintain insurance commensurate with the risk. In addition, purchases of routine "off the shelf" products that do not pose any realistic risk of harm and that are delivered through common carrier generally do not require any indemnification or insurance provisions.

Risk Analysis

Before making decisions about indemnification and insurance requirements, it is necessary to evaluate the potential risks associated with the contract. The identification of potential risks generally requires a thorough understanding of the scope of the contract and may involve discussions with others more familiar with it.

The Risk Management Analysis Matrix below is a tool to assist with the risk assessment and determination of the indemnification and insurance requirements that appropriately address the specific risks associated with the contract. **The Matrix is not a substitute for proper analysis and**

identification of the specific risks that arise under a contract and tailoring the contract language to meet the identified risks.

Following the Matrix are examples of indemnification and insurance clauses that can be incorporated into the body of a contract, **as appropriate**, or be used as an appendix to a solicitation (i.e. Informal Request for Bids, Informal Request for Proposal, Invitation for Bid, or Request for Proposal), and then be incorporated into the purchase order or contract.

Note: Not every recommended insurance requirement will apply to every contemplated contract.

**REMEMBER TO CONSULT WITH LEGAL COUNSEL
AND/OR RISK MANAGEMENT WHEN ADDRESSING
THESE RECOMMENDED TERMS AND CLAUSES**

RISK MANAGEMENT ANALYSIS MATRIX: provides an overview of the risk analysis process.

RISK MANAGEMENT ANALYSIS MATRIX			
		Indemnification and Insurance Provisions	Indemnification and Insurance Provisions
Rating	Definition	Commodities	Services
<u>LOW</u> - Inter-Agency & Political Subdivision - Professional Services Not Requiring On-Site Services or Low Risk On-Site Activities - Non-Professional Services Posing Little Realistic Risk of Harm or Damage to Property - Contracted Services That Do Not Involve Handling of Confidential Information	Presents a minimal threat to safety, health and well-being of participants and third parties, has little potential to cause disruption of business schedule, financial loss/increased cost, or degradation of performance.	None (The purchase of routine off the shelf products.)	None ~ or ~ No Indemnification of Liability with Certificate of Insurance
<u>MODERATE</u> Professional Services Agreements Requiring Significant On-Site Services	Special intellectual ability required to perform the contracted services some of which will be performed on-site. On-site generally involves a significant presence or activity giving rise to a risk of injury or damage to property, rather than a single visit or low risk activities such as classroom training.	N/A	Limited Vicarious Liability with Certificate of Insurance and Additional Insured Endorsement and Errors and Omissions Coverage
<u>MODERATE</u> - Routine Non-Professional Services - Some Unique or Specially Made Products - Routine Leases	Potential to cause injury/illness, property damage, some disruption of business schedule, financial loss/increased cost, or degradation of performance.	Limited Vicarious Liability with Certificate of Insurance and Additional Insured Endorsement	Limited Vicarious Liability with Certificate of Insurance and Additional Insured Endorsement
<u>HIGH RISK</u> - Requires More Stringent Provisions * Requires Authorization from OMB Director's Designee SFN 58571	State has little or no supervision or control over contractor's actions which may cause severe injury/death, major property damage, significant disruption of business schedule, financial loss/increased cost, or degradation of performance.	Intermediate with Certificate of Insurance and Additional Insured Endorsement	Intermediate with Certificate of Insurance and Additional Insured Endorsement

SAMPLE SERVICE AGREEMENTS

LOW RATED RISK

Agreements Between State Agencies (Inter-Agency) and With Political Subdivisions

Indemnification

None

Insurance

None

Professional/Non-Professional Services Agreements Involving Low Risk Activities

Indemnification

None **OR:** The State and Contractor each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$2,000,000 per occurrence.
- 2) Professional errors and omissions with minimum limits of \$1,000,000 per claim and in the aggregate, Contractor shall continuously maintain such coverage during the contact period and for three years thereafter. In the event of a change or cancellation of coverage, Contractor shall purchase an extended reporting period to meet the time periods required in this section. ***[If Applicable]***
- 3) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$500,000 per person and \$2,000,000 per occurrence. ***[If Applicable]***
- 4) Workers compensation coverage meeting all statutory requirements.

The insurance coverages listed above must meet the following additional requirements:

- 1) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by

A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.

