Insurance and Indemnification Guidelines

Presented by:
Maureen Martinez
Insurance & Loss Prevention Specialist

STATE OF NEVADA - Risk Management Division

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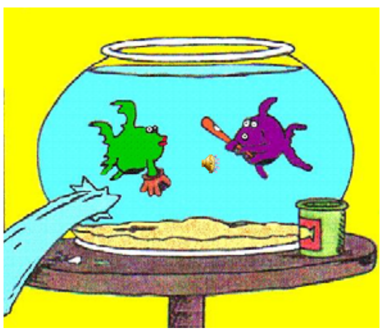
FISH Happens!



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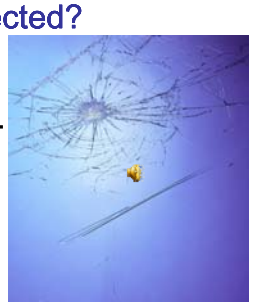
How do you manage the unexpected?

Private companies can practice…



Risk avoidance – don't engage in the Risky activity!

3

or limit their business activities…

- Don't build it unless it is safe.

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Public entities

Lots of Risks but…

- May not be able to avoid THEM…
  - Host the event.
  - Provide that necessary service.
  - Build, manage and operate public facilities or infrastructure.
  - Provide safety and fire protection.

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How do public entities manage Risk??

One way to manage risk is…

NRS Chapter 41….

Tort Claims Act

and our

Tort Claims Office!

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Another tool is…

- Risk Transfer…
  - Let someone else assume your Risk!

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Insurance

- Insurance – a social device used to transfer risk to another party.
  - Advantages
    - Controls uncertainty
    - Readily accepted
    - Additional services
  - Disadvantages
    - Cost
    - Exclusion and limits

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Indemnification

Indemnification used in contracts to
….transfer RISK.

- Hire **independent contractors** to

Do the WORK
and
assume the RISK for
YOU!

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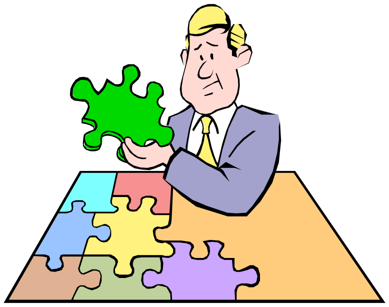
So how Does all Work???



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Fundamentals of Business Insurance

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Where Does Insurance, Bonding and Indemnification Fit in the Contracting Process?

- At the inception of an idea!

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Important Principles That Apply to Any State Contract

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Principle #1

- ✓Contractually transfer the appropriate risks relating to the contract to the contractor.
- ✓Ask for appropriate insurance and bonds to cover the risk.

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Principle #2

- ✓Do not indemnify an independent contractor.
- ✓Contractors have unlimited liability.
- ✓The state of Nevada is subject to NRS Chapter 41, which limits the states' liability.
- ✓Indemnifying a contractor may harm the state's defense against a claim.

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Principle #3

- Many times outcome based **statements of work** and **supervision** are far better **RISK CONTROL** measures to protect the state's interests than insurance or bonds.
- Insurance and bonds should be thought of as the **SAFETY NET** that catches us when everything else goes wrong.

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Asking for Insurance Coverage Alone Does Not Protect Your Agency From All the Risks of Contracting

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Hold Harmless, Defend, Indemnify

- **Hold Harmless**: release of claims
- **Defend**: pays for litigation costs
- **Indemnify**: pays for damages to 3rd parties

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Indemnity/Hold Harmless Agreements

- ✓A method of contractually transferring the risk.
- ✓States that the contractor or service provider will not hold us responsible for any claims arising out of their negligent acts and that the contractor will pay associated claim costs.
- ✓Provides the state with claims protection.
- ✓Most effective when used in conjunction with the appropriate insurance clauses.

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3 TYPES OF INDEMNIFICATION CLAUSES

- ✓Limited - You will hold me harmless from your negligence.
- ✓Intermediate - You will hold me harmless from all negligence except mine.
- ✓Broad - You will hold me harmless from all negligence.

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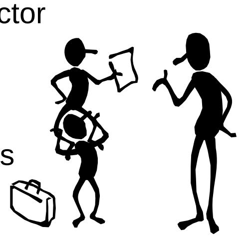
Other Contract Components Protecting the State's Interests

- Independent Contractor
- Statement of Work
- Warranties
- Representations
- Insurance and Bonds
- Consideration
  - ✓Retention
  - ✓Payment schedule



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Why Require Insurance and Bonds?

