Don't Pay Twice!

Presentation Team

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  Exec Director, ERM, Ethics & Compliance
  Title IX Coordinator
  Pima Community College
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  Director of Risk Management
  Wheaton College

Key Takeaways

How and why of insurance and indemnification

Appropriate language For Various Contract Types

Indemnification agreements

Additional insured coverage

Favorable and detrimental contract terms

Waivers of subrogation

Limitations of liability

Certificates of insurance

Perspective on Risk Management

Create and protect value

- Decision-making alignment
  - Strategic objectives
  - Key tactical objectives
  - Business needs
- Risk-assessed, risk-informed
  - Within risk appetite
  - Risk and reward remain in balance
- Effective policies and procedures
  - Compliance, with a timely path to *'yes'* (where appropriate)

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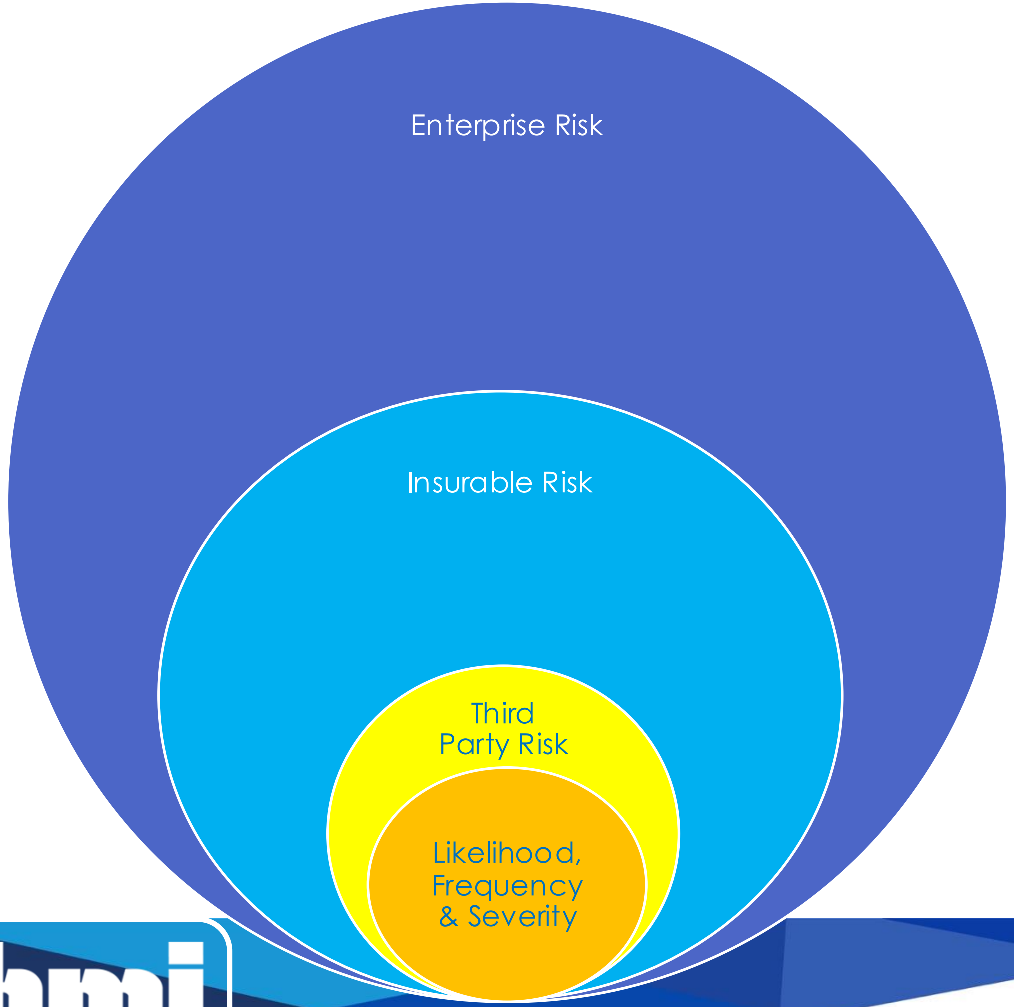
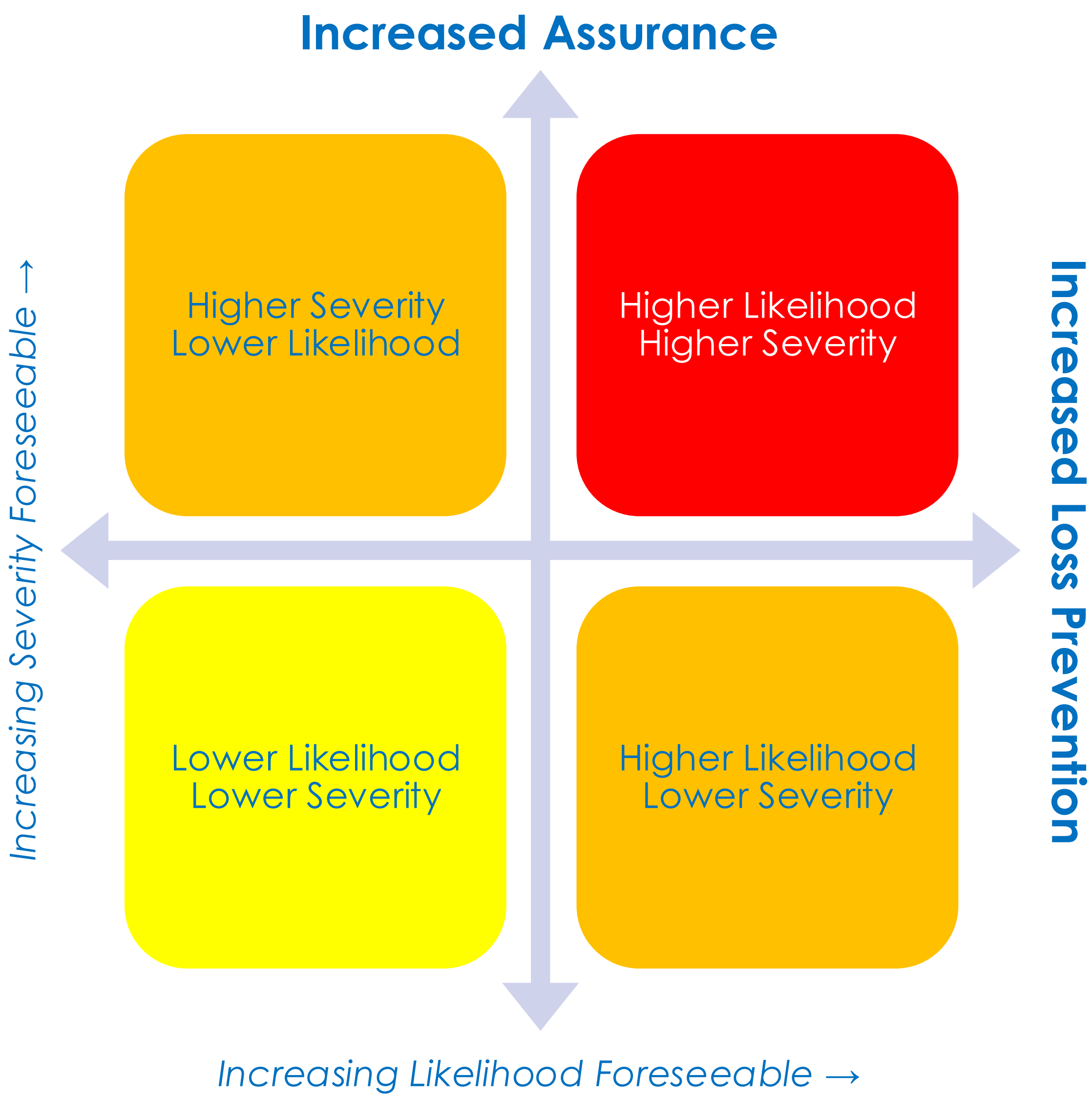
Today's Focus Area





Reasoning Behind Agreement

- We need the facility, service, or product
  - Options may be limited
- Public policy requirements
  - Construction
- Business decision
  - Includes staffing model and shortages
- Contractual transfer
  - Risk control / risk financing
- Permits, licenses, access
- Grants and funding

The Risk Assessment

- What is the scope of work or activity?
- How does it create value or align with strategy? (upside risk)
  - Context, stakeholder interests, interrelationships & interdependencies
- Can you quantify negative consequences? (downside risk)
  - Includes missed opportunity
- How can the outcome be made more certain?
  - Indemnification and insurance are for when things go wrong
  - How can you help improve the likelihood of things going right?
- What level of protection is appropriate?

Building Blocks of More Complex Agreements

Order of Precedence Clause

Your Contract
- Scope of Work
  - What, when, where (sometimes: who, why, how)

Special Provisions
- Amends Standard Specifications
- Addresses uniqueness of this project

Standard Specifications
- Duties and responsibilities
- Safety, due care
- Indemnification
- Insurance

Plans, Drawings, Specifications

Contractor's Documents

Higher Risk Contract Examples

- Medical services
- Environmental contamination risk
- Working with minors
- Network access, sensitive data, PCI
- Lease for, operation of higher risk activities
- Highway construction & maintenance
- Public works, construction & operations
- Landscape maintenance
- Higher risk of employee injury
  - Work at elevation
  - Electrical, high voltage
  - Confined spaces

Common Types of Contracts

- Design
- Construction
- Products and Services
- Professional Services
- Grants
- Camps
- Licenses
- IT/Security

- Leases
- Intergovernmental/Interlocal
- Mutual Aid
- Services we provide
- Space we lease

Photo credit: theblog.adobe.com

General Principle

*The party with **control** should typically be responsible for injury/damage*

Implementation Challenges

- Non-delegable duties or strict liability
- Broad or targeted allegations
  - Conflicts between defendants
  - Avoiding sole remedy protection
- Availability/access to funding source
  - Availability of additional insured status
    - Tiers of subcontractors
  - Defense and indemnification responsibilities
- Agreements with public entities

Common Indemnification Principles

Common Law

- Verbal or written contract
- Where contract is silent on indemnity
  - No contractual remedy
- Active negligence only
  - Contributory negligence voids

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Common Indemnification Principles

Contract Law

- As insurable as possible
- States parties' intentions
- Clear and unambiguous
- Doctrine of Adhesion
- Public policy concerns
- Limiting, broadening, savings language
- Contractual remedy

Photo credit: ucl.ac.uk

Common Indemnification Principles

Public Policy Issues

- Courts don’t like them
- Non-negotiable impact
- Not limited to insurance coverage
- Anti-indemnification statutes
- “Insurance Cramdown”

Photo credit: my cousin vinny

Common Indemnification Terms

Contractual Duties

- **Indemnify**
- Defend
- Hold (Save) Harmless

indemnify

v. to guarantee against any loss which another might suffer. Example: two parties settle a dispute over a contract, and one of them may agree to pay any claims which may arise from the contract, holding the other harmless.

http://dictionary.law.com/Default.aspx?typed=indemnify&type=1

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Common Indemnification Terms

Contractual Duties

- Indemnify
- **Defend**
- Hold (Save) Harmless

{insurer} had both "the right and the duty to defend any suit against the insured seeking damages on account of bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent." Under such a provision, an insurer's obligation to defend is broader than its obligation to pay, and arises whenever the complaint alleges facts and circumstances, some of which would, if proved, fall within the risk covered by the policy.