- 2) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement.
- 3) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.
- 4) Contractor shall provide at least 30-day notice of any cancellation or material change to the policies or endorsements. An updated, current certificate of insurance shall be provided in the event of any change to a policy.

MODERATE RATED RISK

Professional Services Agreements Requiring Significant On-site Presence or Activity

Indemnification

Contractor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from and against claims based on the vicarious liability of the State or its agents, but not against claims based on the State's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. This obligation to defend, indemnify, and hold harmless does not extend to professional liability claims arising from professional errors and omissions. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Any attorney appointed to represent the State must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08. Contractor also agrees to reimburse the State for all costs, expenses and attorneys' fees incurred if the State prevails in an action against Contractor in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$2,000,000 per occurrence.

- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$500,000 per person and \$2,000,000 per occurrence. ***[If Applicable]***
- 3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.
- 4) Employer's liability or "stop gap" insurance of not less than \$2,000,000 as an endorsement on the workers compensation or commercial general liability insurance.
- 5) Professional errors and omissions with minimum limits of \$1,000,000 per claim and in the aggregate, Contractor shall continuously maintain such coverage during the contract period and for three years thereafter. In the event of a change or cancellation of coverage, Contractor shall purchase an extended reporting period to meet the time periods required in this section. ***[If Applicable]***

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. ***Optional Provision:*** The amount of any deductible or self-retention is subject to approval by the State.
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
- 3) The duty to defend, indemnify, and hold harmless the State under this agreement shall not be limited by the insurance required in this agreement.
- 4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy on a primary and noncontributory basis, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies that shall not be limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of the Contractor.
- 5) A "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State.
- 6) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
- 7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.
- 8) Contractor shall provide at least 30-day notice of any cancellation or material change to the policies or endorsements. Contractor shall provide on an ongoing basis, current certificates of

insurance during the term of the contract. A renewal certificate will be provided 10 days prior to coverage expiration. **Optional Provision:** An updated, current certificate of insurance shall be provided in the event of any change to a policy.

**Routine Non-Professional Service Contracts Requiring
On-site Services or Involving Moderate Risk**

Indemnification

Contractor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from and against claims based on the vicarious liability of the State or its agents, but not against claims based on the State's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Any attorney appointed to represent the State must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08. Contractor also agrees to reimburse the State for all costs, expenses and attorneys' fees incurred if the State prevails in an action against Contractor in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$2,000,000 per occurrence.
- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$500,000 per person and \$2,000,000 per occurrence. ***[If Applicable]***
- 3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.
- 4) Employer's liability or "stop gap" insurance of not less than \$2,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. **Optional Provision:** The amount of any deductible or self-retention is subject to approval by the State.

- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
- 3) The duty to defend, indemnify, and hold harmless the State under this agreement shall not be limited by the insurance required in this agreement.
- 4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy on a primary and noncontributory basis, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies that shall not be limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of the Contractor.
- 5) A "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State.
- 6) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
- 7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.
- 8) Contractor shall provide at least 30-day notice of any cancellation or material change to the policies or endorsements. Contractor shall provide on an ongoing basis, current certificates of insurance during the term of the contract. A renewal certificate will be provided 10 days prior to coverage expiration. **Optional Provision:** An updated, current certificate of insurance shall be provided in the event of any change to a policy.

HIGH RATED RISK

Agreements Requiring More Stringent Indemnification - For example, contracts for construction, alteration, renovation, or maintenance of a building, structure, highway, road, bridge, water line, railroad right of entry, sewer line, oil line, gas line, appurtenance, appliance or other improvement to real property, including any moving, demolition or excavation, carnival rides.

Use of the following provisions requires authorization from OMB Director's Designee. Use SFN 58571 to obtain authorization.

Indemnification

Contractor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from claims resulting from the performance of the contractor or

its agent, including all costs, expenses and attorneys' fees, which may in any manner result from or arise out of this agreement, except claims based upon the State's sole negligence or intentional misconduct. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Any attorney appointed to represent the State must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08. Contractor also agrees to reimburse the State for all costs, expenses and attorneys' fees incurred in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$2,000,000 per occurrence.
- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$500,000 per person and \$2,000,000 per occurrence.
- 3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.
- 4) Employer's liability or "stop gap" insurance of not less than \$2,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. **Optional Provision:** The amount of any deductible or self-retention is subject to approval by the State.
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
- 3) The State will be defended, indemnified, and held harmless to the full extent of any coverage actually secured by the Contractor in excess of the minimum requirements set forth above. The duty to indemnify the State under this agreement shall not be limited by the insurance required in this agreement.