You can contractually make the provider of the good or service responsible for their negligence.

However, if the contractor does not have a way to pay for these losses, then the contract alone will not protect the state. Insurance and bonds are ways to backup contract indemnity statements.

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How Does Insurance Work?

- Insurance policies tend not to overlap with other types of policies.

There are some perils that insurance policies just don't cover:

- Intentional Harm or wrongdoing, other than self-defense.
- Crimes, other than defense coverage until found guilty.

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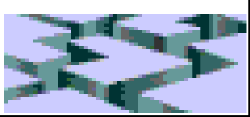
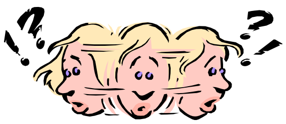
Common Policy Parts & Pieces

- Coverages – The Insuring Agreement.
- Exclusions – What isn't covered.
- Who is an Insured – Who is covered by the policy.
- Limits of Insurance – How much the insurance company will pay.
- Policy Conditions – Restrictions, duties, responsibilities.
- Definitions – What the terms mean.



What Does "Claims Made" or "Occurrence" Form Mean?

Insurance policies are written on a "claims made" or "occurrence" basis. These terms address **claims reporting time periods**.



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A **Claims Made** policy form will respond to incidents arising on or after the policy retroactive date and which are reported during the term of the policy.

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An **Occurrence** policy form covers all claims arising out of incidents occurring during the policy period, regardless of whether or not the policy is still in effect at the time that the claim is made.

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Common Types of Insurance Coverage

- Commercial General Liability
- Automobile Liability
- Professional Liability
- Workers' Compensation

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Less Common Types of Insurance Coverage

- Excess or Umbrella Liability
- Crime
- Pollution Liability
- Aviation
- Various Inland Marine Policies
- Garage and Garagekeepers' Legal Liability

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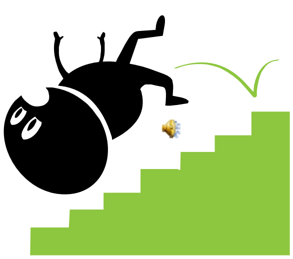
Commercial General Liability (CGL)



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Commercial General Liability (CGL)

Standard business policy that pays for defense costs and damages to third parties as a result of a claim filed against the Insured that alleges their negligent acts and/or omissions resulted in bodily injury and/or property damage.

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Commercial General Liability (CGL)

Coverages include :

- ✓Bodily injury.
- ✓Property damage.
- ✓Limited Contractual liability.
- ✓Products and completed operations.
- ✓May also cover personal and advertising injury liability.

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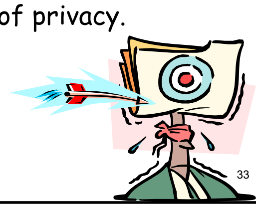
CGL Policy Definitions

- ✓**Bodily Injury**: The injury of physical tissue by an outside force, bodily harm, sickness, or disease.
- ✓**Personal Injury**: Libel, slander, false arrest, and invasion of privacy.



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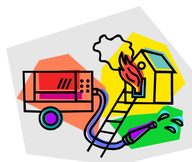
CGL Policy Definitions

"Property damage" **means**:
Physical injury to ***tangible*** property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or



CGL Policy Definitions
(Continued)

For the purposes of this insurance, electronic data is not tangible property.

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What Does This Really Mean?

Standard CGL Policy will not pay for losses due to a contractors damage to your agency's ELECTRONIC DATA unless it is policy is endorsed to provide that coverage.

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What is Products Coverage?

Products coverage pays claims on behalf of the contractor for damage or injury to **third parties** resulting from ***something the contractor made, repaired, or installed.***

37

What is Completed Operations coverage?

- Completed operations coverage pays for bodily injury or property damage to **third parties** resulting from a service or on-going operations.

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CGL Policy Definitions

(Continued)

Contractual Liability: A portion of Commercial General Liability coverage that allows **limited** coverage for liability assumed under the contract. The coverage allowed by Contractual Liability includes:

- Liability assumed under an "insured contract".
- Liability that the insured would have in the absence of the contract or agreement.