Lerner v. General Ins. Co of America
245 S.E.2nd 249 (1978)

https://www.leagle.com/decision/1978494245se2d2491488

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Common Indemnification Terms

Contractual Duties

- Indemnify
- Defend
- **Hold (Save) Harmless**

hold harmless

n. a promise to pay any costs or claims which may result from an agreement. Quite often this is part of a settlement agreement, in which one party is concerned that there might be unknown lawsuits or claims stemming from the situation, so the other party agrees to cover them

http://dictionary.law.com/Default.aspx?typed=hold%20harmless&type=1

Forms of Indemnification

Three or Four Types

(Breadth of Responsibility)

- **Broad Form**
- Intermediate Form
- Limited Form
- Comparative Form (Vicarious Liability)

To the <u>fullest</u> extent permitted by law, Contractor agrees to indemnify, defend, and hold harmless Owner and [. . .] from any and all claims [. . .] <u>including claims alleged to have arisen from the sole negligence of Owner</u> or its officers, employees, agents, or any other for which Owner may be liable.

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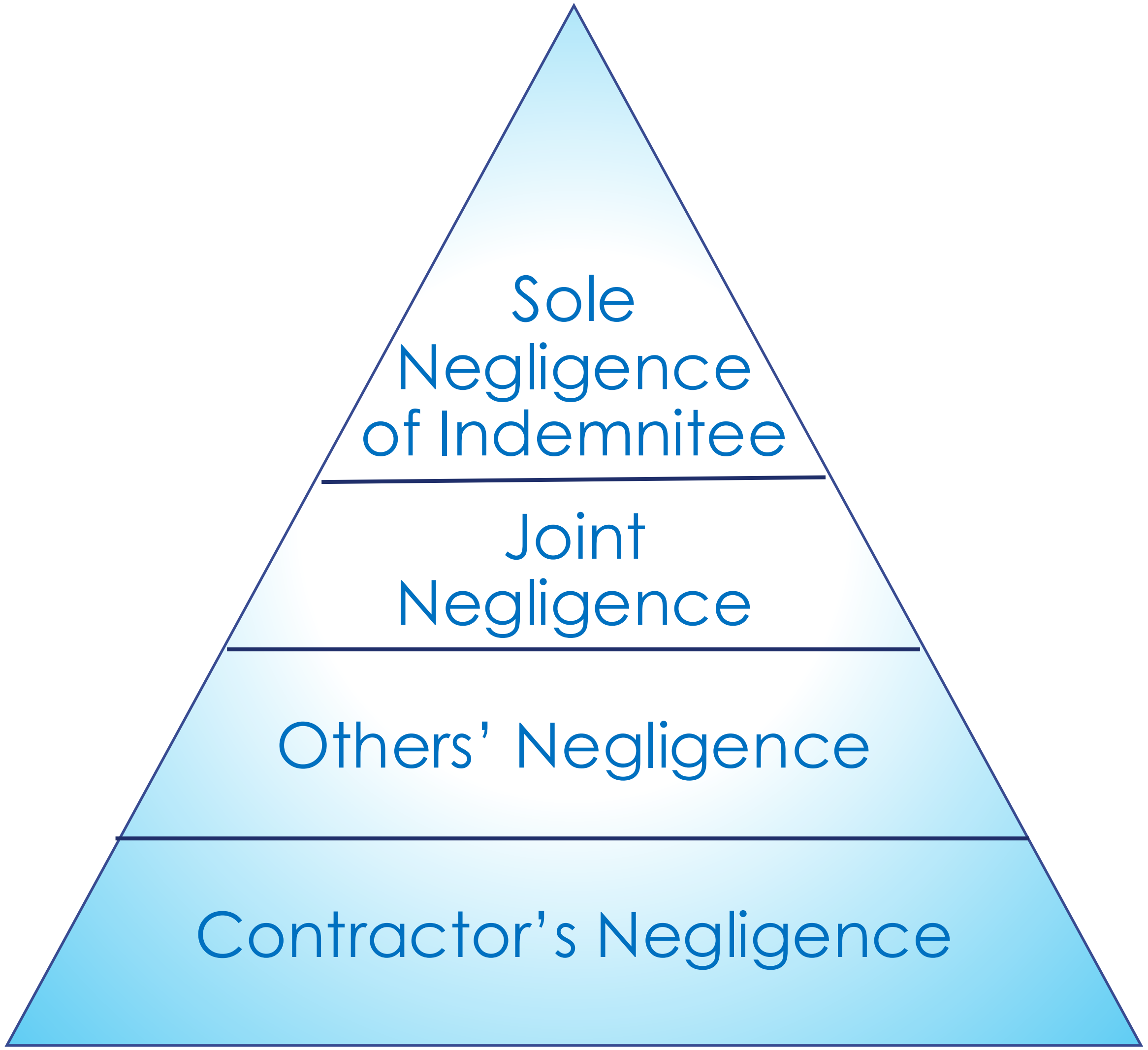

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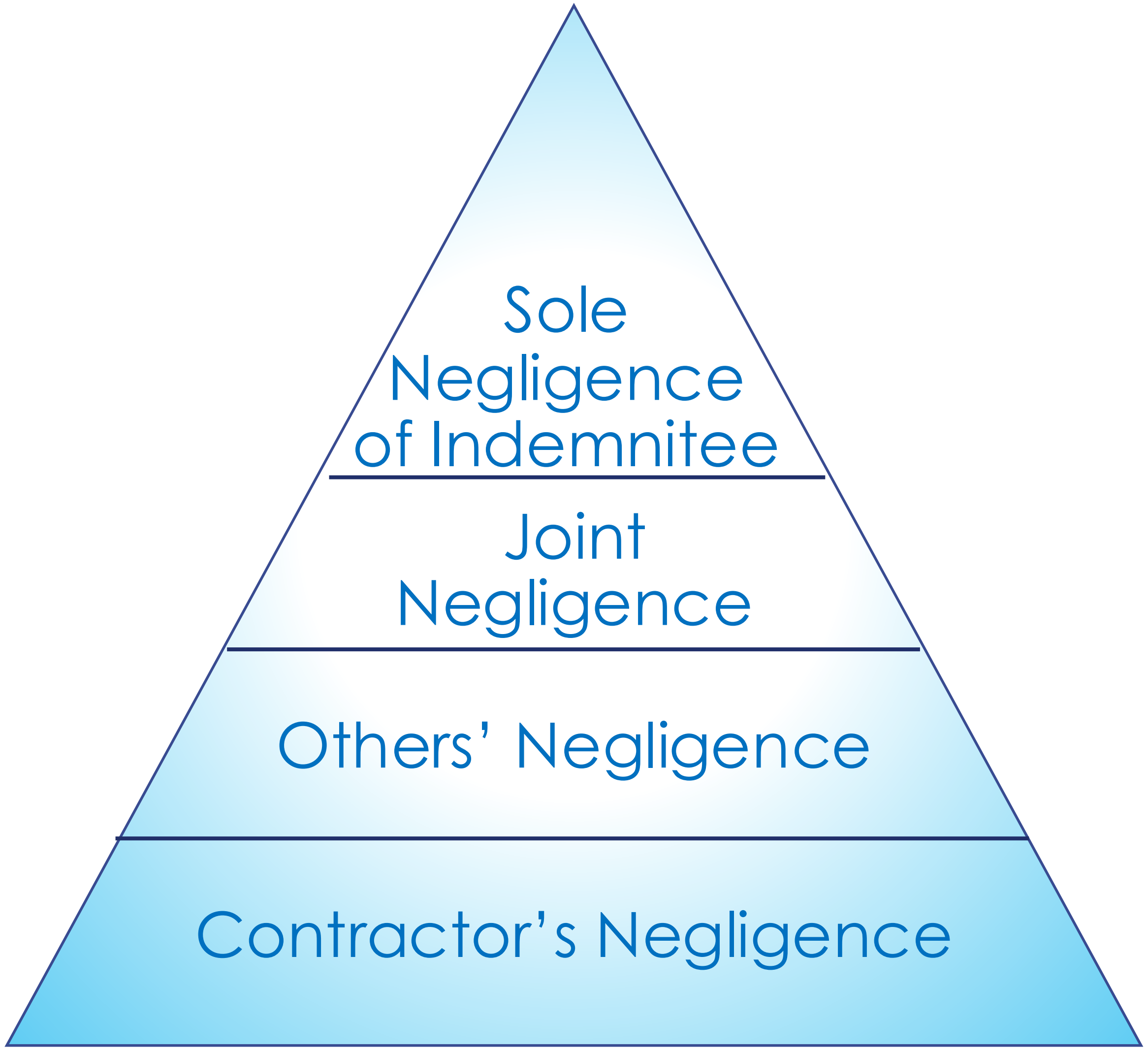

