

## *I Thought I Was an Additional Insured*



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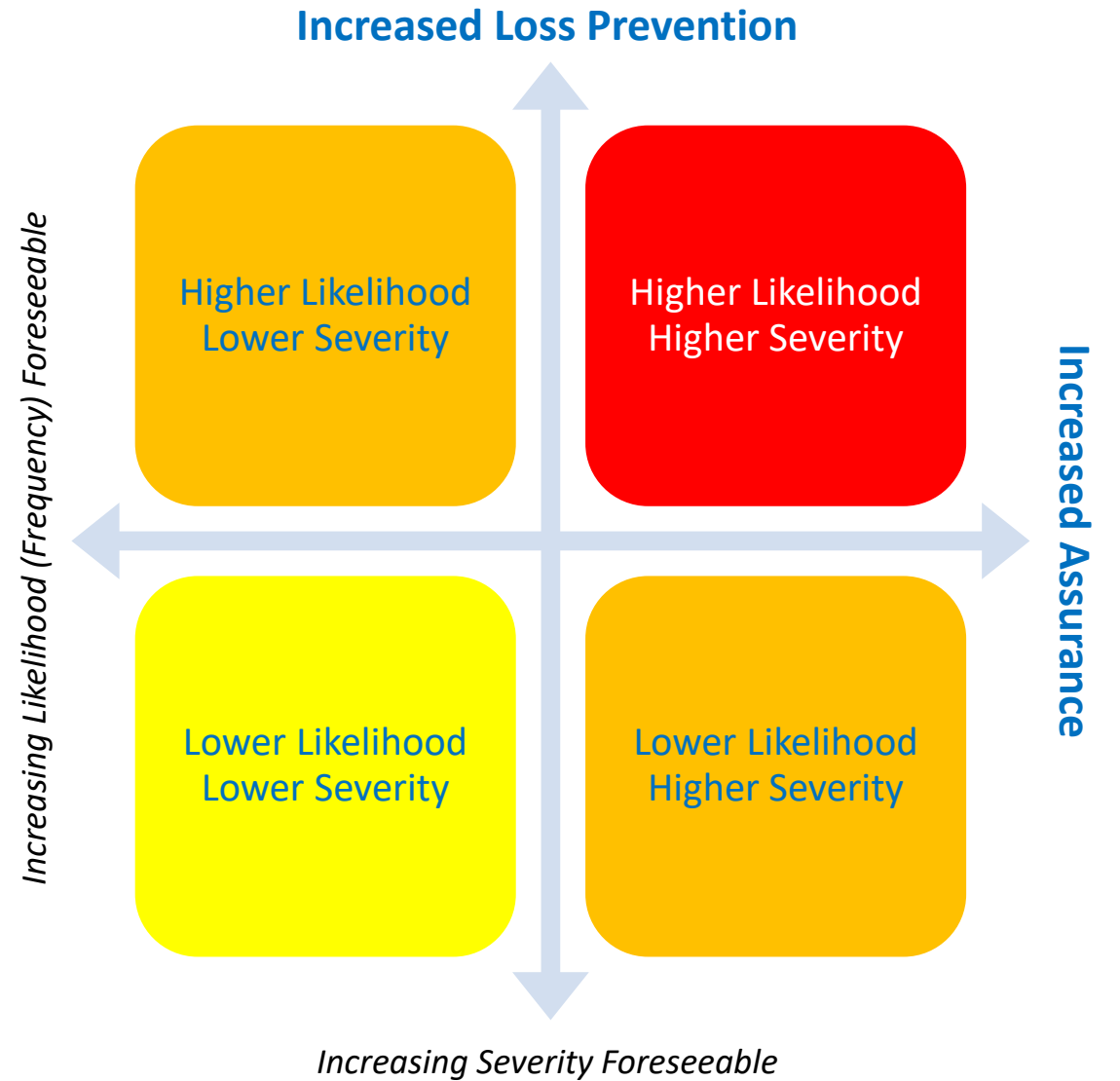
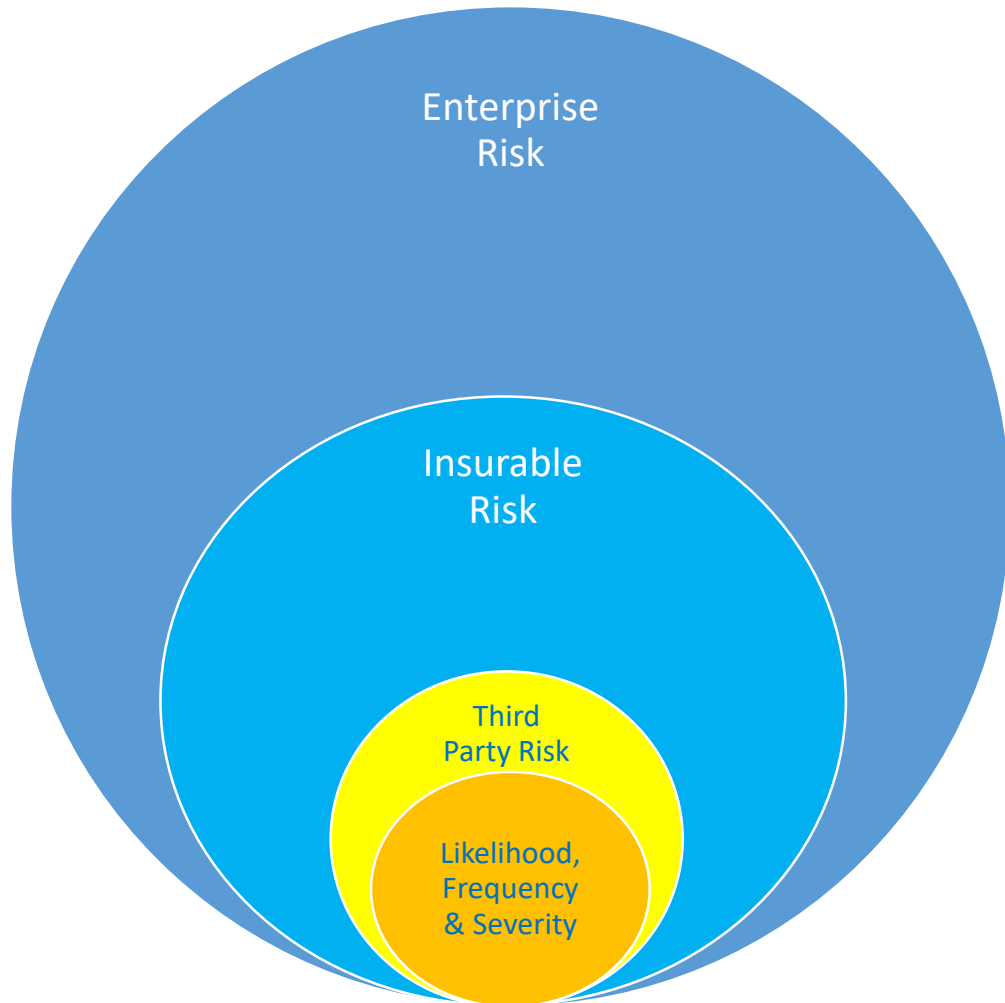
# Perspective on Risk Management

