Due Diligence for Insurance Coverage in Transportation Construction Contracts

DETAILS

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DUE DILIGENCE FOR INSURANCE COVERAGE IN TRANSPORTATION CONSTRUCTION CONTRACTS

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Terri Parker, Parker Corporate Enterprises, Ltd., and Laurel Stevenson, Haden, Cowherd, and Bullock LLC. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report continues NCHRP's practice of keeping departments up-to-date on laws that will affect their operations.

Applications

Federal and state laws and regulations require that contractors provide evidence of insurance for road and bridge construction contracts over specified amounts. The insurance is required to cover general liability, workers compensation, and automobile and other risks. The insurance also has required minimum limits of coverage. Each policy typically has exclusions for pollution liability or force majeure.

Most government road construction contracts specify that the contractor file certificates of insurance showing the contracting agency as an additional named insured as evidence of coverage. This requirement is not enough to protect the contracting agency because certificates of insurance do not demonstrate whether the provided insurance complies with the contract requirements. A consistent problem exists in that contracting agencies typically lack the requisite knowledge and experience necessary to review and determine if the coverage provided in the insurance meets the contractual requirements.

Further, a certificate of insurance may contain a provision stating that it is not a contract, and the policy of insurance needs to be reviewed to determine coverage and any exclusion. Because the policy may not be provided until several weeks after the certificate is provided, there is no way to ensure that the policy provides the necessary protection. Transportation attorneys need to know the extent of due diligence required on their part to obtain the appropriate coverage and value of insurance as specified in the contract documents. This due diligence will require a review and understanding of underlying insurance policy language and insurance industry practices.

This digest summarizes the important issues and insurance language encountered during the contracting process and provides language and solutions used to resolve such issues. It should be useful to transportation attorneys, officials, engineers, contracting officers, and financial officials.

TRANSPORTATION RESEARCH BOARD
OF THE NATIONAL ACADEMIES

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DUE DILIGENCE FOR INSURANCE COVERAGE IN TRANSPORTATION CONSTRUCTION CONTRACTS

By Terri Parker, Parker Corporate Enterprises, Ltd., and Laurel Stevenson, Haden, Cowherd, and Bullock LLC

I. INTRODUCTION

A state transportation agency can be held responsible for the work done by its road and bridge construction contractors. Therefore, the agency must protect itself from the risk of liability for the contractor's actions. Appropriate risk management procedures require that only properly screened, adequately insured, and reliable contractors be awarded construction contracts. The state can be certain it has complied with risk management principles after it has undertaken a careful investigation of the contractor and its proposed insurance policies. This careful investigation is known as "due diligence." While due diligence is not a legal requirement in the sense that it must be done to comply with a law or rule, a state must acquire objective and accurate information about its insurance companies and contractors in order to evaluate the risks of entering into an agreement and a contractual relationship.

Due diligence requires more than compliance with principles and establishing processes. It requires a careful review of a contractor's insurance policies and related documents and a finding by the agency that the policies are in compliance with its insurance requirements. Due diligence begins months, and sometimes years, before the agency lets a project for bid, with the thorough review and crafting of contract standard provisions and specifications. After the bids are received, a thorough review of the documentation provided by contractors and their insurance companies must occur. The agency should ensure that the insurance certificate, policies, and endorsements are in compliance with the contract and specifications. Once these tasks are performed, the state can be sure that it has taken the appropriate steps to protect itself from unnecessary risk and the payment of expenses that should be borne by an insurance company or the contractor.

The risk of accident and injury in a construction zone is appropriately placed on the contractor, who is in control of the project and being paid well for that project. While many states and other public entities have embraced the concept of partnering with contractors, consultants, and other stakeholders so that each partner is working diligently together to complete the final product and share in the risk of the project, the state is ultimately the guardian of the taxpayers' dollars. Part of its responsibility to the taxpayers entails securing appropriate insurance coverage and ensuring that the coverage remains in place during and after the project. The agency may be able to save millions of dollars each year by successfully tendering claims to insurance carriers and demanding the defense of suits filed against it. Construction contractors are required by state and federal law to provide insurance to protect the agency from the negligence of the contractor, and on occasion, the negligence of the agency itself. The contractor is typically expected to provide general liability, worker's compensation, automobile, and other types of insurance coverage as outlined in the state's construction specifications. The coverage amounts vary from state to state, but are generally in the range of millions of dollars due to the risks inherent in the construction projects.