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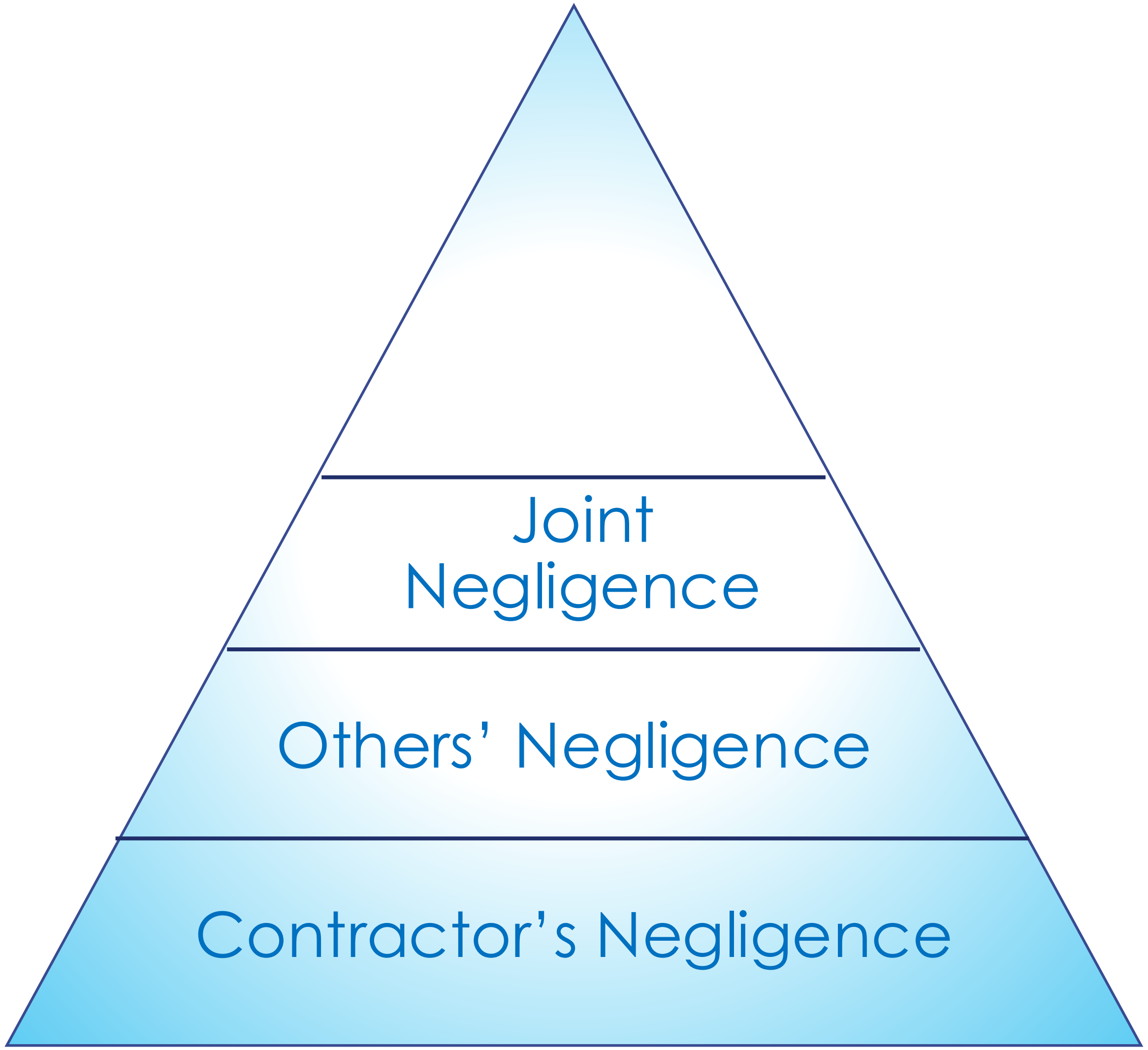

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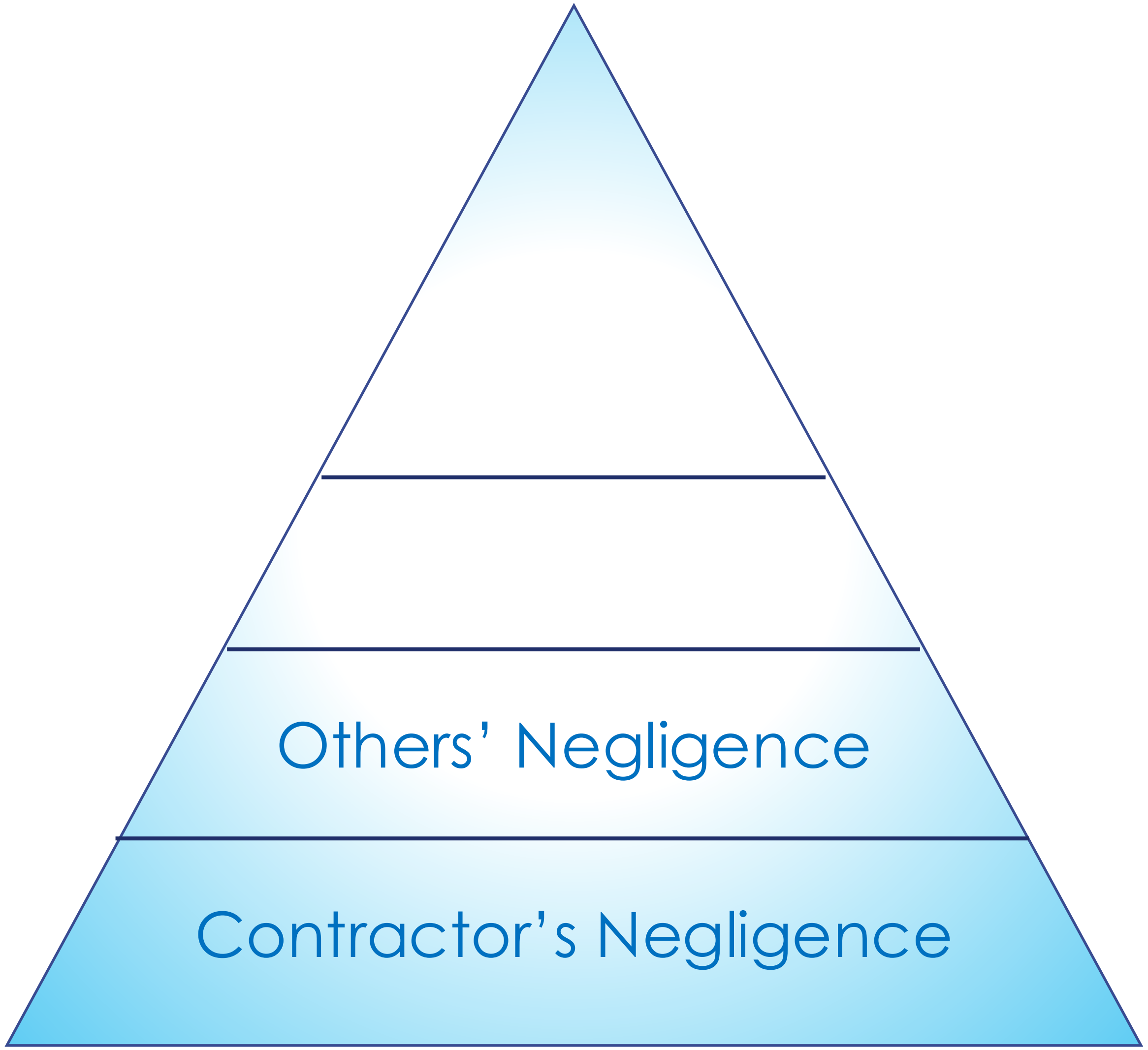

Identifying Forms of Indemnification

Owner's Sole Negligence	Joint Negligence	Other than Owner's	Contractor's Only
Broad Form	**Intermediate Form**	**Limited Form**	**Comparative Form** (Vicarious Liability)
To the fullest extent permitted by law, Contractor agrees to indemnify, defend, and hold harmless Owner and [. . .] from any and all claims [. . .] including claims alleged to have arisen from the sole negligence of Owner or its officers, employees, agents, or any other for which Owner may be liable.	*To the fullest extent permitted by law, Contractor agrees to indemnify, defend, and hold harmless Owner and [. . .] from any and all claims [. . .]* *Contractor's obligation shall not extend to the sole negligence of Owner or its officers, employees, agents, or any other for which Owner may be liable.*	*To the extent permitted by law, Contractor agrees to indemnify, defend, and hold harmless Owner and [. . .] from any and all claims [. . .]* *Contractor's obligation shall not extend to the negligence of Owner or its officers, employees, agents, or any other for which Owner may be liable.*	*To the extent permitted by law, Contractor agrees to indemnify, defend, and hold harmless Owner and [. . .] from any and all claims [. . .] but only to the extent of Contractor's negligence or that of Contractor's officers, employees, agents, or any other for which Contractor is liable.*

Indemnification Clauses

Expanding Language: *"To the fullest extent permitted by law, "*

Limiting Language: *"To the extent permitted by law, "*

Protecting Language: *"Except as provided in Article XX, "* or *"Notwithstanding any other provision, "* (beware of order of precedence)

Preserving Language: *"This Article shall survive termination of this agreement."*

Is the indemnification clause negotiable?

Each party (as "Indemnitor") agrees to defend, indemnify, and hold harmless the other party (as "Indemnitee") from and against any and all claims, losses, liability, costs, or expenses (including reasonable attorney's fees) (hereinafter collectively referred to as "claims") arising out of bodily injury of any person (including death) or property damage but only to the extent that such claims which result in vicarious/derivative liability to the Indemnitee are caused by the act, omission, negligence, misconduct, or other fault of the Indemnitor, its officers, officials, agents, employees, or volunteers.

(Comparative Form Mutual Indemnification Clause Example)

Where Do They Normally Show Up?

Broad Form

- Security Monitoring
- Internet/IT

Intermediate Form

- General Services
- Leases

Limited Form

- Design/Construction
- Improvement to Land
- Medical/Professional

Comparative Form

- Mutual Indemnification
- Between Public Entities

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Contractual Liability Coverage

How it Applies

- Most common in CGL
- Typically excludes all contractual liability
- Adds back coverage meeting "Insured Contract" definition
  - Defined term
  - Includes a standard indemnification clause

f) That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization.