- 4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy on a primary and noncontributory basis, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies that shall not be limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of the Contractor.
- 5) The insurance required in this agreement, through a policy or endorsement, shall include:
 - a) a "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;
 - b) a provision that Contractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be in excess of the Contractor's insurance and shall not contribute with it;
 - c) cross liability/severability of interest for all policies and endorsements;
 - d) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;
 - e) The insolvency or bankruptcy of the insured Contractor shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Contractor from meeting the retention limit under the policy.
- 6) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
- 7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.
- 8) Contractor shall provide at least 30-day notice of any cancellation or material change to the policies or endorsements. Contractor shall provide on an ongoing basis, current certificates of insurance during the term of the contract. A renewal certificate will be provided 10 days prior to coverage expiration.

For high-risk contracts, agencies should consult with the Risk Management Division to evaluate whether to require notice from the carrier through an endorsement.

If Contractor's insurance carrier cannot provide the insurance requirements listed above, Contractor will be required to purchase a project-specific insurance policy on behalf of State including but not limited to an Owner's Protective Liability insurance policy or a Project Management Protective Liability insurance policy with an occurrence limit of not less than \$2,000,000 and an aggregate of \$2,000,000. Said insurance shall be kept in force until the project is accepted by State.

For some large construction projects, it may be determined that the most effective insurance would be the purchase of **All Risk Builder's Risk** coverage. Requirements for such coverage should include:

Builder's Risk insuring the interest of the State, contractor(s) and subcontractor(s) of all tiers including coverage on an All Risk basis, including but not limited to, coverage against fire, lightning, wind damage, hail, explosion, riot or civil commotions, aircraft and other vehicles, collapse, flood, earth movement, and coverage available under the so-called Installation Floater. The policy(ies) for such coverage shall be secured and maintained by contractor in an amount equal to the Full Completed Value of the project. Any deductible amount under the policy(ies) shall be the sole responsibility of the Contractor.

For operations involving a risk of environmental pollution such as a ruptured pipeline, contractors should be required to provide proof of **pollution liability** coverage. Requirements should include:

Pollution Liability: Contractor shall provide Contractor's Pollution Liability coverage for Personal Injury, Property Damage and Cleanup Cost arising from pollution conditions caused by the operations of the Contractor for limits of \$5,000,000. Occurrence coverage is preferred but coverage may be provided on a claims-made form that includes a three-year tail coverage endorsement. Coverage shall include contractual liability coverage for claims arising out of liability of subcontractors, loading and unloading, unlimited completed operations, and non-owned disposal site coverage (if applicable).

LEASES

MODERATE Risk Lease - If the terms of the Lease **DO** require the landlord to provide snow and Ice removal and maintenance on walkways and parking lots or to maintain common areas, or if it is likely members of the public will visit the facility.

Indemnification

Lessor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from and against claims based on the vicarious liability of the State or its agents, but not against claims based on the State's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. The legal defense provided by Lessor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Lessor also agrees to reimburse the State for all costs, expenses and attorneys' fees incurred if the State prevails in an action against Lessor in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance

Lessor shall secure and keep in force during the term of this agreement and from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$2,000,000 per occurrence.
- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$500,000 per person and \$2,000,000 per occurrence. ***[If Applicable]***
- 3) Property insurance insuring the full and true value of all Lessor's real property and personal property located on or in the building in which the leased premises are located for all losses. Lessor waives any right to seek compensation from State for any covered losses for which this required insurance is to apply. ***Optional Provision:*** Lessor shall require all other tenants to have property insurance covering the full and true value of all of tenant's personal property located on or in the building together with a waiver of subrogation.
- 4) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.
- 5) Employer's liability or "stop gap" insurance of not less than \$2,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. ***Optional Provision:*** The amount of any deductible or self-retention is subject to approval by the State.
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
- 3) The duty to defend, indemnify, and hold harmless the State under this agreement shall not be limited by the insurance required in this agreement.
- 4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy on a primary and noncontributory basis, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies that shall not be limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of the Contractor.
- 5) A "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State.
- 6) The Lessor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.