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CGL Exclusions

- Liquor Liability – Needs additional endorsement.

Separate policies are needed for the other GL exclusions including:

- Pollution
- Crime
- Professional Liability
- Auto Liability
- Transportation of Goods
- Contractor's Property – such as tools, equipment and building materials.

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Automobile Liability

Insurance that provides coverage for third party bodily injury or property damage arising out of the *use of an insured vehicle*.

41

When Do you Need Automobile Insurance Coverage?

WHEN the contractor needs to use a MOTOR VEHICLE to provide the services.

Commercial Automobile Coverage is also needed whenever the contractor will be transporting the state's employees, clients, etc. or the state's property.

42

Commercial Auto Coverage vs. Personal Auto Coverage?

- Use of Personal Automobile coverage instead of Commercial or Business Automobile coverage may be used for SOLE PROPRIETORS but ask for the endorsements…
  - ✓**Business Use Endorsement** or insure that business use is covered under their personal auto policy.
  - ✓**Personal Automobile** coverage will not name the state as an **Additional Insured**.

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Automobile Liability Coverage Considerations

- Ask questions, such as, but not limited to:
  - Does contractors' policy include coverage for owned, non-owned or hired vehicles?
  - Will the Contractor transport groups of people for the state?
  - Use vehicles or carry cargo that could make an accident severe?
  - Have multiple vehicles on the road at any given time?
  - Bring heavy equipment or trucks onto your property?

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Automobile Liability Coverage Considerations

- Will driving be only a small part of the contractual activities?
- Is there little or no chance that the state could be held responsible for the Contractor's actions while driving?

45

Automobile Liability vs. Mobile Equipment

- Is Contractor bringing Mobile or heavy equipment onto your property?

Note: MOBILE EQUIPMENT is not considered to be an AUTOMOBILE, therefore an automobile liability policy provides no coverage for the operation of this equipment.

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Automobile vs. Mobile Equipment (cont.)

–Require CGL coverage for the liability exposure arising from the Contractor's operation of the mobile equipment.

– CGL insurance does not cover the transport of mobile equipment.

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Professional Liability or Errors and Omissions Coverage

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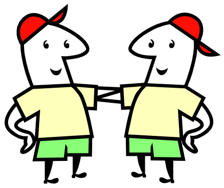
The Terms Professional Liability and Errors and Omissions Coverage are used interchangeably.



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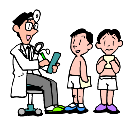
Who Should Have Professional Liability or Errors and Omissions Coverage?

- ✓Licensed and accredited specialists such as:
  - ✓Doctors or medical practitioners.
  - ✓Engineers.
  - ✓Information technology specialists (computer programmers, etc).
  - ✓And non-licensed professionals such as interpreters, recorders, testing facilities and research laboratories.



What Does Professional Liability or Errors and Omissions Cover?

- ✓Pays the financial loss of the state, when the covered person breaches standard of care and fails to perform their professional duty.
- ✓The coverage is specific to the nature of the profession.
- ✓Covers malpractice, misconduct, negligence, errors, omissions, or incompetence in the performance of a covered act.

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Workers' Compensation

- ✓ Insurance covering employee injuries, disability or death.
- ✓ The policy protects the employer from being sued by the employee for injuries.

✓**Nevada law requires all employers, unless exempt, to provide this coverage for all subject employees working in Nevada.**

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Which Companies needs Workers' Compensation????

- Corporations
- **Companies** who have **employees** including:
- **LLC**
- **Partnerships**

  and
- **SOLE PROPRIETORS**

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What about the Sole Proprietor?

May reject Workers' Compensation coverage if they meet *two* conditions:

- Must NOT use employees to perform services under the state contract.

AND

- Must sign AFFIDAVIT FORM.

Form available on Risk Management Web Site!
http://www.risk.state.nv.us/

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What Specific Questions Should I Ask About Workers' Compensation?

- Is the contractor an incorporated business?
- Is contractor using the services of others to perform services under the contract?

If Yes…

Workers' Compensation is required.

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CRIME COVERAGE

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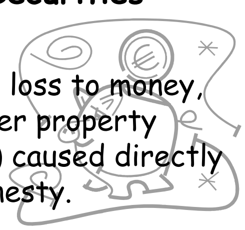
Employee Dishonesty, Third Party Fidelity and (when applicable) Money and Securities



Insurance covering loss to money, securities, and other property (other than money) caused directly by employee dishonesty.

