



RISK TRANSFER THROUGH CONTRACTING

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DISCLAIMER

The material being provided in this presentation is for your general information, and is not a substitute for legal advice. Consult your entity's attorney for advice concerning specific situations.

OBJECTIVES

- Define risk transfer
- Discuss the different types of risk transfer.
 - Contractual (non-insurance) Risk Transfer
 - Hold harmless/Indemnification Agreements
 - Waivers
 - Insurance
 - Certificates of insurance
 - Subrogation
 - Performance and Payment Bonds

RISK TRANSFER

Risk transfer is a risk management and control strategy that involves the contractual shifting of risk from one party to another.

RISK ASSESSMENT



- Identify the risks associated with a particular activity or project
 - Consider the following impacts when evaluating the consequences of the loss to the organization
 - Financial
 - Human
 - Reputational
 - Damage to assets
 - Customer service
 - Environmental
 - Regulatory

WHAT DO YOU DO?

- Will the organization:
 - Avoid
 - Transfer
 - Accept

CONTRACTUAL RISK TRANSFER

Contractual Risk Transfer is a non-insurance agreement between two parties whereby one agrees to indemnify and hold the other party harmless for specific actions, inactions, injuries or damages.

WHAT IS A CONTRACT?

- A legally binding agreement that is entered into between two or more parties in which there is a promise to do something in return for a valuable consideration.
- The “Big 4”
 - Service
 - Construction
 - Joint Powers/Inter-Agency/MOU
 - Grants

CONTRACTUAL RISK TRANSFER

- Contracts
 - Be in writing
 - Identify clearly what is expected of each party
 - Identify how the parties will be compensated
 - Identify insurance requirements
 - Include an indemnification paragraph

INDEMNIFICATION CLAUSES/ HOLD HARMLESS AGREEMENTS

The contractual obligation of one party, the indemnitor, to return another party, the indemnitee, to the same financial condition that existed prior to the loss or claim.

INDEMNIFICATION DRAFTING TIPS

- Keep it simple
- Avoid outdated terms
- Avoid requirements that cannot be achieved in the marketplace
- Allow flexibility
- The type of clause you include will depend on the specific situation and your bargaining power with the other party

INDEMNIFICATION CLAUSES

- 3 different types of Indemnification Clauses
 - Broad Form—transfers all liability, even if your entity is at fault.
 - Intermediate Form—transfers liability, regardless of which party caused the damages or loss, unless you are solely at fault.
 - Limited Form—transfers liability, but only to the extent that the indemnitor is negligent

BROAD FORM

“To the fullest extent permitted by law, Contractor agrees to defend and indemnify the City, and its officers, employees and volunteers from and against all claims, damages, losses, and expenses, including attorney fees arising out of or resulting from the performance of work under this Agreement regardless of whether or not it is caused in part by the negligent acts, errors or omissions of the City, and its officers, employees or volunteers. Contractor agrees this indemnity obligation shall survive the completion or termination of this Agreement.”

INTERMEDIATE FORM

“To the fullest extent permitted by law, Contractor agrees to defend and indemnify city, and its officers, employees and volunteers, from and against all claims, damages, losses, and expenses, including attorney fees, arising out of or resulting from the performance of work under this Agreement; **except that this indemnification shall not apply to any of the foregoing incurred solely as a result of the negligent acts, errors, or omissions of the City and its officers employees or volunteers.** Contractor agrees this indemnity obligation shall survive the completion or termination of this Agreement.”

LIMITED FORM

“To the fullest extent permitted by law, Contractor agrees to defend and indemnify the City, and its officers, employees and volunteers from and against all claims, damages, losses and expenses, including attorney fees, arising out of or resulting from the performance of work under this Agreement, but only to the extent caused in whole or in part by the negligent acts, errors or omissions of the Contractor. Contractor agrees that this indemnity obligation shall survive the completion or termination of this Agreement.”

INSURANCE

- Types of insurance
 - GL
 - Auto
 - Workers' Compensation
 - Professional (aka Errors and Omissions)
 - Builder's Risk (construction contracts)
 - Umbrella/Excess
- Identify acceptable minimum limits
- Include an additional insured requirement

WHAT IS A CERTIFICATE OF INSURANCE?