The best time to ensure that the contractor has the appropriate insurance in place is before the project begins, but normally the window of time between the contract award and notice to proceed is limited. Many agencies rely on the contractor's certificate of insurance as proof of insurance, but the certificate may omit mention of risk-changing exclusions or endorsements. The certificates can also provide incorrect or incomplete information. When the agency only has an insurance certificate, it cannot determine whether the appropriate coverage has been provided because the certificate does not guarantee coverage. Due diligence requires the agency to review either the policy in its entirety, or at the very least, the specific endorsements. Just one word in an endorsement can change the amount and scope of coverage for the state and potentially leave the state open to unintended liability.

The agency should be aware that it has a tremendous amount of bargaining power, especially at the outset of the contract period. If a discrepancy in the insurance coverage is discovered early in the process, the agency can demand the coverage called for in the specification with the very real threat of shutting down the project for lack of appropriate insurance. However, once the project is underway or substantially completed, the agency begins to run out of options to demand compliance with its

specifications. If the policy is not reviewed until years after the completion of the project and after suit has been filed, the agency is no longer able to negotiate the coverage it could have easily obtained prior to or during construction. The agency may then have to resort to litigation to obtain the coverage it paid for and was entitled to receive.

Multiple state agencies' difficulties in obtaining the insurance coverage and protections required under their construction specifications prompted this research project. This project addresses the common issues faced by the agencies such as: proof of coverage; difficulty of interpretation of specification and insurance language; coverage disputes; lapse in coverage; and qualifying contractors for the bidding process. Resources for the agencies' contract administrators are included herein.

II. SURVEY AND SURVEY RESULTS

A formal survey asking for information about insurance requirements for road and bridge contracts was sent to the 50 state transportation agencies. Information requested included: what types and amounts of insurance are required by the agency; what processes are used to determine whether insurance is actually in compliance with the specifications and requirements; whether indemnification is required of the contractor; and whether the agency has experienced difficulties in obtaining compliance with its requests for defense and indemnification. Twenty-eight states responded. A copy of the survey is attached as Appendix A.

The research team requested that survey respondents include insurance policies when responding to the survey. Only three states indicated that they required insurance policies to be submitted for review before issuing a Notice to Proceed. Most of the states relied entirely on the insurance certificate and/or an affirmation by either the contractor or its insurance company that the coverage was in compliance with state law and the state's specifications, although a few required the contractor to produce appropriate endorsements. Most of the responding agencies indicated that they had not engaged in litigation with their contractors' insurance companies or the contractors themselves in the last 5 years, although several agencies were contemplating litigation over coverage issues and three of the responding agencies had been involved in litigation with a contractor.

During the preparation of this digest, multiple insurance policies and endorsements were reviewed. The policies had been submitted to the states as proof of compliance with the states' specifications. A careful review of the policies and endorsements revealed that some were in fact noncompliant with the specifications. For instance, one endorsement contained a provision that specifically excluded coverage for acts "arising out of operations performed by the state." This type of coverage is known in the insurance industry as "illusory coverage" since it specifically excludes the coverage it is supposed to be providing. An additional insured endorsement found in several policies contained language that specifically excluded coverage for damages "arising out of any of the contractor's supervisory and inspection" duties. Of course much of the work a contractor does on a construction site is supervisory and inspection related. Another additional insured endorsement excluded coverage unless the damages "directly result from the contractor's operations." The authors also noted one policy that purported to provide completed operations coverage, but the coverage was specifically excluded by endorsement.

The following information is a synopsis of the survey data received from the states.