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Contractual Liability Coverage

Belt and Suspenders Approach

- Third party beneficiary
  - Usually no direct action against insurer
- Use language that is as insurable as possible
- Broader than additional insured
- Additional insured necessary for direct access to assured funding source (insurer)

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Anti-Indemnification Statutes

- Typically prohibits:
  - Broad Form
  - Intermediate Form
  - *Against public policy and void*
- Typically applies to:
  - Architect, engineer, surveyor services
  - Contracts related to improvement of land
  - May have carve outs
- May or may not limit or prohibit insurance coverage

Greatest Challenges:

Non-delegable duties
Unclear responsibilities
Third Party Over claims

Anti-Indemnification Statutes

- Vary from State to State
- Exceeding statutory limitation may void entire indemnification requirement
- States vary upon including broader coverage as an additional insured

A.R.S. § 34-226 (C) *Except as provided in subsection B of this section, a construction contract or subcontract or design professional services contract or subcontract entered into in connection with a public building or improvement shall not require that the contractor, subcontractor or design professional* ***defend, indemnify, insure or hold harmless*** *the contracting agent or its employees, officers, directors, agents, contractors or subcontractors from any liability, damage, loss, claim, action or proceeding,* *and any contract provision that is not permitted by subsection B of this section is against the public policy of this state and is void.*

(Example: Arizona)

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Limitation of Liability Clauses

- Separate clause, usually in different location
- Limit type and amount of damages
- Eliminate consequential damages
- Can negate indemnity provisions.

Carve Out The Indemnity Clause

<u>Except as provided in Paragraph XX, Indemnification,</u>
In no event shall Contractor be liable for special, indirect, incidental, consequential, exemplary, or punitive damages, even if it has been advised of the possibility of such damages. Contractor's maximum liability to Owner under this agreement shall be the recovery of actual damages up to the amount payable by Owner to Contractor pursuant to this agreement.

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Subrogation

Meaning: *To stand in the shoes of another*

subrogation

n. assuming the legal rights of a person for whom expenses or a debt has been paid.

subrogate

verb

1. to put into the place of another; substitute for another.

2. Civil Law. to substitute (one person) for another with reference to a claim or right.

An insured's waiver is binding upon the insurer

It's hard to collect from an insured you have agreed to indemnify

Separation of insureds or separation of interests clause adds protection

http://dictionary.law.com/Default.aspx?typed=subrogate&type=1
https://www.dictionary.com/browse/subrogate

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Read the Policy

General Guidelines:

An insured can usually waive a right to subrogation <u>before</u> a loss.

An insured must usually protect a right to subrogation <u>following</u> a loss.

(Against public policy in some states)

Property Insurance:
A typical contractual provision

Liability Insurance:
Usually permitted

Workers' Compensation:
Must be endorsed

http://dictionary.law.com/Default.aspx?typed=subrogate&type=1
https://www.dictionary.com/browse/subrogate

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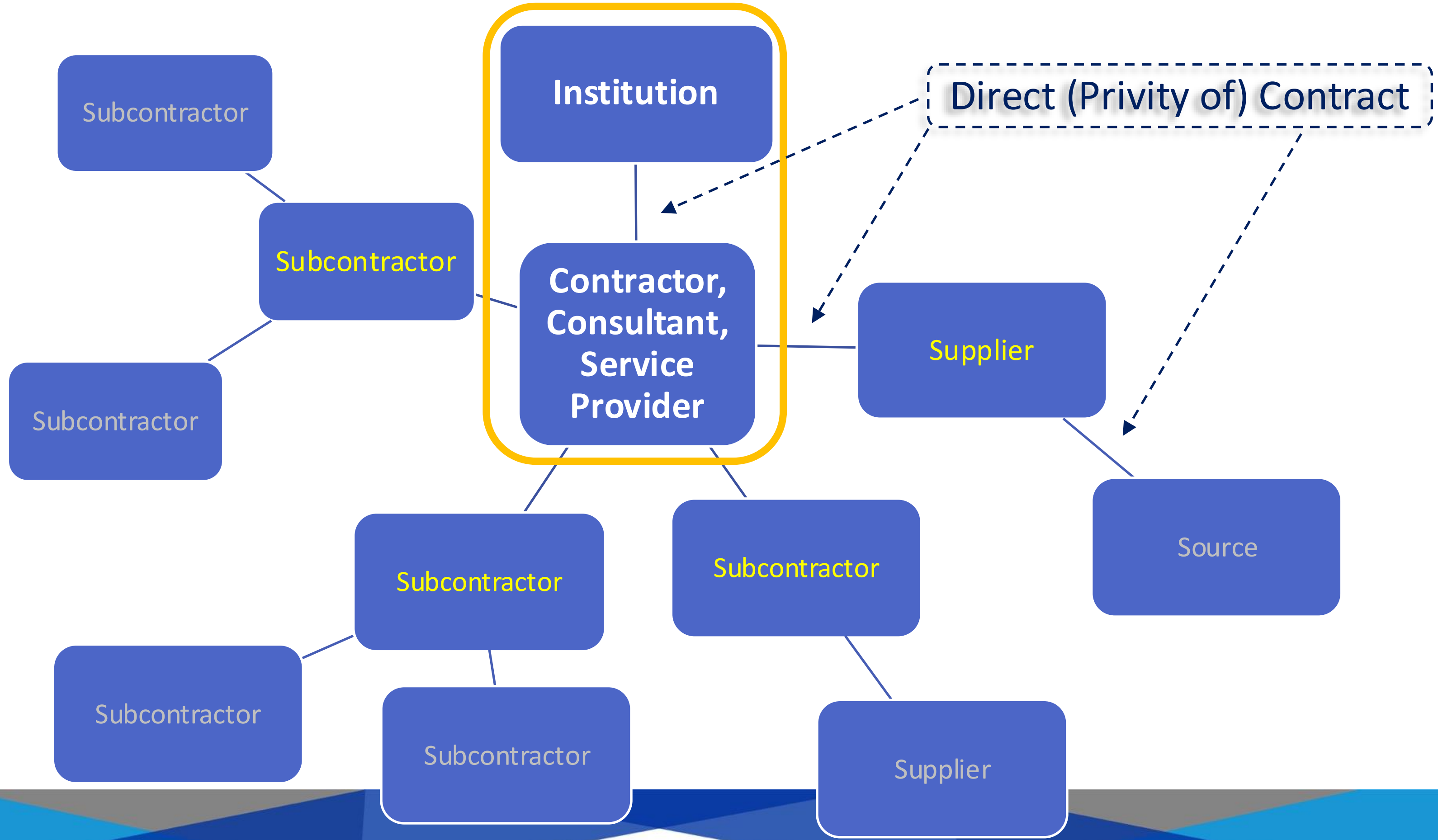
Relationship Example (Construction)

Parties to our agreement . . .



. . . but I <u>may</u> be a beneficiary of protection from any or all.

Commercial General Liability

Should reference a minimum standard (such as ISO CG 00 01)

- Includes contractual liability coverage within provided coverage

Scheduled additional insured endorsements

- CG 20 10 or CG 20 26 for ongoing operations
- CG 20 37 adds products/completed operations

Automatic additional insured endorsements

- CG 20 33 (ongoing operations) <u>requires</u> privity of contract, CG 20 38 does not (for subcontractors)
- CG 20 39 (products/completed ops) <u>requires</u> privity of contract, CG 20 40 does not (subcontractors)

Exclusions can affect parties differently

Commercial General Liability

- Specific and aggregate limits
- Project vs Location limits
- Layering of coverage
- Waivers of subrogation
- COIs vs endorsements

We set a minimum standard.
Avoid dictating their means of fulfilling it.

Example Language Referencing Recognized Standards

Contractor shall obtain and maintain throughout the term of this contract commercial general liability insurance at least as broad as the ISO CG 00 01 form policy with limits not less than $1,000,000 per occurrence and $2,000,000 in the aggregate. Contractor shall ensure that Owner (and . . .) is included as an additional insured. Policies shall include waiver of subrogation. ISO's CG 20 33 automatic additional insured endorsement is acceptable for <u>Contractor's</u> policies. Contractor shall either include coverage for subcontractors or shall require subcontractors to indemnify Owner (and . . .) and provide insurance coverage meeting the same minimum requirements. Subcontractors using an automatic additional insured endorsement shall be at least as broad as ISO's CG 20 38.

Self-Insurers

Do we have direct access to the funding source?

<u>If fully self-insured</u>:
The indemnification clause defines coverage

Usually gives direct access

Can be complicated by parental guarantees and alternative funding mechanisms

Can the funding source respond appropriately?

Is the risk funded?

Is the funding acceptable?

Is the risk capped?

Should you be an additional insured on the excess/umbrella policy?

Is an alternative funding mechanism in place?

Auto Liability

- Omnibus Insured Definition
  - Named Insureds
  - All permissive use
  - Anyone else liable for their use
- Designated Insured
  - CA 20 48
- Blanket
  - Company/manuscript forms

We will pay all sums an "insured" legally must pay . . . resulting from the ownership, maintenance or use of a covered "auto"

The following are "insureds."

a. *You for any covered "auto."*

b. *Anyone else while using with your permission . . . except (list)*

c. *Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.*

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Coverage and Limitations

- Read the contract carefully
  - Limiting or modifying language
- Limited to Policy coverage
  - Additional insured and contractual liability
  - Exclusions may affect parties differently
- Shared limits
  - Project or location limits
- Erosion of limits
  - First claims defended/paid, first protected
  - Aggregate limits

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Professional Liability and Medical Malpractice

Cross Liability Exclusion:

- No contractual liability
- No additional insured

Impact

You may need to defend lawsuit and seek indemnification for what is proven.