- Issued by the insurance company
- Verifies the existence of insurance
- Information only
- Not a contract
- Does not give any specific rights to the certificate holder
- Does not change the policy
- Additional insured info

ACORD® **CERTIFICATE OF LIABILITY INSURANCE** DATE (MM/DD/YYYY)
Today's Date

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 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
The Wheeler Agency
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INSURER(S) AFFORDING COVERAGE

INSURER A: (Name of their insurance company) NAIC #
INSURER B: _____
INSURER C: _____
INSURER D: _____
INSURER E: _____
INSURER F: _____

INSURED
(Their Name)
(Their mailing address)
(Their City) FL 32025

COVERAGES **CERTIFICATE NUMBER:**

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED 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 LTD	TYPE OF INSURANCE	ADDITIONAL INSURED	POLICY NUMBER	POLICY EFF DATE (MM/DD/YYYY)	POLICY EXP DATE (MM/DD/YYYY)	LIMITS
☒	COMMERCIAL GENERAL LIABILITY CLAIMS MADE ☒ OCCUR	☒	99-99999-99	11/06/2000	11/06/2000	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (EA INSURED) \$ 5,000,000 MED EXP (Any one person) \$ 10,000 PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMPLETED AGG \$ 2,000,000
A	GEN'L AGGREGATE LIMIT APPLIES PER: POLICY ☐ PERIOD ☐ LOC ☐ OTHER: _____					COMBINED SINGLE LIMIT \$
	AUTOMOBILE LIABILITY ANY AUTO ☐ SCHEDULED AUTOS ☐ ALL OWNED AUTOS ☐ NON OWNED AUTOS ☐ HIRED AUTOS ☐					
	UMBRELLA LIAB EXCESS LIAB ☐ OCCUR ☐ CLAIMS MADE ☐					EACH OCCURRENCE \$ AGGREGATE \$
	WORKERS COMPENSATION AND EMPLOYERS LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? ☐ (Mandatory in FL) If yes, describe the nature/DESCRIPTION OF OPERATIONS below	Y/N ☐ N/A				PER STATUT. ☐ OTHER ☐ E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$
DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks) CERTIFICATE HOLDER IS AN ADDITIONAL INSURED						
CERTIFICATE HOLDER (Your name) (Your mailing address) (Your city, state and 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. AUTHORIZED REPRESENTATIVE (signature of their insurance agent)						

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CRITICAL ISSUES

- Limitations
 - Holder not guaranteed notice of cancellation
 - Numerous disclaimers
 - Information not binding on the insurer
- Potential Uninsured Loss
 - Coverage
 - Indemnification
 - Subrogation

REMEMBER.....

- Insurance coverages are always subject to the exclusions, definitions, and conditions of the Policy.
- Many “standard form contracts” simply protect the interests of the contractor and others actually attempt to shift the legal responsibilities of the contractor to your entity.
- In certain situations, you may want to request an endorsement rather than a certificate only.
- Create a reminder system.

PERFORMANCE AND PAYMENT BONDS

- Performance Bonds
 - Generally used with service/construction contracts.
 - Allows your organization to complete the project, and requires the Contractor to “pay the difference” between their agreed to price and that of a replacement contractor.
- Payment Bonds
 - Requires the Contractor to pay for the materials and/or labor for the contract.

WAIVERS

A waiver is a legal document that a person who participates in an activity may be required to sign acknowledging the risks involved in his or her participation.

By signing the waiver, the participant accepts the risks and agrees to not sue the party providing the services.

WAIVER OF SUBROGATION

A waiver of subrogation provision prevents the insurance company (who steps into the shoes of the insured after it pays a loss) from suing the other party to the contract – which likely caused the loss.



"Sign here to indicate you have no idea what
you've signed."

RECAP

- Risk Assessment/Risk Appetite
- Contractual risk transfer
- Insurance as a transfer method
- Waivers



QUESTIONS

THANK YOU!

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