A. Amounts and Types of Insurance Required

Limits of coverage required ranged from a low of $100,000 to $300,000, which is Alabama's general liability limit, to a higher range of $2 million bodily injury per accident with a $3 million general aggregate and $1 million automobile coverage, such as required by Utah. Some agencies, such as New Jersey, require excess coverage of up to $10 million. Numerous agencies reported that they did not require excess or umbrella coverage even though many contractors provided it. Other agencies reported that excess insurance was required on some, but not all, projects. Maine reported that it required excess coverage for fewer than 5 percent of its projects, and South Carolina reported that excess coverage is always required. Connecticut has a provision in its specifications requiring $20 million in excess coverage for an $80 million bridge job. The levels of coverage for commercial general liability are aligned in some states with the sovereign immunity laws of the state, such that a contractor is required to purchase the amount of insurance allowed under state law that may be needed to cover any damages. Coverages required in the mega projects[1] appear to be coverage for property damage and liability regardless of sovereign immunity limits.

[1] Prior to the enactment of SAFETEA-LU in August 2005, projects with over $1 billion in construction costs were designated as "Mega Projects." SAFETEA-LU has lowered the monetary threshold from an estimated total cost of $1 billion to $500 million or greater, and the term "Mega Project" has since been eliminated and replaced with the term "Major Project." See http://www.fhwa.dot.gov/ipd/project_delivery/defined/major_project.aspx.

B. Additional Insured and Additional Named Insured Coverages

Only 2 of the 28 states indicated that they do not require their contractors to name them as additional insureds or purchase separate owner's protective policies on their behalf. These types of coverage are essential to the agency. There are many reasons for requiring the contractor to name the state as an additional insured on its insurance policies: the state is able to transfer some of its risk to an insurance company; the state gets an immediate right to a defense by the insurer rather than waiting to be indemnified for its costs at a later date; the policy may allow one party to transfer liability arising from its own negligence to the other party's insurer; and the coverage may increase the limits of insurance available to the additional insured on the project.

Naming the state as an additional insured provides it with direct rights under the named insured's policy. Coverage for an additional insured, however, is usually limited to liability arising out of the operations performed by or on behalf of the policyholder. This means the coverage will only apply if there is a logical connection between the incident and the operations of the policyholder. Additional named insured's operations are more closely tied to the named insured/policyholder. By adding the state as an additional named insured, the holder is extending coverage under the policy to the actual operations of the state. In some situations, coverage may be limited to actions that have a connection with the contractor's actions or inactions, but the coverage typically includes the same right of defense in a lawsuit that the contractor is entitled to receive. Insurance companies use many different forms and endorsements to identify coverage provided to additional insureds. Some of the forms, such as Insurance Services Office (ISO) forms, are standard and have been interpreted by the courts to provide certain types of coverage, as discussed later in this paper. Other forms are not standard and may not offer the coverage that was contemplated by the parties or the insurance specifications.

Colorado and Wisconsin reported that they used Owner Controlled Insurance Programs (OCIP) on design-build or mega projects. An OCIP is an insurance and risk control program implemented for a single construction project or a series of construction projects. Instead of each contractor providing its own insurance and passing the cost to the owner through the construction contract, the owner of the project purchases certain lines of insurance (such as general liability, excess liability, and workers compensation) to cover most of the contractors on a job site. The Government Accountability Office suggests $50 million as the project cost threshold for considering a federally funded owner's controlled program.[2]

C. Indemnification

Indemnification is the complete shifting of liability for loss from one party to the contract to another party to the contract. Only one state that responded to the survey indicated that it did not require its contractors to indemnify and hold it harmless. Indemnification is simply another way the agency can be certain that its contractor will be responsible for its actions or inactions on the job site if insurance coverage is declined for any reason. Generally, agencies require their contractors to indemnify and hold them harmless because the contractor's promise of indemnification provides another, separate layer of protection. In a typical state construction contract, the general (or prime) contractor is required to indemnify the state agency for any claims, losses, or expenses that the state incurs for bodily injury or property damage arising out of the general contractor's operations, materials, parts, or equipment due to the negligence of the general contractor. The subcontractors are also required to indemnify the prime contractor and the state.