- 7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.
- 8) Lessor shall provide at least 30-day notice of any cancellation or material change to the policies or endorsements. Lessor shall provide on an ongoing basis, current certificates of insurance during the term of the contract. A renewal certificate will be provided 10 days prior to coverage expiration. **Optional Provision:** An updated, current certificate of insurance shall be provided in the event of any change to a policy.

LOW Risk Lease - If the terms of the Lease do **not** require the landlord to provide snow and ice removal and maintenance on walkways and parking lots or to maintain common areas, or if it is unlikely members of the public will visit the facility, the following indemnification and insurance language is acceptable.
Omit indemnification language for leases with political subdivisions.

Indemnification

None or Lessor and Lessee each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

Insurance

Lessor shall secure and keep in force during the term of this agreement, from insurance companies or a government self-insurance pool authorized to do business in the state of North Dakota, the following insurance coverages:

- 1) Commercial general liability, including contractual coverage, with minimum liability limits of \$2,000,000 per occurrence.
- 2) Workers' compensation coverage meeting all statutory requirements.
- 3) Property insurance insuring the full and true value of all Lessor's real property and personal property located on or in the building in which the leased premises are located for all losses. Lessor waives any right to seek compensation from State for any covered losses for which this required insurance is to apply. **Optional Provision:** Lessor shall require all other tenants to have property insurance covering the full and true value of all of tenant's personal property located on or in the building together with a waiver of subrogation.

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self-retention amount of other similar obligations under the policies shall be the sole responsibility of the Landlord (or Tenant).
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved

by the State. "Follows form" means the excess policy must be written with the same terms and conditions as the policy to which it is excess.

- 3) Lessor shall furnish a certificate of insurance evidencing the required coverages are in effect prior to commencement of the agreement.
- 4) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.
- 5) Lessor shall provide at least 30 day notice of any cancellation or material change to the policies or endorsements. Lessor shall provide on an ongoing basis, current certificates of insurance during the term of the contract. A renewal certificate will be provided 10 days prior to coverage expiration. **Optional Provision:** An updated, current certificate of insurance shall be provided in the event of any change to a policy.

Limiting the Liability of Certain Vendors

The need for State agencies and facilities to purchase software, communication, and electronic equipment has presented challenges for state procurement - that of a vendor's request to limit its liability.

This issue is not unique to North Dakota. In fact, state and corporate members of the National Association of Chief Information Officers of the States (NASCIO) formed a subcommittee to address the issue because it is of nationwide concern. That subcommittee published the *NASCIO Procurement Subcommittee's Recommendations on Liability Limitations for State IT Contracting*. That document contains specific recommendations for contractually addressing liability for direct and indirect damages in IT contracts. It recommends that States *should hold* vendors responsible for direct damages arising out of a contract and that States *should not hold* vendors responsible for indirect damages unless responsibility is specifically allocated to the vendor in the contract.

N.D.C.C. § 32-12.2-15 is generally consistent with this recommendation and allows agencies to limit the liability of a vendor for indirect losses for certain products and related services when the agency determines, in consultation with the Attorney General's Office and the Office of Management and Budget, that agreeing to the limitation is in the best interests of the State. Direct losses may also be limited to an estimated amount when it is difficult to quantify any potential direct loss beyond the price paid for the product or service, with any agreed upon limitation of direct loss presumed to be twice the contract amount. Although third-party claims being brought against the State are often a primary reason a vendor seeks a contractual limitation of liability provision, agencies must be careful to distinguish between third-party claims alleging vicarious or other derivative liability of the State based upon the actions of a vendor as opposed to claims that simply relate in some way to the contract. Agencies may **not** limit the State's right to contractual or common law indemnification or contribution as well as losses resulting from fraud, intentional or willful misconduct, breach of confidentiality obligations, or personal injury or damage to tangible property.

Agencies must also maintain documentation of the justification for agreeing to any limitation. *No form or template is necessary, and an email exchange is often sufficient.* A state employee that

agrees to a limitation of liability without consulting with the Attorney General's Office and the Office of Management and Budget may be acting outside the scope of their employment.