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When Do You Need to Ask for Employee Dishonesty Coverage?

When the contractor is handling money, securities, other valuable property, or data.

58

Third Party Fidelity Bond

Employee Dishonesty coverage should be specifically endorsed to include Third Party fidelity coverage and include State as loss payee.

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What is the Difference Between an Umbrella Policy and Excess Coverage?

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Umbrella Policies

✓Provide excess coverage over another underlying liability policy.

✓Many times provides broader coverage than the primary (underlying) liability policy.

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Excess Liability

✓Pays after the primary (underlying) liability policy limits have been exhausted.

✓Follow form of the primary (underlying) liability policy.

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Pollution Liability Coverage

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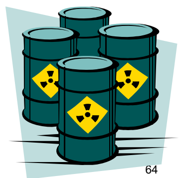
Contractors Pollution Liability Coverage (CPL) & Pollution Legal Liability (PLL)

Protects contractors against claims for third-party bodily injury, property damage or cleanup costs/environmental damages arising from pollution conditions caused in the performance of covered operations.



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Inland Marine Coverage

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What is Inland Marine Coverage?

- Coverage for property which involves an element of transportation.
- Either the property is:
  - Actually in transit,
  - Held by a bailee,
  - At a fixed location which is an important instrument of transportation,
  - Or is a movable type of goods which is often in different locations.

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Various Inland Marine Coverages

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Kinds of Inland Marine Insurance

1. Domestic goods in transit,
2. Goods of Bailee's customers;
3. Moveable equipment and unusual property,
4. Property of certain dealers, and
5. Instrumentalities of communication and transportation.

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When Should Your Agency Require Inland Marine Coverage?

- When agency goods or property are being transported by another entity.
- When agency goods or property are left in the care, custody, and control of another entity.
- When a contractor is transporting state equipment from one place to another.
- When state property is placed on exhibition by another entity e.g. artwork, historical documents, artifacts, etc.

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Builder's Risk Coverage

- ✓ Inland marine insurance that provides direct damage coverage to buildings or structures under construction.
- ✓ Also covers foundations, fixtures, machinery, and equipment used to service the building, materials, and supplies used in the course of construction.
- ✓ Fire, theft, and vandalism are the most frequent claims.

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When Does Your Agency Need to Ask for Builder's Risk Coverage?

- ✓ When a building is being constructed.
- ✓ When substantial alterations will be made to an existing structure i.e., bearing walls, lifting foundations, extensive construction.

71

When Your Agency Doesn't Need to Ask for Builder's Risk Coverage?

- For construction to an existing building that does not involve structural modifications, or substantial alteration of the building.

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Installation Floater

- ✓Usually an add-on to a Builders Risk Policy, but may be purchased separately by subcontractors on the project.
- ✓Insurance that covers machinery and equipment of all kinds during transit, installation, and testing at the purchaser's premises.
- ✓Theft and vandalism are covered.

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When Should You Require a Installation Floater?

✓When a building is being constructed, repaired, or remodeled and there will be:

- ✓More than $75,000 in building materials and supplies at a storage location, or in transit that are intended to become a permanent part of the building.

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Aviation Liability

Covers liability for bodily injury and property damage to others (i.e., injury to, or death of persons outside the aircraft as well as property damage or destruction done with the aircraft), arising out of the ownership, maintenance, or operation of an aircraft.

75

When Do You Need Aircraft Liability Coverage?

When the contractor is using an airplane to provide the contracted service.

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Aircraft Liability Coverage Considerations

- If carrying state passengers on behalf of the state, make sure that:
- Check the qualifications and certifications of the pilot.
  (1) The pilot is certified to carry passengers and
  (2) The Aircraft Liability provides coverage for the passengers on a "per seat" limit.

Contact RISK Management for more information.

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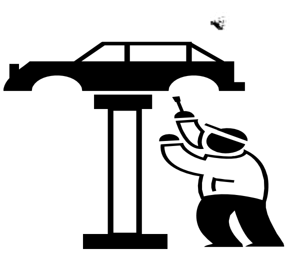
Garage and Garagekeepers' Legal Liability Coverage



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Garage Liability Coverage

- ✓Covers garage operators for liability, medical payments, and automobile physical damage arising out of the operations of auto dealers, service stations, auto repair shops, and parking lots.
- ✓Includes General Liability coverage for garage operations.