Photo credit: uh.edu

Occurrence vs Claims Made Form

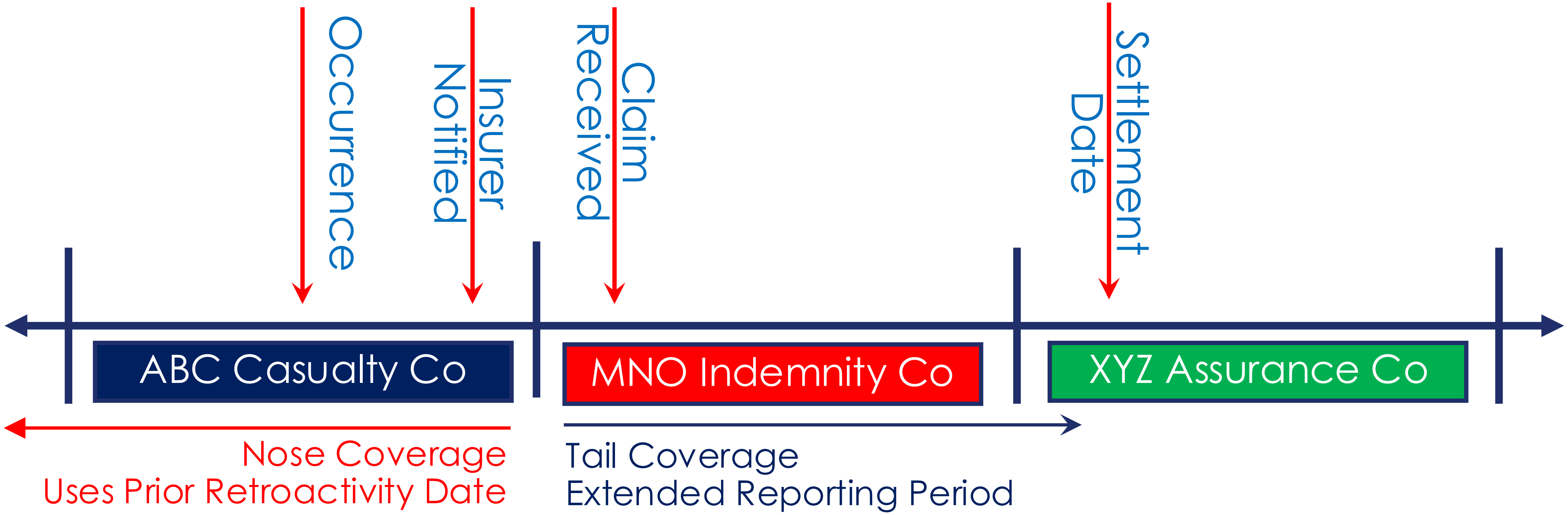
Occurrence Form

Covers claims occurring during the coverage period no matter when claim is made

Claims Made Form

Covers claims made or reported during the coverage period where occurrence was on or after the retroactivity date

Occurrence vs Claims Made Form



Occurrence Form: **ABC <u>is</u> responsible**

Claims Made Form: **ABC or MNO <u>may be</u> responsible**

MNO with nose coverage, **ABC** with tail coverage

Notice of event prior to expiration triggers **ABC**

No coverage without prior notice, nose or tail coverage!

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Occurrence vs Claims Made Form

<u>If you have Claims Made Coverage and Change Insurers</u>:

Notify current insurer of all incidents that may result in claims

Nose coverage provides more certain coverage

Tail coverage may still leave a coverage gap

Occurrence vs Claims Made Form

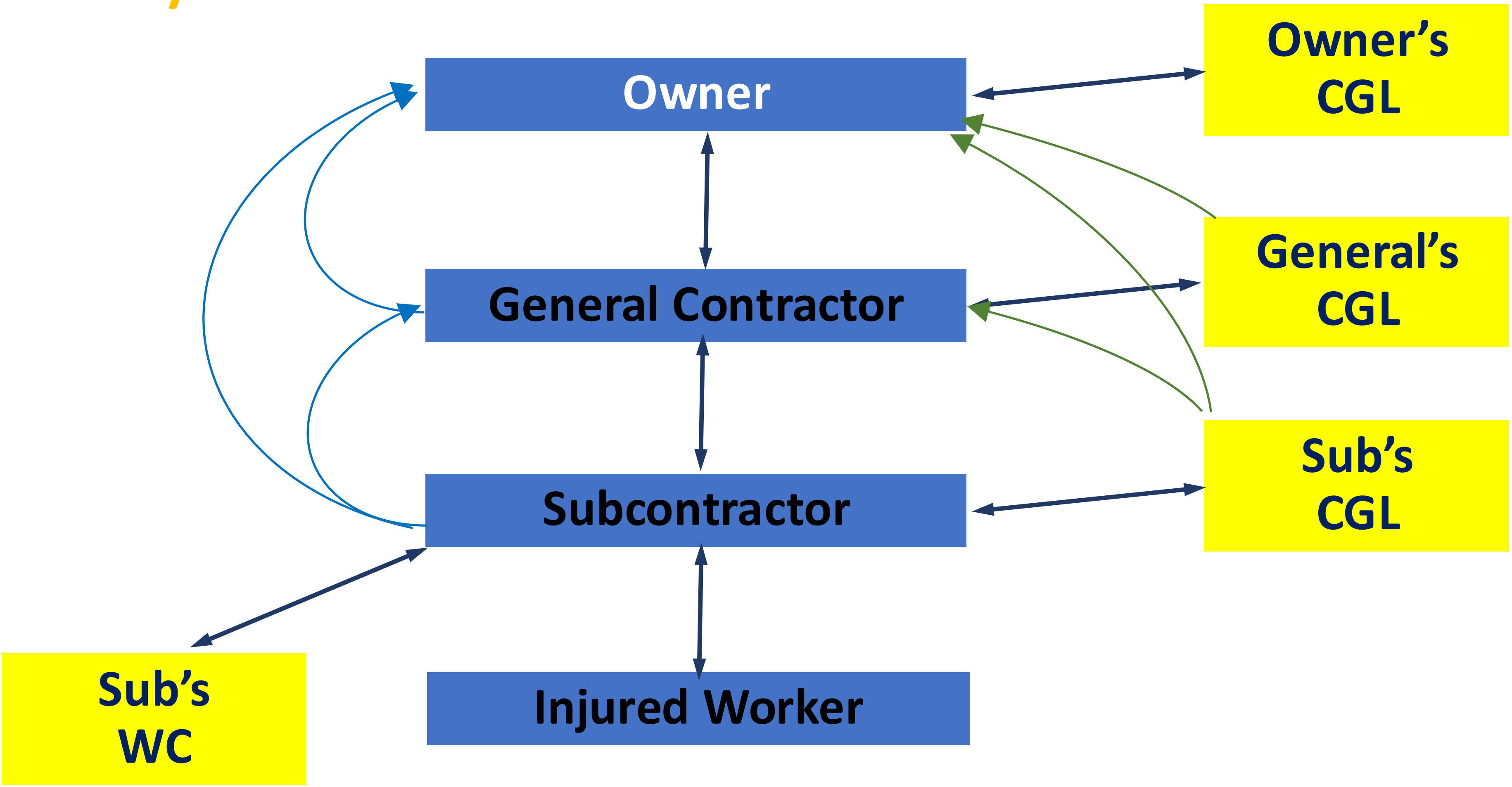
__Contractual Claims-Made Coverage Maintenance__:
Likely period for statute of limitations tolling +
Statute of limitations period (federal and state) +
Reasonable notice period =
Years of maintenance requirement

Third Party Over Claims

- Injured employee’s sole remedy against employer or fellow employee is WC
- Injured employee sues others who may be liable
  - Property owner
  - General contractor
  - Subcontractor
  - Architect or engineer
- Triggers multiple indemnity, contractual liability, and additional insured responsibilities

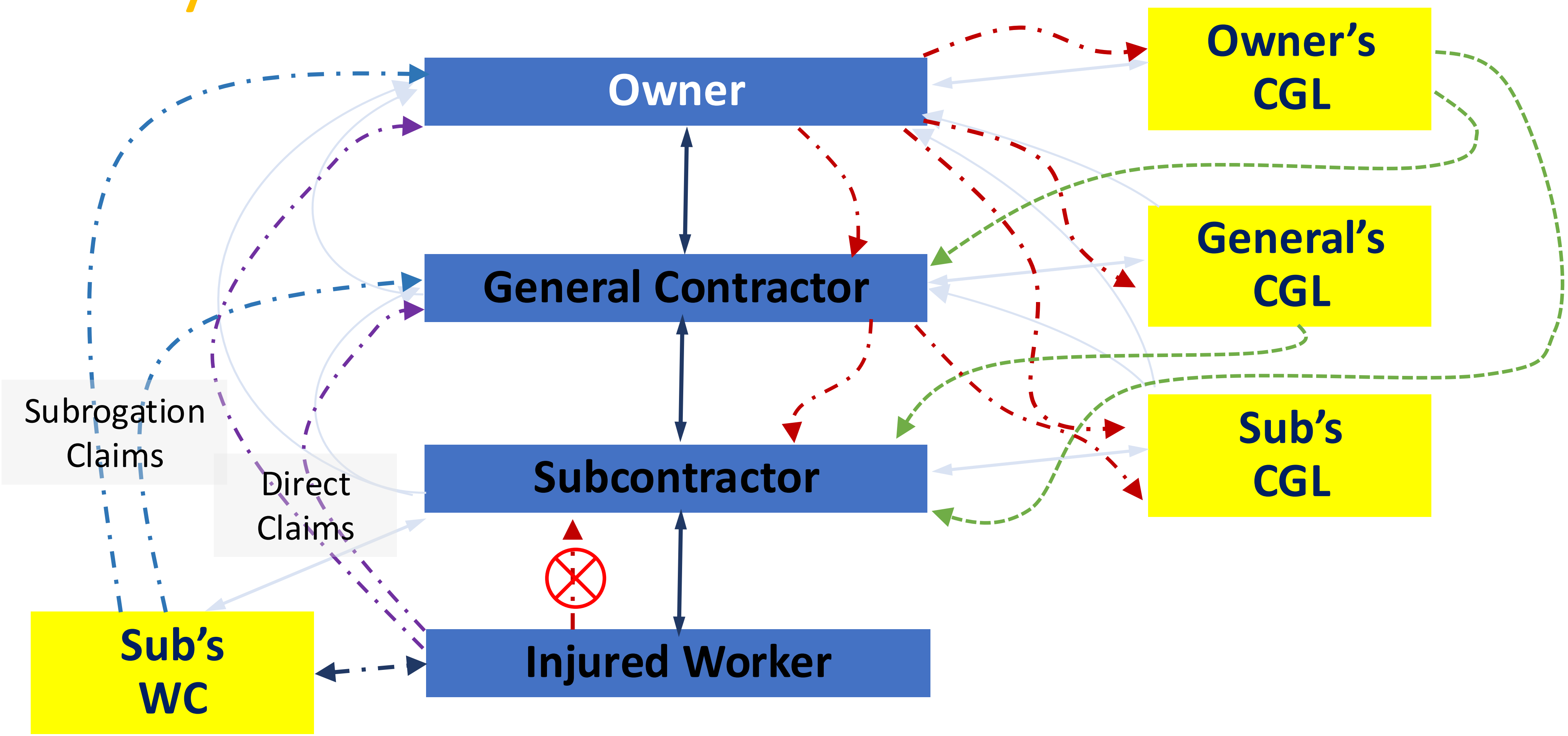
Photo credit: Bing Creative Commons

Third Party Over Claims



Based upon work by the International Risk Management Institute (IRMI)