CERTIFICATES OF INSURANCE AND ENDORSEMENTS

Contractors are required to provide the State with a Certificate of Insurance and/or Endorsement documenting the required coverages are in place, prior to commencement of the contract. A Certificate of Insurance will ordinarily only reflect the coverages that are in place at the time the Certificate is issued and may often not reflect the contract terms that require an endorsement. A person may not request that a certificate of insurance include items that are not part of the underlying policy but may request that it identify policy provisions that meet the contractual requirements.

When a manual additional insured endorsement is required it may take up to 90 days until the insurance carrier will provide it. Make sure that you verify receipt of the endorsement within 90 days.

A sample letter of instruction for the successful vendor can be found on the Team ND Connect State Procurement [Templates](#) web page.

Certificate of Insurance: A completed Certificate of Insurance should contain the following:

- Name and address of agent, phone number and fax number;
- Name of insurance company(ies) and policy number(s);
- Policy period;
- Name and street address of insured;
- Description of coverage(s);
- Name/Number of Project;
- Policy limits as provided in the contract;
- Special instructions or terms of coverage (for example: identification of project or operations with respect to certificate being issued);
- State and/or agency listed as the certificate holder; and
- Signature of the insurer's agent or representative and date.

Endorsement: When the contract terms provide that the State must be named as an additional insured, an endorsement is required. The only way that an entity other than the named insured (contractor) is protected under the terms of the contractor's insurance policy is by adding, by endorsement, an additional insured.

Under some circumstances, a contractor's policy may provide for a blanket additional insured, meaning that additional insured status is automatic under the terms of the policy where the contractor has by contract agreed to add the State as an additional insured. For higher risk

activities, agencies should consult with the Risk Management Division in evaluating the adequacy of the State being an additional insured through a blanket endorsement. When the State is being made an additional insured through a blanket additional insured endorsement/provision, the certificate of insurance should indicate the State is an additional insured to the extent required by contract or other appropriate description.

Sample/Understanding the Certificate of Insurance

Field descriptions and additional information provided on the following pages.

ACORD ³		CERTIFICATE OF LIABILITY INSURANCE		DATE (MM/DD/YYYY) (1)	
THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER. (2)					
IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s). (3)					
PRODUCER (4) Insurance Broker/Agency		CONTACT NAME: (5) PHONE (A/C, No, Ext): FAX (A/C, No): E-MAIL: ADDRESS:			
INSURED (6) Vendor/Title of Business in Contract		INSURER(S) AFFORDING COVERAGE (7) INSURER A: A+ rated XYZ insurance company		NAIC #	
INSURER B:		INSURER C:		INSURER D:	
INSURER E:		INSURER F:			
COVERAGES		CERTIFICATE NUMBER:		REVISION NUMBER:	
(8) THIS IS TO CERTIFY THAT 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. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.					
INSUR LTR	TYPE OF INSURANCE (14)	ADOC (INS)	DOB (WVD)	POLICY NUMBER (12)	POLICY EFF (MM/DD/YYYY) (13) POLICY EXP (MM/DD/YYYY)
(9)	COMMERCIAL GENERAL LIABILITY (a) CLAIMS-MADE ☐ OCCUR ☐ GENTL AGGREGATE LIMIT APPLIES PER: POLICY ☐ PER ☐ SUBJECT ☐ LOC ☐ OTHER: AUTOMOBILE LIABILITY (b) ANY AUTO OWNED AUTOS ONLY ☐ SCHEDULED AUTOS ☐ HIRED AUTOS ONLY ☐ NON-OWNED AUTOS ONLY ☐ UMBRELLA LIAB (c) ☐ OCCUR ☐ EXCESS LIAB (c) ☐ CLAIMS-MADE ☐ DED ☐ RETENTION \$ ☐ WORKERS COMPENSATION AND EMPLOYERS' LIABILITY (d) ANY PROPRIETOR/PARTNER/EXECUTIVE/OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below (e) may see professional liability or other	(10)	(11)	must see policy number	current-effective during contract
					LIMITS (15) EACH OCCURRENCE \$ DAMAGE TO RENTED PREMISES (Ea occurrence) \$ MED EXP (Any one person) \$ PERSONAL & ADV INJURY \$ GENERAL AGGREGATE \$ PRODUCTS - COMPROP AGG \$ COMBINED SINGLE LIMIT (Ea accident) \$ BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ EACH OCCURRENCE \$ AGGREGATE \$ PER STATUTE ☐ OTH-ER ☐ E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$
DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)					
(16) may reference such things as: the contract, location, additional insured, or any other special provisions					
CERTIFICATE HOLDER (17) State of North Dakota Agency/Department Attn: _____ Address City, State ZIP			CANCELLATION SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS. (18) AUTHORIZED REPRESENTATIVE (19) signed by agent issuing the Certificate		
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Understanding the Certificate of Insurance