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Garagekeepers' Legal Liability Coverage

- ✓Coverage for autos left for service, repair, storage, or Safekeeping.
- ✓The limits of coverage should be high enough to cover the total value of any autos left for safekeeping (yours and others) at any time.

80

What About Self-Insurance?

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Before Accepting Self-Insurance

- Make sure the contractor has the financial stability to be self-insured.

Ask for:

- Audited financial statements of their self-insurance fund - monies should be set aside in a funded reserve to pay claims.
- Ask for policies, procedures, or other adequate documentation demonstrating the contractor's ability to adjust, process, settle, litigate, and pay claims.

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What is a Bond?

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What is a Bond?

✓A *Surety Bond* is a risk transfer mechanism that performs the following functions:

- ✓Guarantees that the bonded project will be completed according to the terms of the contract and at the determined contract price.
- ✓Guarantees that the laborers, suppliers, and subcontractors will be paid even if the contractor defaults.
- ✓Relieves the owner from the risk of financial loss arising from liens filed by unpaid laborers, suppliers, and subcontractors.

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What is a Bond?

(Continued)

- ✓Reduces the possibility of a contractor diverting funds from the project.
- ✓Provides an intermediary (the surety) to whom the owner can air complaints and grievances.
- ✓Lowers the cost of construction in some cases by facilitating the use of competitive bids.

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Bonds?

Bonds are different from insurance.

A bond is a *simple guarantee*.

- ✓If there is a loss, the bonding company (Surety) will pay but will seek full reimbursement from the contractor.
- ✓Premium is based on the contractor's <u>loss experience, assets, and finances</u>.

87

What Are The Typical Kinds of Bonds Used in Contracts?

88

Bid Bond

Provides financial assurance that the *bid is submitted in good faith* and that the contractor intends to enter into the contract at the bid price and if stated in the bid, *provide the required performance and payment bonds*.

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Performance Bond

Protects the state from financial loss should the contractor fail to perform the contract in accordance with contract terms and conditions.

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Payment Bond
(Labor & Materials Bond)

Guarantees that the contractor will pay certain subcontractors, laborers and material suppliers associated with the project.

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Maintenance Bond

Protects the state against defects in workmanship or materials (usually for two years) after the contractor has completed the work.

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Additional Bond Information

✓Bond terms are usually 12 – 24 months.

✓The bond amount requested depends on the risk of the contract.

✓In most cases, bonds cost about 1% - 3% of the contract amount.

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Bonding Related Questions to Ask

- Is bonding a requirement either by statue or a condition of the funding source?
- How much will it cost to find another contractor e.g. RFP, staff time, etc. if this contractor is unable to fulfill contract?
- If the project is not completed within the specified timeframe, how much will it cost the state?
- Or if project is completed, but not as specified, how much could it cost the state time or money to hire another vendor to fix the problems.

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Break

95

Coverage Assessment

How much insurance?

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Contract Risk Assessment

- What is the activity?
- Who could be harmed?
- What could go wrong?
- How bad could it be?
- How much could it cost?
- What would the headlines be if the worst possible happened?

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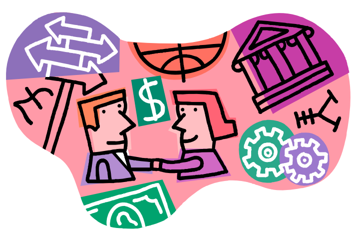
Contract Risk Assessment

Assignment of insurance amounts based on both the BENEFITS and the RISK.



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Weighing the Value of Opportunities

Rating	Value	Description (Opportunity)
1	Insignificant	Minor budgetary, funding, or resource gain; Little benefit from services provided; little impact on public relations.
2	Minor	Low budgetary, funding, or resource gain; Some benefit from services, some gain in public relations.
3	Moderate	Moderate budgetary, funding, or resource gain; good benefit for services, Adequate public relations.
4	Major	Major budgetary, funding, or resource gain; provides necessary services, Good public and/or client relations.
5	Critical	Huge budgetary, funding, or resource gain; service consider a critical service, Excellent public and/or client relations.