Because the state wants to be sure that the contractor can fulfill its indemnification obligations, it usually requires two insurance clauses in its contract. First, the state requires that the contractor maintain specific amounts of insurance, which will, if needed, pay for the indemnification obligations. Second, the state mandates that the contractor name it as an additional insured under its commercial general liability (CGL) policy. These steps help to ensure that the contractor has funds available to compensate the state for unanticipated liability. This concept is discussed in much more depth later in this digest.

D. Litigation

The states of Missouri, New York, and Washington each reported involvement in litigation, or that they were contemplating litigation due to a denial of insurance coverage. New York indicated that its coverage disputes arose from several types of situations: whether the loss occurred within project limits; whether the claim arose out of the project work; and the failure of the contractor to name the State as an additional insured. New York also had problems when insurance carriers refused to provide coverage for claims asserted by the contractor's employees.

[2] Neil Wilcove and Stephanie Stewart, *The Pros and Cons of Consolidated Insurance Programs,* http://enewsletters.constructionexec.com/riskmanagement/2013/04/the-pros-and-cons-of-consolidated-insurance-programs (last visited Feb. 7, 2015.)

Missouri reported that it had been in litigation with an insurance carrier due to the carrier's refusal to defend or indemnify the agency after a lawsuit was filed against it. In that case, a fatal accident had occurred within the physical limits of a construction job. The insurance company refused the state's tender of defense, arguing that the contractor had not worked in the area where the accident occurred. The state took the position that the entire project was within the control of the contractor at the time of the accident, that there was evidence that construction work had occurred in the general area, and that the contract required the contractor to provide traffic control and other items that had not been provided at the time of the accident. In denying the contractor's motion for summary judgment on the issue of defense and indemnity, the court found that the insurance company was contractually required to provide a defense to the state, but left the question up to a jury as to whether it had an indemnity obligation.[3] The insurance company was required to provide a defense, due to Missouri's requirement that when the complaint "alleges facts that give rise to a claim *potentially* within the policy's coverage, the insurer has a duty to defend"[4] (emphasis added).

Washington and Missouri both reported that they have tendered the defense of claims to a nonresponsive insurance carrier and have either filed suit or are considering filing suit against the carrier on a bad faith theory. Missouri's claim of bad faith stems from an accident in a construction zone where the plaintiff alleged that improper striping, signing, and traffic control plans caused a fatal accident. Plaintiffs sued the Missouri Highways and Transportation Commission (MHTC) and its contractor. While the insurance carrier for the contractor accepted the tender of defense, the excess carrier refused, citing policy exclusions.

E. Proof of Insurance and Affirmation of Coverage

Many states indicated that they accept the Agent Company Operations Research and Development (ACORD®) 25 Certificate of Insurance used by most commercial insurance companies as proof of insurance. However, the form contains a statement that reads:

> This certificate is used 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.

The certificate does not provide proof of insurance. In *Trapani v. 10 Arial Way Associates,*[5] the court stated that a certificate of insurance that expressly states that it is "a matter of information only and confers no rights upon the certificate holder" is insufficient, by itself, to show that additional insurance coverage has been purchased.[6] As noted above, many agencies accept the certificate alone as proof of compliance with their construction insurance requirements. This is a mistake because without reviewing the specifics of the coverage, the agency cannot be certain that it has obtained the coverage required in its specifications and contracts. It has not engaged in vigorous due diligence.

Insurance coverage types and amounts are described only in the body of the policy and its endorsements. Many states use only forms provided by ISO. ISO has produced hundreds of different forms that deal with CGL insurance since its inception in the early 1970s. The forms are differentiated by number designation, typically found in the lower left corner of the first page of the document. The forms change every few years, normally in reaction to changes in the law or demands of the industry. Several new ISO forms dealing with additional insured provisions were released in the spring of 2013. Many commentators noted that the newest forms provide the most restrictive coverage yet,[7] and urged insureds to carefully draft and review the insurance requirements within the contract to ensure that the coverage and limits intended by the parties is obtained. Other companies, such as The Hartford Financial Services Group and Liberty Mutual Insurance, issue standard insurance forms that follow a format similar to the ISO forms.