FIELD		DESCRIPTION	NOTATION
1	DATE	Actual date the Certificate was issued.	Date ensures that the Certificate is current.
2	THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.	This statement makes it clear that the Certificate of Insurance cannot amend, extend, or alter the underlying policies of insurance and the certificate holder has no contractual rights as a result of receipt of the certificate.	A certificate of insurance may be relied upon to verify types, dates, and limits of coverage. Additional terms/requirements such as being made an additional insured should be verified through receipt and review of the endorsement and/or policies of insurance.
3	IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).	This statement clarifies that if the certificate holder has asked to be named as an additional insured, this cannot be accomplished simply by the issuance of a certificate – the policy must be endorsed. The same can be true of waivers of subrogation.	Generally, one should obtain any required endorsement(s) to ensure all requirements are met.
4	PRODUCER	Broker or agent that prepared and provides the certificate.	
5	PRODUCER CONTACT	Contact information for the producer/broker/agent.	
6	INSURED	The name of the insured (the entity that purchased the insurance).	This entity should be the contractor – the party requested to provide coverage.
7	INSURER(S) AFFORDING COVERAGE	This section is used to identify the insurance	The State requires that insurers are rated "A-" or

FIELD	DESCRIPTION	NOTATION
		companies issuing the policies described in the certificate. Each insurer is identified by letter (letter will be referenced in 9). May indicate the rating of the insurance company.
8	THIS IS TO CERTIFY THAT 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. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.	The insurance policies listed were issued to the insured and all insurance provided is subject to the normal policy terms, exclusions, and conditions.
9	INSR LTR	The Company letter of the insurer as identified in "Insurer(s) Affording Coverage" (from 7).
10	ADDL INSR	Indicates if the certificate holder has been named as an additional insured on the policy.
11	SUBR WVD	Indicates if subrogation has been waived on the policy.
12	POLICY NUMBER	Identification number assigned to specific policy.
		better by A.M. Best Company, Inc. Less than an "A-" rating must be approved by the State. The certificate affords no contractual rights even if such rights are referenced or made part of the contract between the insured and certificate holder. Must obtain the endorsement to ensure requirement is met, if not through a blanket additional insured. Must obtain the endorsement to ensure requirement is met, if not through a blanket waiver of subrogation. Should not be left blank-insist that all policy numbers be provided.

FIELD	DESCRIPTION	NOTATION
13	POLICY EFF / POLICY EXP	Date that the terms and conditions of the policy will commence and expire. Ensure that the policy period covers the time frame of the project.
14	TYPE OF INSURANCE	a) Commercial General Liability: Protection from liability arising out of a business operation. • <i>Claims Made</i>- coverage for occurrences taking place during the policy period and the claim must be made or reported during the policy period. • <i>Occur</i> – coverage is provided for occurrences taking place during the policy period regardless of when an actual claim is made or reported. • <i>General Aggregate</i> – the most a policy will pay in a given policy period, regardless of the number of insured or claims. b) Automobile Liability: Protection from liability arising out of negligent operation, maintenance or use of a covered auto, which result in bodily injury or property damage to a 3rd party. c) Umbrella Liab/Excess Liability: Liability coverage in addition to or on top of the primary general liability policy. d) Workers Compensation & Employers' Liability: Coverage for employee injuries occurring within the course of their employment. a) Generally, "occurrence" affords better coverage. If the general aggregate limit applies to the policy, coverage may be limited if there are other additional insured. b) Combined single limit is the most a policy will pay for 3rd party bodily injury and property damage combined for each accident. c) State generally doesn't request umbrella or excess liability coverage, but it may provide proof of more coverage. d) <i>Workers Comp.</i> should meet statutory requirements. <i>Employers Liability or Stop Gap Coverage</i> is used to