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Risk Assessment

- Extreme Risk
- High Risk
- Moderate Risk
- Low Risk

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E = Extreme Risk:

- First, consider not doing the activity.
- If you must, you will need to decide how much a potential loss could cost?
- In general, risks at this level warrant RISK MANAGEMENT REVIEW…

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H = High Risk:

- Could a potential loss cost in excess of $1 million? If so, ask for more coverage.
- Make sure your assessment considers all costs of potential losses.
- Risk Management would not recommend limits of less than $1 million for High rated risks.

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M = Moderate Risk:

- Standard limit of insurance is $1 million.
- Assessment should consider all costs of potential losses.
- If assessment reveals potential loss in excess of $1 million, your risk may actually be high (see H for High Risk.)

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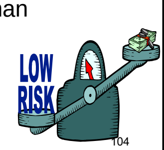
L = Low Risk:

- If risk is minimal, this is the area where coverage and limits may potentially be flexible.
- Standard limit is still $1 million.
- In the case of minimal risks, the agency could make a business decision to lower the limits of coverage.
- Risk Management would not generally recommend insurance limits of less than $500,000.
- If the risk assessment reveals only minute risk, agency could make a business decision to waive coverage.



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Supplemental Clauses

ICING ON THE CAKE

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Additional Insured

- ✓Protects the state when named in an action that is not its responsibility or fault.
- ✓The state benefits by not having to use its assets for litigation purposes.

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Additional Insured

- ✓Should be issued as an endorsement to the contractors insurance coverage.
- ✓The endorsement to the contractors insurance coverage may be issued on a blanket basis that applies to any entity the contractor enters into a contract with.

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Additional Insured Samples

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Notice of Cancellation or Change

- ✓Requires the contractor or service provider's insurance company to notify us if:
  - ✓There is a possibility of the policy limits being exhausted.
  - ✓The policy is cancelled or non-renewed.

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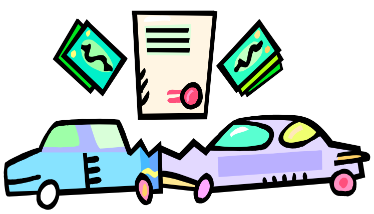
Certificates of Insurance And Additional Insured Endorsements



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What Document(s) are Acceptable to Verify Insurance Coverage?

- ✓Certificate of Insurance.
- ✓Letter from corporation stating they are self-insured. This should be accompanied by a financial statement, unless you are certain about the entity's financial stability.
- ✓Letter from bank stating the amount held in reserves to pay claims and lawsuits.

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Certificate(s) of Insurance

- ✓Requires the contractor to prove to the state that it has met the insurance requirements of the contract.
- ✓One way to prove this request is by submitting a Certificate of Insurance stating the coverage and policy limits.
- ✓Also MUST HAVE ENDORSEMENTS to verify Additional Insured Status.

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Certificate(s) of Insurance
(Continued)

- ✓Make sure the coverage and policy limits match the contract requirements.
- ✓Look at the policy effective date and expiration dates to make sure they coincide with the contract term. If not, request another certificate several months before the policy expires.

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Certificate of Insurance
(Continued)

- ✓The State of Nevada or your agency is named as the certificate holder and made additional insured by endorsement.
- ✓What do the comments in the description section say? Contact the agent with any questions.
- ✓Is there an SIR (self-insured retention) listed?

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What Does SIR Mean?

- ✓Stands for Self-Insured Retention.
- ✓Works like a deductible.
- ✓Any losses must exceed the SIR amount before the insurance company will handle the claim, so vendor must have assets available to pay large claim if they have a large SIR.

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Reading Certificates of Insurance

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Contracting Resources

- http://www.risk.state.nv.us/

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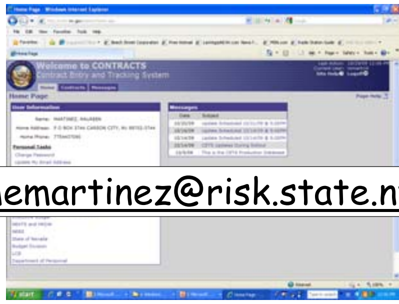
For CETS approvals



memartinez@risk.state.nv.us

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Additional Questions

Maureen E. Martinez
Insurance and Loss Prevention Specialist
Risk Management Div
775-687-3193 phone
775-687-3195 fax

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The End

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