## *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)



# Today's Focus Area



# 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

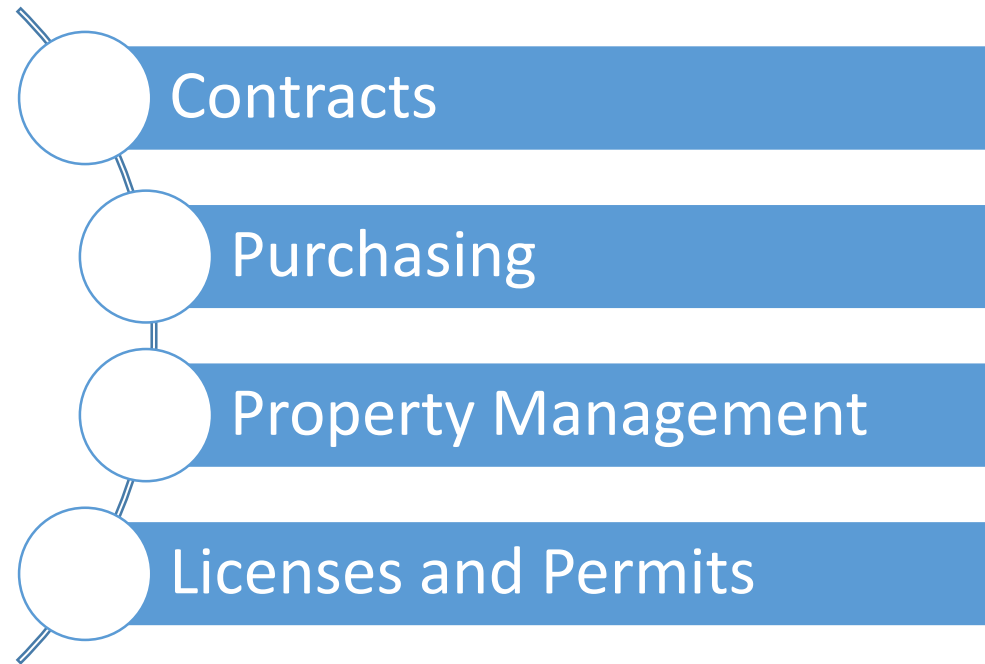


# Reasoning Behind Agreement

- 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
- Pass-through grants and funding



# Contracting/Permitting Responsibilities



## ***What We Do Well***

- Standard form agreements
- Standard insurance requirements
- Standard processes
- Initial certificate of insurance review

## ***Typical Challenges***

- Square peg, round hole
- Non-standard form agreements
- Indemnification/insurance changes
- Limitation of liability language
- Compliant insurance confirmation
- Management of insurance renewal, *not just tracking*