FIELD		DESCRIPTION	NOTATION
		e) Professional Errors and Omissions or other specialty coverage: Coverage for professionals against liability as a result of errors and omissions in performing those services.	cover liability actions against an employer arising out of a work-related accident/illness. While workers' compensation is intended to be the exclusive remedy for injured workers, there are occasional situations in which an employer may be separately liable to an injured worker or his family. The employers' liability component of a workers' compensation policy covers this exposure with defined limits of liability. e) Generally not possible to be named an additional insured on a professional errors and omissions policy.
15	LIMITS	Coverage limit amounts.	The Risk Management recommended limits are based upon the State's limits set by statute. The "per person and per occurrence" language is in the statute, but generally, insurance policies are not written on a person person/per occurrence basis, but rather per occurrence and a general aggregate.
16	DESCRIPTION OF OPERATIONS/ LOCATIONS/VEHICLES	Records information necessary to identify the operations, locations, vehicles, specific job site/location or contract number, exclusions added by endorsement, and/or	If the certificate of insurance states you are an additional insured, it is not a guarantee that you are an additional insured on the

FIELD		DESCRIPTION	NOTATION
		special provisions for which the certificate was issued.	actual policy – request a copy of the endorsement.
17	CERTIFICATE HOLDER	Entity to which the certificate is issued.	Specify the State agency/entity involved and its address (i.e. State of North Dakota, Agency...).
18	CANCELLATION	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.	A certificate holder and additional insured cannot plan on receiving any notice from the insurance company if coverage is being cancelled or non-renewed.
19	AUTHORIZED REPRESENTATIVE	Producer/broker/agent who has been authorized to sign the Certificate.	

Sample Additional Insured Endorsement

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 10 04 13

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 -	Location(s) Of Covered Operations
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.

SAMPLE

Sample Letter when Certificate Is Inadequate

Date:

To:

To Whom It May Concern:

Thank you for forwarding the Certificate of Insurance. After review, the certificate does not reflect required limits and/or coverages as outlined in the contract dated _____. If those coverages are in place, please amend the certificate form to reflect the following:

[INSERT THE INSURANCE PROVISIONS FROM CONTRACT]

Please forward the amended Certificate by (10 days) . If you have any questions, please call me at _____.

Sincerely,

Sample Letter for Expiration of Certificate of Insurance

Date:

To:

To Whom It May Concern:

Our records indicate that your Certificate of Insurance currently on file with us has either expired or will be expiring. Please have your insurance agent send us a new Certificate of Insurance evidencing the following:

[INSERT THE INSURANCE PROVISIONS FROM CONTRACT]

Delete if there is no additional insured endorsement requirement

Further, ensure that the state of North Dakota, **Agency Name** is named as an additional insured and if applicable, provide an Endorsement to the policy within 30-60 days documenting that the required coverage is in place.

If you have any questions, please call me at _____.

Sincerely,

DEFINITIONS OF COMMON INSURANCE TERMS

A

Additional Insured — A person or entity other than the named insured who is protected by the policy, often regarding a specific interest. This coverage is typically extended through a policy endorsement. Contrast with “Named Insured.”

Adjuster — A person who settles claims for insurers.

Aggregate — Cumulative. An annual aggregate limit of \$1 million means that when the total of all claims in a year reaches \$1 million, coverage ceases.

All States Endorsement — Automatically extends statutory workers compensation coverage to states where the contractor’s new operations are added during the policy term.

B

Bodily Injury — Injury, sickness, or disease sustained by a person, including death resulting therefrom. See also Personal Injury.

Bond — An obligation of the insurance company to protect one against financial loss caused by the acts of another.

Breach — Failure to live up to the warranties or condition of an insurance contract.

C

Cancellation — The termination of an insurance policy or bond before its expiration by the insured or insurer.

Carrier — An insurance company.

Certificate of Insurance — A form used to convey information (valid only as of the date it is issued) regarding the client’s insurance coverages. It does not confer rights upon a certificate holder or alter, extend, or amend policy coverage.

CGL – Commercial General Liability Coverage — Principal form of liability insurance for businesses that provides coverage for bodily injury and property damage, personal and advertising injury, contractual, products and completed operations on an occurrence basis.

Claim — The amount of damage for which a third party seeks reimbursement from the insured and/or insured seeks reimbursement from his or her insurance company. Once the amount has been determined, it becomes a loss. Claim and loss are often used interchangeably. Self-insured losses are often called claims.