Third Party Over Claims



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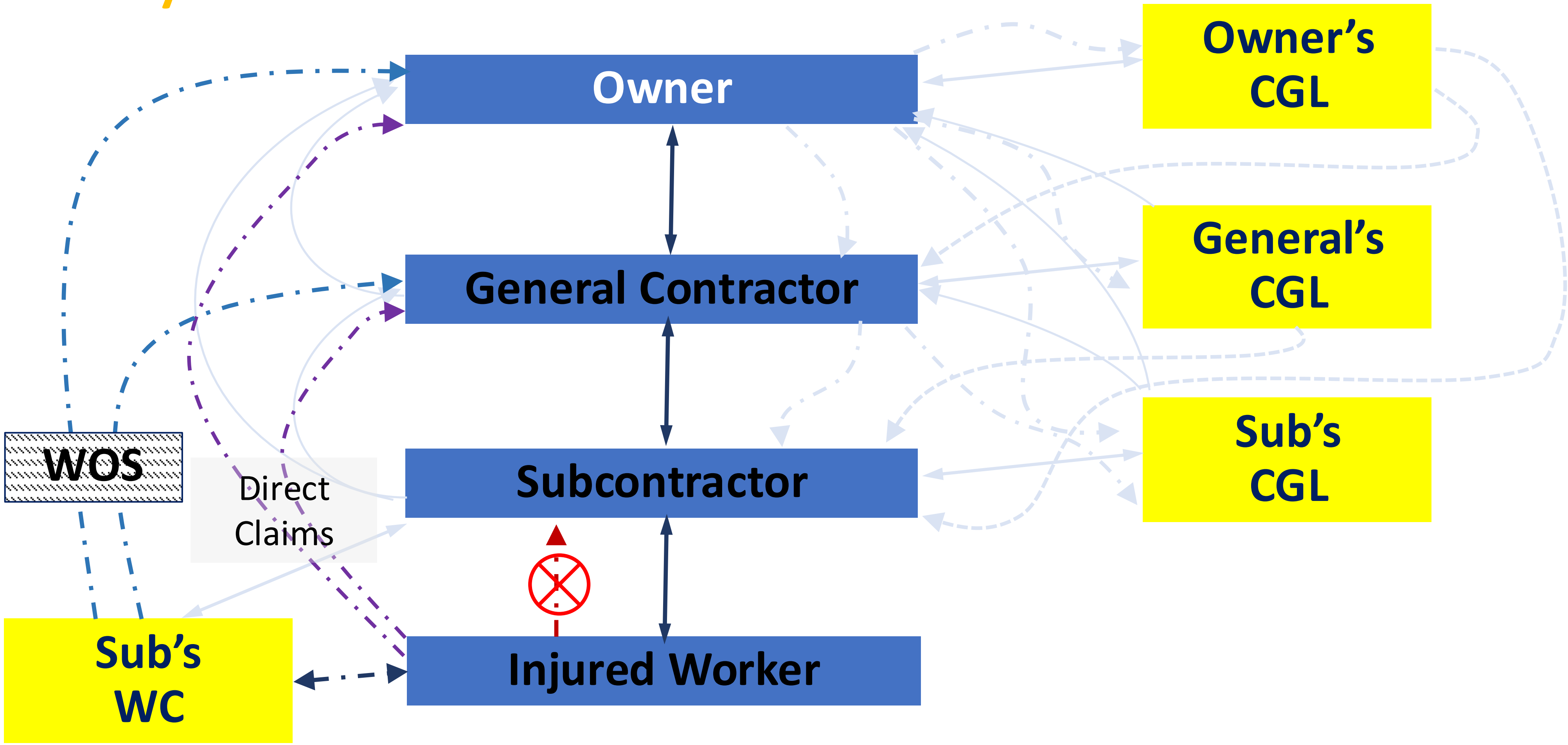
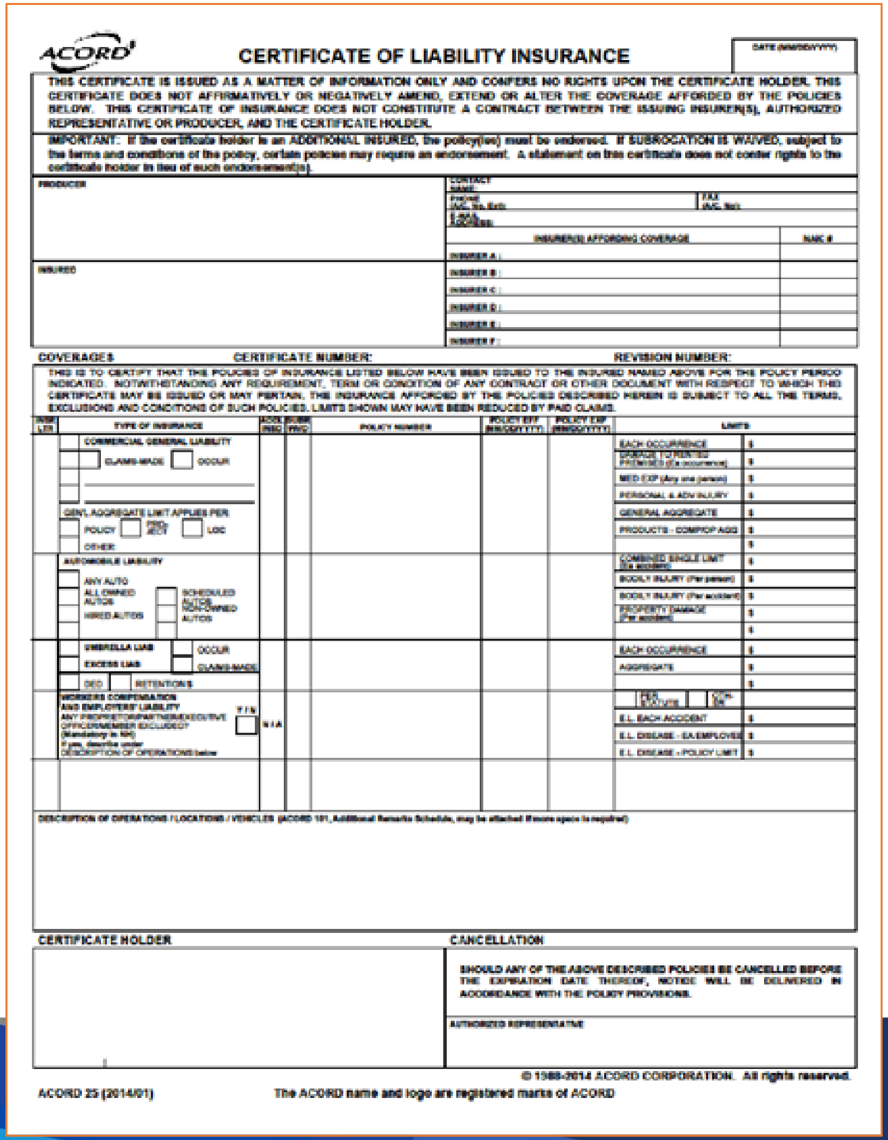


Based upon work by the International Risk Management Institute (IRMI)

Certificates of Insurance

- Provide a snapshot in time
- Don’t ask producer to do something they can’t do
  - Conveys information, not rights
  - Cannot misrepresent coverage
  - Can’t extend coverage via COI
- Obtain copies of language that grants or limits coverage



ACORD

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

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.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must 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).

PRODUCER

CONTACT NAME:

PHONE (A/C, No, Ext):

FAX (A/C, No):

E-MAIL ADDRESS:

INSURER(S) AFFORDING COVERAGE

NAIC #

INSURED

INSURER A :

INSURER B :

INSURER C :

INSURER D :

INSURER E :

INSURER F :

COVERAGES

CERTIFICATE NUMBER:

REVISION NUMBER:

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.

TYPE OF INSURANCE

POLICY NUMBER

LIMITS

COMMERCIAL GENERAL LIABILITY

CLAIMS-MADE

OCCUR

EACH OCCURRENCE

MED EXP (Any one person)

AUTOMOBILE LIABILITY

ANY AUTO

HIRED AUTOS

UMBRELLA LIAB

EXCESS LIAB

OCCUR

CLAIMS-MADE

EACH OCCURRENCE

AGGREGATE

WORKERS COMPENSATION AND EMPLOYERS' LIABILITY

E.L. EACH ACCIDENT

CERTIFICATE HOLDER

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.