As noted above, some of the states indicated that they required an affirmation or certification from either the contractor or the contractor's insurance company that affirms the provider reviewed the individual insurance requirements and believed that the insurance provided was in compliance with those requirements. Examples of forms provided from the states of New York and North Dakota are

[3] Cincinnati Insurance Co. v. Missouri Highway and Transportation Commission, No. 4:12-CV-01484-NKL, 2014 U.S. Dist. LEXIS 128394 (W.D. Mo. Sept. 15, 2014).

[4] *Id.* at *31.

[5] 301 A.D.2d 644, 755 N.Y.S.2d 396 (N.Y. App. Div. 2003).

[6] *Id.* at 647.

[7] *See* Scott Pence and Wm. Cary Wright, *Not All Additional Insured Endorsements are Created Equal: Brief History of ISO's Additional Insured Endorsements and 2013 Changes,* Under Construction (The ABA Forum on the Construction Industry), Aug. 2013; and Shanda K. Pearson, *The Times They Are A-Changing, 2013 Revisions to ISO's Commercial General Liability Coverage Forms,* Insurance Law, Aug. 2013.

included as Appendix B. New York's certificate of insurance contains the following language:

> The subscribing insurance company, authorized to do business in the state of New York, certifies that the insurance of the kinds and types and for limits of liability herein stated, covering the work described in the underlying contract herein identified, has been procured by and furnished on behalf of the insured and is in full force and effect for the period listed below.

Similarly, North Dakota requires that its contractors sign and submit a form in which the contractor attests that "your company has insurance coverage consistent with the contract provisions" and further that "[t]he contractor has and will maintain in force, insurance coverage (including proof of coverage) consistent with the contract specifications." New Jersey submitted a similar form that must be signed by the authorized representative of the insurance company, rather than the contractor. Arizona construction specifications on this topic state as follows:

> The contractor's submission of the required insurance certificates constitutes a representation to the department that the contractor has provided a copy of their specifications to every broker who has obtained or filed a certificate of insurance and has communicated the necessity of compliance with these specifications with the broker and, to the best of the contractor's knowledge, each certificate of insurance meets the requirements of the specifications.

Requiring the contractor to affirm or swear that the insurance provided is compliant with the specifications or contract provisions provides additional protection for the agency because it puts the burden directly on the contractor, rather than the insurance provider, to promise that the requested insurance has been procured. If it later turns out that the insurance was not procured in the amounts or coverages that were outlined, the contractor is in breach of the contract. New Jersey requires that the contractor submit proof of insurance on a particular form developed for this purpose. The form is a two-page document that requires the contractor to certify that the policies it obtained comply with state specifications. It includes a checklist for each type of required insurance (CGL, automobile, worker's compensation, and owner's protective coverage). A checklist for each endorsement must be submitted. New Jersey's form can be found in Appendix B. A form such as this provides an easy format for staff to use to ensure compliance with insurance requirements. Requiring the insurance company to affirm that it has reviewed the insurance requirements and provided compliant insurance also offers additional protection to the agency.

F. Timing of Notice to Proceed

Every state that responded to the survey issued a Notice to Proceed (NTP) to the contractor within 60 days of the award of the project and three states noted that they typically issued the NTP within 2 weeks of award. New York reported that its standard specifications require the contractor to begin work within 10 days of the award, but further commented that the contractor is not allowed to begin work until all insurance is in place. When there is very little time to collect and review documentation, it may be difficult for staff to do a thorough review of the policies and endorsements prior to the issuance of the NTP.

G. Types of Coverage Required

Every agency that responded to the survey required their contractors to provide insurance coverage as follows: general liability and/or CGL or bodily injury, automobile, and worker's compensation. Most agencies also required railroad protective coverage and environmental hazard or pollution coverage, depending on the scope of the project. Other required coverages may include products and completed operations, additional insured or additional named insured, and professional liability.