# Building Blocks

## *Order of Precedence Clause*

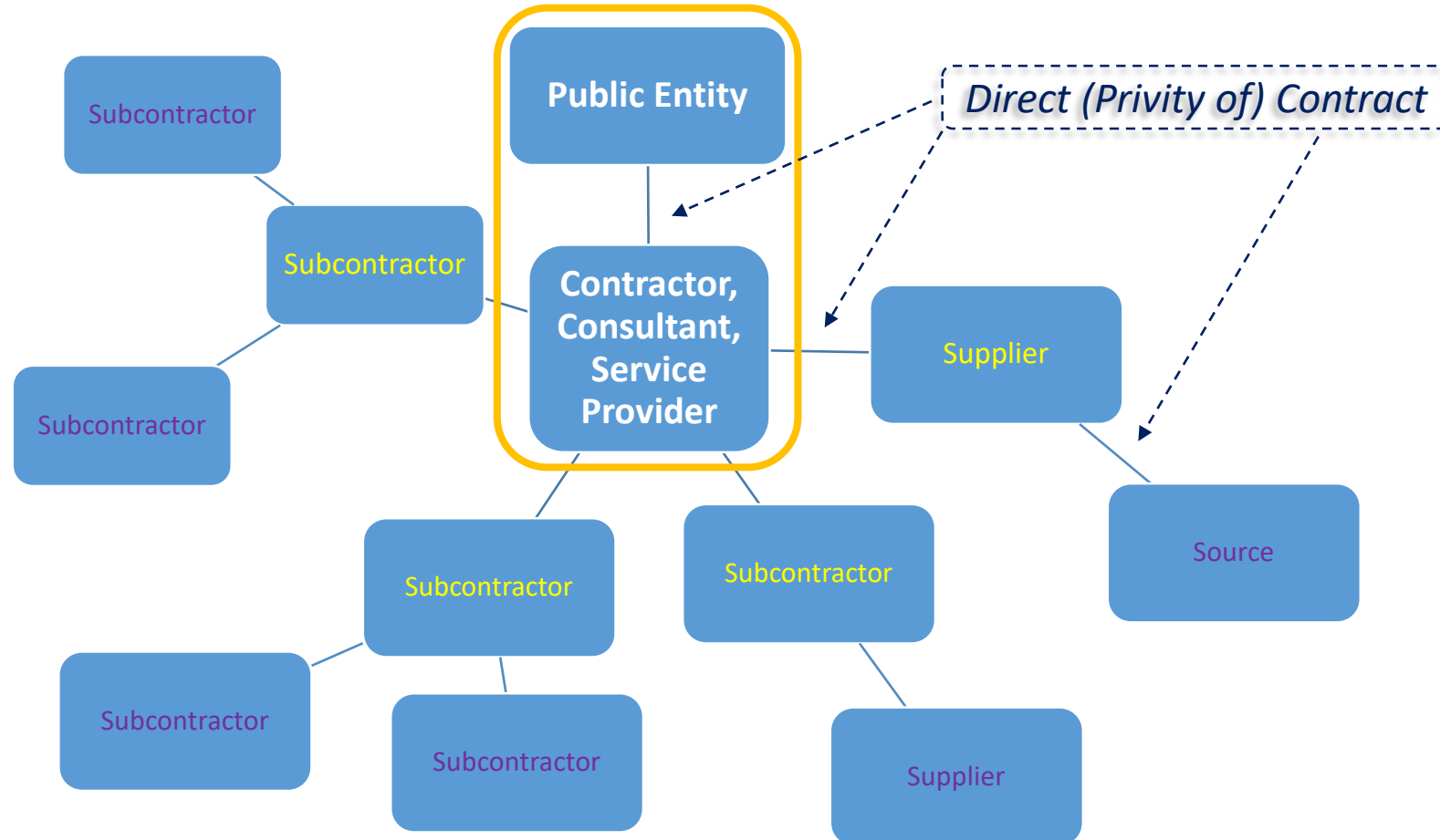


## *Higher Risk Contract Examples*

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

# Relationship Example

*Parties to our agreement . . .*



*. . . but I may be a beneficiary of protection from any or all.*



# Contract Objective and Today's Focus

*Contract or Agreement*

## From the Contractor/Consultant

## From the Insurer

*Outcome  
Duty*

- Completed scope of work meeting standards
- Responsibilities for safety & compliance
- Indemnification
  - Defense, usually
  - Possibly limited by another clause
- Insurance coverage and limits
- Payment and performance bonds
- Contractual remedies
  - Commonly limited by another clause

*Protection*

- Party to the contract if additional insured
  - Privity of contract issues for lower tiers
  - Common in CGL and AL, otherwise uncommon
- Beneficiary of contractual liability coverage
  - Few coverage lines include contractual liability
  - Defense included if required in the contract
- Subject to terms, conditions, exclusions
  - Exclusions may affect parties differently
  - Erosion of limits issues

# 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?

# Identifying Forms of Indemnification

*Owner's Sole Negligence*

## **Broad Form**

*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.*

*Joint Negligence*

## **Intermediate Form**

*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.*

*Other than Owner's*

## **Limited Form**

*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.*

*Contractor's Only*

## **Comparative Form (Vicarious Liability)**

*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.*

# Selecting Forms of Indemnification

<i>Owner's Sole Negligence</i>	<i>Joint Negligence</i>	<i>Other than Owner's</i>	<i>Contractor's Only</i>
<b>Broad Form</b>	<b>Intermediate Form</b>	<b>Limited Form</b>	<b>Comparative Form</b> (Vicarious Liability)
Anti-indemnification statute issues <i>Varies by State</i>		Mutual indemnification	Avoids common law indemnification issues; a contractual remedy
Exceeds what most public entities can provide		Public entities max	
May violate public policy	Typical for other than professional liability or improvement to land	Standard for Professional liability	Standard for public entities