AUTHORIZED REPRESENTATIVE

ACORD 25 (2014/01)

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Other, Sometimes Problematic Language

- Legacy language
- Is noncompliance a material breach?
- Remedy language
- Separation of insureds or severability of interests clause
- Primary and non-contributory
- Extended cancellation notice

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CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)
02/06/2026

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PRODUCER Your Local-Regional Broker 12345 Main St. Anytown, CA 96345	CONTACT NAME: James Brown	
	PHONE (A/C, No, Ext): 234-567-8901	FAX (A/C, No):
	E-MAIL ADDRESS: James.Brown@YLRB.com	
	INSURER(S) AFFORDING COVERAGE	NAIC #
	INSURER A : ABC Casualty Co	
INSURED Contracting Consultants PO Box 888 Elsewhere, CA 96234	INSURER B : MNO Indemnity Co	
	INSURER C : XYZ Assurance	
	INSURER D : Professional Protected Cell Captive	
	INSURER E :	
	INSURER F :	

COVERAGES CERTIFICATE NUMBER: REVISION NUMBER:

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.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
A	COMMERCIAL GENERAL LIABILITY	X	X	26-0002378	3/3/26	3/3/28	EACH OCCURRENCE	$ 1,000,000
	CLAIMS-MADE X OCCUR						DAMAGE TO RENTED PREMISES (Ea occurrence)	$
							MED EXP (Any one person)	$
							PERSONAL & ADV INJURY	$ Inc
	GEN'L AGGREGATE LIMIT APPLIES PER:						GENERAL AGGREGATE	$ 2,000,000
	POLICY X PRO-JECT X LOC						PRODUCTS - COMP/OP AGG	$ Exc
	OTHER:							$
A	AUTOMOBILE LIABILITY	X	X	2677879-03	3/3/26	3/3/28	COMBINED SINGLE LIMIT (Ea accident)	$ 1,000,000
	ANY AUTO						BODILY INJURY (Per person)	$
	ALL OWNED AUTOS X SCHEDULED AUTOS						BODILY INJURY (Per accident)	$
	X HIRED AUTOS X NON-OWNED AUTOS						PROPERTY DAMAGE (Per accident)	$
								$

	GEN'L AGGREGATE LIMIT APPLIES PER: POLICY [ ] PRO-JECT [X] LOC [X] OTHER:						GENERAL AGGREGATE	$ 2,000,000
							PRODUCTS - COMP/OP AGG	$ Exc
								$
A	AUTOMOBILE LIABILITY; ANY AUTO [ ]; ALL OWNED AUTOS [ ]; HIRED AUTOS [X]; SCHEDULED AUTOS [X]; NON-OWNED AUTOS [X]	X	X	2677879-03	3/3/26	3/3/28	COMBINED SINGLE LIMIT (Ea accident)	$ 1,000,000
							BODILY INJURY (Per person)	$
							BODILY INJURY (Per accident)	$
							PROPERTY DAMAGE (Per accident)	$
								$
B	UMBRELLA LIAB [X]; EXCESS LIAB [ ]; OCCUR [X]; CLAIMS-MADE [ ]; DED [ ] RETENTION $	X	X	26-0002378	3/3/26	3/3/28	EACH OCCURRENCE	$ 4,000,000
							AGGREGATE	$ 4,000,000
								$
C	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY; ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) Y / N [ ]; If yes, describe under DESCRIPTION OF OPERATIONS below	N / A	X	260002378	3/3/26	3/3/28	[X] PER STATUTE [ ] OTH-ER	
							E.L. EACH ACCIDENT	$ 1,000,000
							E.L. DISEASE - EA EMPLOYEE	$ 1,000,000
							E.L. DISEASE - POLICY LIMIT	$
D	Professional Liability			PL 2026-2026	1/1/26	1/1/27	$500,000 SIR	1,000,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

Certificate Holder and its officers, agents, and employees are additional insured when required by contract per CG 20 33. WC includes waiver of subrogation when required by Contract per WC 00 03. CGL and Auto Liability policies are primary, non-contributory when required by contract. CGL limits do not exceed amount required in contract, even if listed as "minimum."

CERTIFICATE HOLDER

SanTan College
555 Main Street
San Tan, AZ 85555

Attn: Contract Manager

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.

AUTHORIZED REPRESENTATIVE

James A Brown

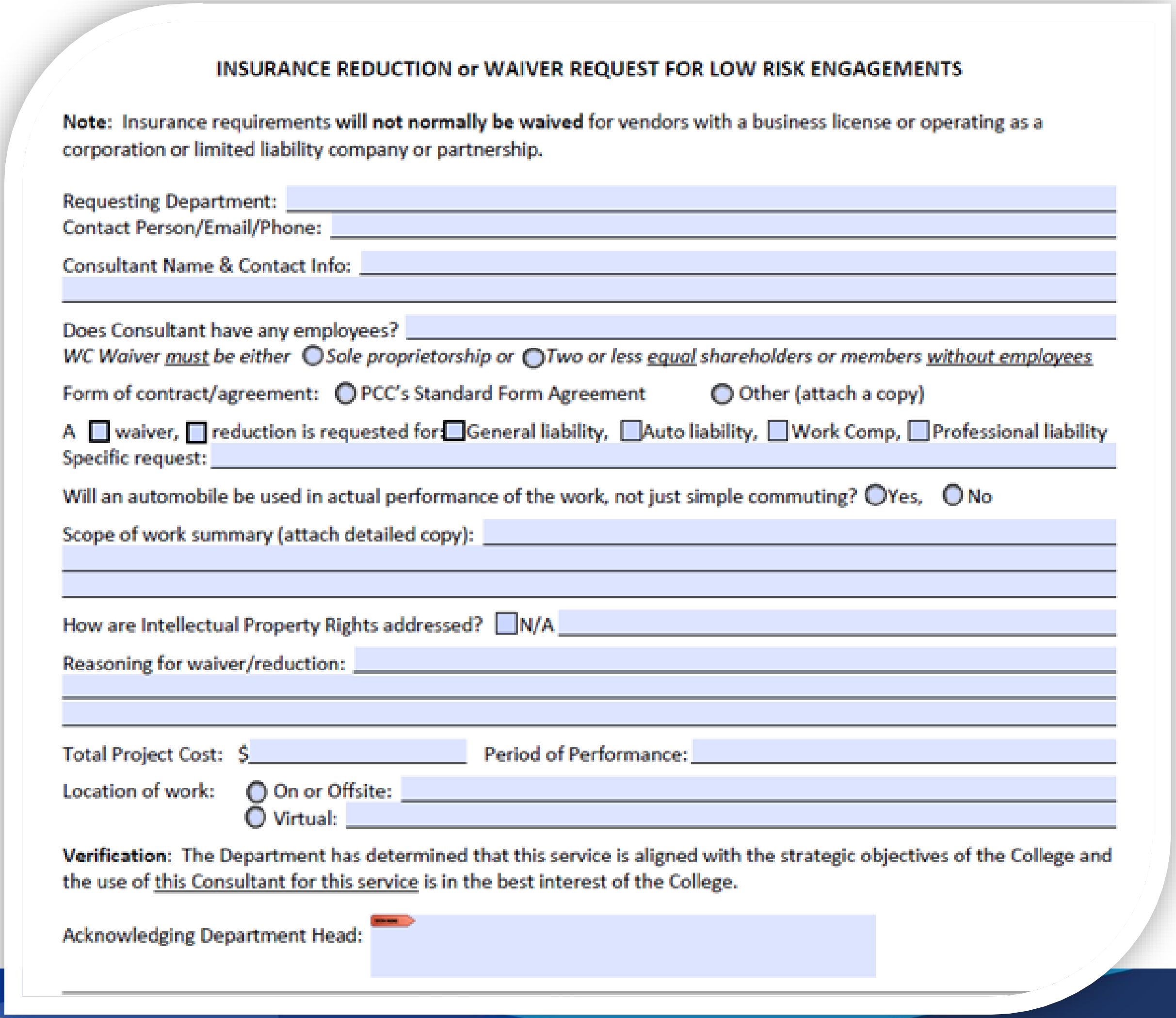
Dealing with Exceptions

Timely review process

- Requested early in process
- Request includes necessary information
- Administrator verifies need
- Balances opportunity and consequence

Consider workflows

- Auto routing
- Documents each step
- Copies available automatically



INSURANCE REDUCTION or WAIVER REQUEST FOR LOW RISK ENGAGEMENTS

Note: Insurance requirements **will not normally be waived** for vendors with a business license or operating as a corporation or limited liability company or partnership.

Requesting Department:

Contact Person/Email/Phone:

Consultant Name & Contact Info:

Does Consultant have any employees?

WC Waiver must be either ○ *Sole proprietorship or* ○ *Two or less equal shareholders or members without employees*

Form of contract/agreement: ○ PCC's Standard Form Agreement ○ Other (attach a copy)

A ☐ waiver, ☐ reduction is requested for: ☐ General liability, ☐ Auto liability, ☐ Work Comp, ☐ Professional liability

Specific request:

Will an automobile be used in actual performance of the work, not just simple commuting? ○ Yes, ○ No

Scope of work summary (attach detailed copy):

How are Intellectual Property Rights addressed? ☐ N/A

Reasoning for waiver/reduction:

Total Project Cost: $ Period of Performance:

Location of work: ○ On or Offsite:

○ Virtual:

Verification: The Department has determined that this service is aligned with the strategic objectives of the College and the use of this Consultant for this service is in the best interest of the College.

Acknowledging Department Head:

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Reversing Positions

- Understand your expenditure of funds restrictions
- Use an appropriate form of indemnification
  - Make your understanding of the law very clear in written communication
  - Confirm they are not asking you to violate the law
  - Use limiting language: *"To the extent permitted by law, "*

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In Conclusion

Themes
Create and protect value
Align with strategy
Critical thinking
Flexibility

- Clarify standards
- Clarify duties
- Clear intention of the parties
- Use an appropriate form of indemnification
- Define minimum insurance standards
- Extra effort on higher risk
- *Manage* COIs, don't just *track* them
- Ask questions, listen, engage
- Beginning with the end in mind helps maintain perspective

Discussion Time

CPE Code:

<Update>

Photo credit: Source Unknown (Bing)

cbmi

COLLEGE BUSINESS MANAGEMENT INSTITUTE

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Director of Risk Management

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Executive Director of ERM, E&C, TIXC

Pima Community College

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UK Auxiliary Services

SACUBO
SOUTHERN ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS

Examples: References in the Signed Contract

ARTICLE 11 – INSURANCE AND BONDS

11.1 CMAR shall provide Insurance as provided on the attached Exhibit B, and in accordance with Section 11.1 of the General Conditions. CMAR shall provide proof of such insurance and all required endorsements in forms acceptable to College prior to commencing any Work under this Contract.

11.2 CMAR shall provide performance and payment bonds to College in accordance with Section 11.2 of the General Conditions and A.R.S. § 41-2574.

11.3 Failure to provide proof of insurance and the required endorsements, or the required bonds, in forms acceptable to College will be a material breach and sufficient grounds for College' termination of this Contract for cause.