H. Preapproval Process

Two states reported that they had insurance preapproval processes in place such that a contractor whose bid was accepted could begin work immediately if its approvals were up to date. The California Department of Transportation (Caltrans) allows a contractor, prior to bidding on a contract, to submit its insurance documents for preapproval. This program is intended to reduce delays in the contract execution and reduce the administrative and paperwork burden on both the contractor and Caltrans, so that a contractor who is awarded multiple contracts in one insurance policy period does not have to submit the same information again and again. Upon review and approval of appropriate documentation, Caltrans will issue a certificate of preapproved insurance. Caltrans requires that the contractor's CGL policy contain a blanket endorsement making the policy cover any work by the contractor under contract with the agency. Similarly, Kansas reported that the majority of its contractors have certificates of insurance that cover all Kansas Department of Transportation (KDOT) projects for a given annual period so that it is not normally necessary for the contractors to submit additional or new documentation before beginning a project.

I. Standard Forms

Several agencies, such as the New York State Department of Transportation (NYSDOT) and the Colorado Department of Transportation (CDOT),

require insurance providers to use particular industry forms, such as the ISO Commercial General Liability Form CG 00 01 10 93 or its equivalent, although they allow for forms that provide equivalent coverage. When the agency requests a particular form in its specifications, it is easy for staff to review the endorsements to determine if the appropriate form has been submitted. A potential difficulty emerges when the insurance provider submits what it proposes to be the "equivalent" of a particular standard form and much time is needed to determine if the coverage truly is equivalent.

Most agencies require particular types and amounts of coverage in their specifications, i.e., CGL in the amount of $2 million and automobile coverage in the amount of $1 million. Those agencies typically require the contractor and the subcontractors to name the agency and its assigns as additional insureds, but do not require proof of that status on a particular form or endorsement. Missouri has developed a checklist (see Appendix C) to assist the contract administrator in reviewing the insurance information submitted by its contractors.

J. Details of Specifications

While the specifications used by each agency have the same general components, i.e., they identify the work to be done and the manner in which the work must be done, multiple differences were identified with regard to the agencies' methods of administering the insurance processes. The following are a number of variations from the generic specifications that were noted in the survey responses:

1. Documents Submitted

Caltrans requires a copy of the CGL policy and excess policy or binder (if the policy is not readily available), as well as all applicable endorsements, riders, and other modifications in effect to be submitted prior to contract execution. They accept certificates of insurance for all other required coverages. Caltrans requires a formal declaration by a certified public accountant that the contractor has sufficient funds to pay deductibles or other retention. Indiana requires a binder and the entire policy to be submitted. Maryland requires certificates of insurance plus all applicable endorsements.

2. Affirmations of Coverage

In Arizona, the contractor has to sign an affirmation that "submission of the insurance certificate is a representation that the contractor provided specifications to all insurance brokers and communicated the necessity of compliance. To the best of the contractor's knowledge, the provided coverage is compliant." Agencies use this type of document as an additional means of binding the contractor or carrier. It can operate as an additional component of the contract and is designed to further impress upon the contractor or his insurance carrier that they are legally bound to provide the coverage outlined in the specifications.

3. Completed Operations Coverage

Completed operations coverage addresses liability that arises out of the contractor's operations once those operations have been completed or abandoned. Colorado and Utah require 1 year of completed operations coverages. Other states, such as Nebraska, require 3 years of coverage. The intended effect of this coverage is that even after a job is completed or accepted, if a defect is discovered, a claim can be made against the contractor. A claim could involve materials, signing, striping, compaction of soils, and many other aspects of the job.

4. Tiered Insurance

California, Colorado, and Connecticut tie the required insurance coverage amount and umbrella limit to the value of the construction job. For instance, a small job that has little risk of liability may carry limited insurance requirements, compared to a large job with a lot of risk attached to it. Caltrans offers the tiered insurance option to reduce insurance as a barrier to small business enterprise contractors by allowing contractors to bid according to the total bid range of the job.