**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."*

*Should your indemnification clause be negotiable?*

# 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

# Limitation of Liability Clause

Preexisted the breakup of the Bell System (1982)

*Except as provided in Paragraph XX, Indemnification,  
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.*

# Public Entities

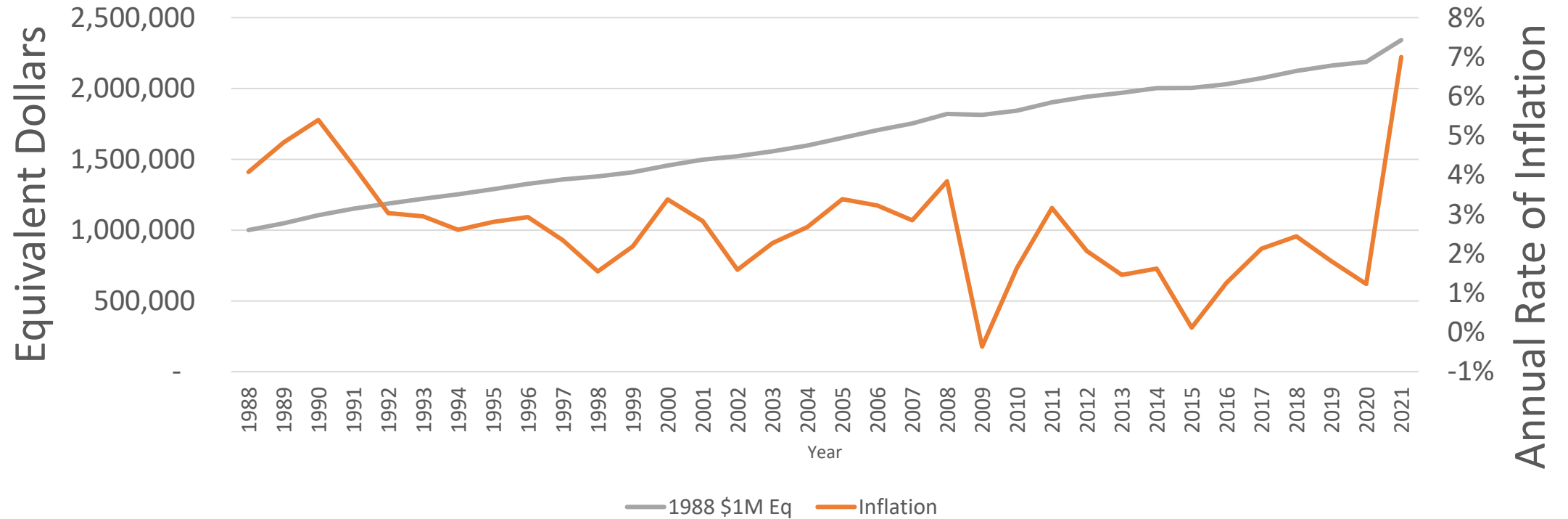
- Ability to indemnify typically limited
  - Public funds constraints
  - Comparative Form indemnification typically safe, vicarious liability defense
- JPAs, IGAs, Interlocal Agreements:
  - Comparative form usually appropriate for mutual indemnification

*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 officer, officials, agents, employees, or volunteers.*

(Public entity language developed by AZ PRIMA members, including the State)

# What Limits to Require?

## Impact of Inflation on \$1,000,000



*US estimates of inflation only, ignores impact of social inflation*



# 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 requires privity of contract, CG 20 38 does not (for subcontractors)
  - CG 20 39 requires privity of contract, CG 20 40 does not (products/competed ops)
- Per project (our site) aggregate limits vs per location (their business)
- Exclusions can affect parties differently