Contractual Liability — Coverage for liability assumed under contract.

Coverage — A term used to designate the type of protection provided by an insurance policy.

D

Deductible — An amount of loss to be absorbed by the insured.

E

Effective Date — The date on which an insurance policy goes into effect starting date.

Employer's Liability — Liability insurance for employers to protect against bodily injury claims resulting from accident or disease of employees not covered by workers compensation.

Endorsement — An amendment to an insurance policy that in some way modifies the original contract provisions.

Errors and Omissions — Commonly referenced as E&O, or professional liability. Should be required when requested services require special intellectual ability rather than strict physical activity. Examples: Engineers, accountants, consultants, technology designers/installers, public officials, directors and officers. Medical personnel E&O is often called medical malpractice coverage.

Exclusions — Specific items identified as not being covered under a particular policy.

F

Follows Form — A requirement that an excess policy to be written with the same terms and conditions as the policy to which it is excess.

H

Hold Harmless Agreement — A clause found in contracts and leases that shifts (or attempts to shift) liability for loss from one party to another.

I

Indemnify/Indemnity — Making "whole" or restoring financially, after a loss.

Indemnity Agreement — Same as a hold harmless agreement.

Insured — The person who has purchased an insurance policy and is protected by it; sometimes also referred to as the "assured."

Insurer — The insurance company.

L

Lessee — A tenant who has signed a lease.

Liability Insurance — Any form of coverage whereby the insured is protected against claims of other parties arising from specified causes.

Limit — The maximum amount the insured can collect under the terms of a policy.

Loss — Any destruction or disappearance of value.

N

Named Insured — Any person, firm or corporation, or any member thereof, specifically designated by name as insured(s) in a policy as distinguished from the others who, though unnamed, are protected under some circumstances. A common application of this latter principle is in auto liability policies wherein by a definition of “insured,” coverage is extended to other drivers using the car with the named insured’s permission. Other parties can also be afforded protection of an insurance policy through being named an Additional Insured (see definition) through a policy endorsement. Other rights and responsibilities of the Named Insured include: rights to request policy endorsements or additional coverage, terminate policy, receive premium refund; obligations to notify insurer of a claim, pay premiums, and to comply with all other policyholder obligations.

Negligence — Failure to exercise that degree of care that a reasonable person would exercise under the same circumstance.

P

Primary and Noncontributory Basis — Term commonly used in contract insurance requirements to stipulate the order in which multiple policies triggered by the same loss are to respond.

Property Insurance — Insurance that indemnifies an individual or entity with an ownership interest in real or personal property for loss of or damage to property or the loss of business income-producing ability.

R

Reinsurance—A contract to transfer all or a portion of the insurer’s (ceding insurance company’s) risk, assumed on behalf of its insureds, to another insurer/reinsurer. The reinsurer agrees to reimburse the insurer/ceding insurance company for the claim’s reinsured portion. A reinsurer may, in turn, seek reinsurance on some portion of the risk it has reinsured, a process known as “retrocession.”

Risk — The chance or probability of financial loss.

S

Self-insurance — Retention of risk. This generally refers to a planned program for financing or otherwise recognizing losses. It is not the same as insurance.

Stop Gap — Specific form developed to provide employer’s liability coverage for the employer’s activities in monopolistic workers compensation states.

Subrogation — The right of an insurer to recover from a third party an amount paid on a loss when the third party is at fault.

T

Tail Coverage — Extended Reporting Period — Provides for a specific time period after the policy expiration during which the insured can file a claim that occurred but was not reported during the claims-made policy term.

Term — The length of time for which a policy or bond is written.

Third Party — Someone other than the parties directly involved in an action or transaction; someone other than the insured and the insurer.

U

Umbrella or Excess Policy — A broad, high-limit liability policy usually requiring the insured to carry primary or underlying insurance.

V

Vicarious Liability — A form of secondary liability that assigns responsibility for an injury to a person that did not cause the injury but who has a particular relationship with the person that was negligent. It is sometimes referred to as imputed negligence.

W

Waiver — The relinquishment of a known right; for example, waiver or subrogation under a fire insurance policy.

Waiver of Subrogation — A waiver by the named insured giving up any right of recovery against a third party. Normally an insurance policy requires that subrogation (recovery) rights be preserved.