ARTICLE 12 – INDEMNIFICATION

CMAR shall have and assume the indemnity obligations set forth in Section 12 of the General Conditions.

Examples: Responsibility and WC

A. These Insurance Requirements apply to the party contracting with College (Contractor, CMAR, and/or Design Professional) working or providing services in relation to the Project pursuant to the Contract, Job Order, Project Order, or other agreement with College to which this Exhibit B is attached as an Exhibit. Contractor/CMAR/Design Professional, as applicable, shall obtain and submit to College before any Work is performed, certificates of insurance from the Contractor/CMAR/Design Professional's insurance brokers, agents, or carriers indicating the presence of coverages and limits of liability as set forth in the Contract Documents, but in no event shall the coverages and limits be less than those specified as follows:

1. **Workers' Compensation:**

   a) Coverage A: Statutory Benefits

   b) Coverage B: Employer's Liability

Bodily Injury by accident	$1,000,000	each accident
Bodily Injury by disease	$1,000,000	policy limit
Bodily Injury by disease	$1,000,000	each employee

   c) Coverage must include a Waiver of Subrogation endorsement.

   d) Where applicable, the U.S. Longshore and Harbor Workers Compensation Act Endorsement shall be attached to the policy.

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Examples: Auto Liability

2. **Commercial Auto Coverage:**
   (a) Auto Liability at least as broad as the standard ISO CA 00 01 form with limits of not less than $1,000,000 each accident, combined Bodily Injury and Property Damage Liability insurance. Certificate to reflect coverage for "Any Auto" <u>or</u> "All Owned, Scheduled, Hired and Non-Owned."

   (b) If the Contract Documents require Contractor/CMAR/Design Professional to remove and haul hazardous waste from the Project site, or if the Project involves such similar environmental exposure, pollution liability coverage equivalent to that provided under the ISO Pollution Liability-Broadened Coverage for Covered Autos Endorsement shall be provided, and the Motor Carrier Act Endorsement (MCS 90) shall be attached.

Examples: General Liability

3. **Commercial General Liability:**

   Commercial General Liability insurance at least as broad as an ISO standard form CG 00 01 with not less than the following limits:

Each Occurrence Limit	$1,000,000
Personal Injury/Advertising Injury Limit	$1,000,000
Products/Completed Operations Aggregate Limit	$1,000,000
General Aggregate Limit (other than Products/Completed Operations)	$2,000,000

(a) Coverage must include a Waiver of Subrogation endorsement.

(b) Policy forms must include:

1) Premises and Operations coverage with no explosion, collapse or underground damage (XCU) exclusions.
2) Products and Completed Operations coverage. Contractor/CMAR agrees to maintain this coverage for a minimum of 10 years following completion of the Contractor/CMAR's Work and to continue to name College as an Additional Insured for the entire 10-year period.
3) Blanket contractual coverage for the indemnity/hold harmless agreements assumed in this Contract. Any Employee Exclusion must be deleted.
4) Broad Form Property Damage coverage, including completed operations or its equivalent.

Examples: General Liability (continued)

5) An endorsement naming College and any other party required to be named as an additional insured under the Contract Documents as Additional Insured(s) under the coverage specified under Commercial General Liability. Acceptable endorsements shall be at least as broad as the current versions of the following ISO forms except where noted:

   i. CG 20 10 11 85 or CG 20 26 11 85, or
   ii. CG 20 10 and CG 20 37, or
   iii. Automatic additional insured endorsements CG 20 33 and CG 20 39. These forms are not acceptable for subcontractors. Acceptable automatic additional insured endorsements for subcontractors include CG 20 38 and CG 20 40.

   Any form that does not grant additional insured status for both the ongoing operations and products/completed operations coverages IS NOT ACCEPTABLE.

6) Coverage on an "Occurrence" form. **"Claims Made"** and **"Modified Occurrence"** forms are not acceptable.

7) Coverage to include general aggregate limits on a "per project" basis.

Examples: Professional & Excess Liability

4. **Errors & Omissions Liability**
   (Applicable to any Design Services and/or any design/engineering/pre-construction services are part of Work)

Each Claim	$1,000,000
Aggregate	$3,000,000

   a) Coverage provided must have no exclusion for design-build projects.
   b) Evidence of coverage for ten (10) years beyond completion of the Project must be provided.

5. **Excess Liability:**
   Umbrella or excess liability to extend the above liability coverages and limits to reach a minimum total combined limit of at least the following:
   a) For Contractor/CMAR:

Each Occurrence/Claim	$4,000,000
Aggregate	$10,000,000

   b) For Design Professional:

Each Occurrence/Claim	$2,000,000
Aggregate	$5,000,000

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Examples: Pollution & Privacy (Cyber)

6. **Pollution Legal Liability** $1,000,000

   (Applicable as to any pollutants or hazardous waste exposures as part of the Work). Contractor/CMAR/Design Professional shall maintain insurance covering losses caused by pollution conditions (including mold) that arise from the Work.

7. **Privacy, Security and Data Breach:**

Each Claim/Occurrence	$3,000,000
Aggregate	$3,000,000

   Privacy, security or data breach coverage, which such coverage may be provided via a separate policy or as an endorsement to any other policy the Contractor/CMAR/Design Professional maintains.

Examples: Builders' Risk (Offsite: Contractor)

6. **Contractor/CMAR "All Risk":**
   Contractor/CMAR shall maintain "all risk" insurance on a replacement cost basis covering:
   a) Loss or damage to personal property (for which it has title and/or risk of loss) which is to become a final part of the Project, during any time such personal property is in transit and while stored or worked upon away from the Project Site.
   b) Materials or any other type of personal property ("personal property") acquired for the Project or delivered to the Project site. Contractor/CMAR/Design Professional agrees that it shall be solely responsible for such property unless and until it becomes a fixture on the Project, or otherwise is installed and incorporated as a final part of the Project. Such responsibility shall include, but not be limited to, theft, fire, vandalism and use by unauthorized persons.

Examples: Builders' Risk (Onsite: Owner)

G. **College All Risk Policy.** Unless otherwise provided, the College shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builders risk "all-risk" or equivalent policy form in the amount of the initial contract sum, plus value of subsequent contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis. This insurance shall include interests of the College, Contractor/CMAR/Design Professional and its subcontractors in the Project, and shall include, without limitation, insurance against the perils of fire and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal, including demolition occasioned by enforcement of any applicable legal requirements. Contractor/CMAR/ Design Professional shall bear the responsibility for the deductible for such coverage when a loss affects the Work. Such property insurance maintained by College does not cover any tools or equipment owned or rented by Contractor/CMAR/Design Professional including trailers, excavators, scaffoldings, or forms. Contractor/CMAR/Design Professional is responsible for providing insurance coverage for such items.

Examples: Other Requirements

9. Other Requirements

a) All policies must contain an endorsement affording an unqualified thirty (30) days notice of cancellation to the additional insured(s) in the event of cancellation, non-renewal or material reduction in coverage.

b) All policies must be written by insurance companies whose rating, in the most recent Best's Rating Guide, is not less than A- VII. All coverage forms must be acceptable to College.

c) Certificates of Insurance with the required endorsements evidencing the required coverages must be delivered to the College prior to commencement of any Work. Updated certificates of insurance shall be sent to the College as required policies are renewed, changed, or replaced. Failure of College to demand such certificate or other evidence of full compliance with these insurance requirements or failure of College to identify a deficiency from evidence that is provided shall not be construed as a waiver of Contractor/CMAR/Design Professional's obligation to maintain such insurance. College shall have the right, but not the obligation, to prohibit Contractor/CMAR/Design Professional or any of its subcontractors or subconsultants from entering the Project site until such certificates or other evidence that insurance has been placed in complete compliance with these requirements is received and approved by College.

Examples: Other Requirements

C. **Additional Insureds.** The insurance coverage, except Workers' Compensation and Errors and Omissions, required by this Exhibit B, shall name College, its agents, representatives, officers, directors, officials and employees as Additional Insureds. The endorsement shall include the following language or equivalent: "Coverage afforded by this policy for the benefit of the additional insured(s) is primary and any other coverage maintained by such additional insured(s) shall be non-contributing with the coverage provided under this policy." Regarding Commercial Auto Liability insurance, coverage provided under the policy's omnibus insured definition meets the requirement.

D. **Waiver (Subrogation).** The policies, except Professional Liability, shall contain a waiver of transfer rights of recovery (subrogation) against College, its agents, representatives, directors, officers, and employees for any claims arising out of the Design Professional's work or service.

E. **Waiver (Property Insurance).** College and Contractor/CMAR/Design Professional waive all rights against each other and against College, Architect/Engineer, and separate contractors for damages caused by fire or other perils covered by Builder's Risk or any other property insurance, except such rights as they may have to the proceeds of such insurance. Such insurance may be subject to an amount deductible from the sums otherwise payable thereunder and the burden of such deduction shall be borne by the party receiving the direct benefit of such insurance.

F. **Deductibles and Self-Insured Retention.** Contractor/CMAR/Design Professional shall be responsible to satisfy any deductible or self-insured retention with respect to any of the coverages required by the Contract Documents.

Examples: Other Requirements

H. **Rental Equipment.** In the event that rental of equipment is undertaken to complete and/or perform the Work, Contractor/CMAR/Design Professional agrees that it shall be solely responsible for such rental equipment. Such responsibility shall include, but not be limited to, theft, fire, vandalism and use by unauthorized persons.

I. **CCIP/OCIP.** If the Contract Documents provide for a Contractor/CMAR or Owner Controlled Insurance Program ("CCIP" or "OCIP") which provides coverage for the Work, the Contractor/CMAR/Design Professional shall comply with all provisions of any such CCIP or OCIP, as applicable.

J. **Additional Provisions.** Any additional provisions specific to the Project are attached hereto or to the applicable Contract Documents or Project Order. In the event of any conflict between the attached terms and the terms of this Exhibit, the Contractor/CMAR/Design Professional shall comply with the more stringent provisions.

K. **Right to Increase Limits.** College reserves the right, in its sole discretion, to require higher limits of liability coverage if, in College' opinion, operations by or on behalf of Contractor/CMAR/Design Professional create higher than normal hazards.