# Commercial General Liability

- Specific and aggregate limits
- Layering of coverage
- Dealing with deductibles and SIRs
- 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 Contractor's 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.*

# Other Typical Insurance

- Auto Liability
  - CA 00 01, includes Omnibus Insured definition (makes you an insured)
  - MCS-90 when carrying hazardous materials (required by FMCSA, even if silent)
- Environmental Liability
- Professional Liability
  - Cross insured exclusion, no additional insured, no contractual liability
- Property
  - Waiver of subrogation standard
  - Loss Payee vs Additional Insured
- Cyber

# 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: \_\_\_\_\_

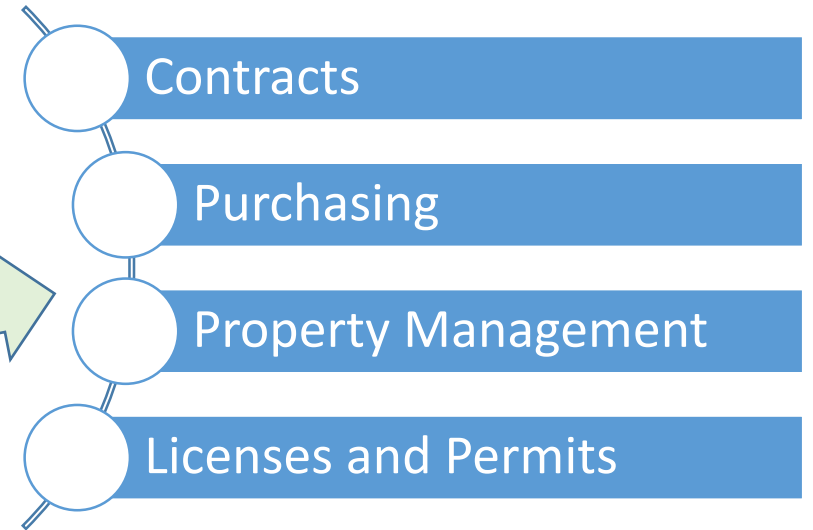
# Direct Access to the Funding Source

- Additional insured status (insurer)
  - Yes, you become a party to the contract
- Contractual liability coverage (insurer)
  - No, you are a third party beneficiary to the contractor's insurance policy
- Self-insurance and deductibles (contractor)
  - Yes, contractor's responsibility via the indemnification agreement
  - Beware of limitation of liability clauses, caps, and carve outs
- Alternative risk financing strategies (varies)
  - Get more information, may need guarantees

# Verifying Compliance

## Managing vs Tracking

- Whose responsibility?
- Service or in-house?
- COIs or copies of endorsements?
- Blanket COIs vs project specific COIs
- Initial review (may have multiple brokers)
- Coordinating contract dates with COI system dates
  - Renewal dates almost *never* match the contract period
  - Lagging renewal documentation
- Unmatched COIs – *Keep them!*



# 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

# Tendering and Coverage

- Provide timely notice to contractor and insurer(s)
  - Include contract provisions and COI (with attachments)
  - Also report to your own insurer!
- A friendly 'demand'
- Recognize different interests based upon allegations
- Acceptable counsel
- Cooperation and involvement in the defense
- Responses to reservation of rights
- Responses to coverage denial



# 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.

# 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” or “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” or “per location” 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

# 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.

# Reversing Positions

## An Extreme Example *Railroad Rights-of-Way*

- Understand your expenditure of public 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, ”*
- Commercially insured: Additional insured probably okay
- Group self-insurance (pool): Confirm
- Self-insured: Public funds restrictions tend to apply
- Captive: Confirm

# In Conclusion

- 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

## Themes

*Create and protect value*

*Align with strategy*

*Critical thinking*

*Flexibility*