5. Reporting Claims

Maine's specifications indicate that any failure to comply with reporting requirements, such as a delay in time, shall not affect coverage. Utah's specifications require the agency and the contractor to provide each other with notice of a suit within 2 days of service of a lawsuit. Most insurance policies require that the insured inform the carrier of a pending claim promptly, but don't specifically define "promptly."

6. Attorney's Fees and Direction of Defense

As do most states, Kansas requires indemnification by its contractors. However, the Kansas specification states that defense costs, plus interest, are to be paid by the contractor if the claim is a result of the contractor's (or subcontractor's) actions. In Utah, the specifications require a contractor to defend claims arising out of or resulting from the contractor's work. The Utah Department of Transportation may require the contractor's counsel to represent it or may select separate counsel. Defense costs are

determined after the apportionment of fault by settlement or jury verdict. In some matters in Missouri, insurance companies and the Missouri Department of Transportation (MoDOT) have agreed that department in-house counsel will defend the case, while billing the insurance company for expenses. Using that strategy, the insurance company pays expenses only and any judgment, and the agency gets the benefit of in-house representation without the risk of paying any judgment. Occasionally, the insurance company pays all costs associated with in-house counsel representation.

7. Certificate of Insurance

Maine, Massachusetts, and New York each has its own certificate of insurance that is to be used by the contractor when providing proof of insurance. Other certificates will not be accepted. Each state uses this certificate so that it can easily review the coverages provided by contractors.

8. Retainage of Payment

Minnesota, Rhode Island, and Washington have the ability to retain payments from the contractor, either from the job under construction or any other job, if they find it necessary to protect their interests regarding lawsuits, claims, or any actions that have arisen out of the contractor's actions or inactions. If money is due to the contractor, the agencies may withhold the funds until they receive evidence that the claim or action has been settled. In the indemnification section of its specifications, Rhode Island states: "The State may retain for its exclusive use, without recourse by the Contractor or anyone claiming under the Contractor, any and all amounts due the Contractor as provided under the Contract Documents to assure the Contractor's compliance with this section."

9. Policy Exclusions

Maryland requires any policy exclusions to be shown on the face of the insurance certificate. As noted earlier, although certificates are intended to notify the contractor and state of the coverage that is in place at the time of the contract, the certificate does not serve as proof of insurance. Maryland's practice provides an additional layer of assurance to the state that the coverage required under the contract is provided.

10. Cancellation of Coverage

All the agencies surveyed require insurance coverage to remain in effect throughout the job, and some states, such as South Carolina, provide that coverage cannot be cancelled except upon 30 days' notice to the agency. Multiple agencies require notice of cancellation of insurance to be provided 2 weeks to 30 days prior to cancellation and every agency considers cancellation of insurance without replacement to be a material breach of the contract.

11. Rejection of Insurance Company

Many agencies, including Caltrans, Nebraska Department of Roads, Wyoming Department of Transportation, and Michigan Department of Transportation, require an insurance company to have a particular financial rating, such as AM Best and a Financial Size Category of VII, before insurance will be accepted. This provision is intended to ensure the carrier's ability to pay for the claims it is insuring.

12. Sovereign Immunity

Rhode Island, in the indemnification section of its specifications, provides as follows, "nothing herein shall be deemed to constitute a waiver of the sovereign immunity of the state, which immunity is hereby reserved by the state." Similarly, New Jersey specifications provide: "The department does not waive sovereign immunity except as provided under NJSA 59:13-1. The rights or benefits provided in the contract that exceed those provided under state law are contractual in nature and do not expand the waiver of sovereign immunity found in state law."

A more detailed discussion of these issues can be found in Section IV—Common Coverage Issues.

13. Tender of Defense

Caltrans requires a contractor to respond to the tender of a claim for defense within 30 days of the tender. If the contractor fails to accept or reject the tender within 30 days, the department may withhold any funds it considers necessary for the defense and indemnity until the claim is disposed of or the contractor accepts or rejects the defense. When an insurance company refuses to respond to a tender of defense, or delays its response by months or even years, the state must use its own resources to defend a claim that should be defended by the contractor's insurance carrier.

III. LEGAL RESEARCH TOPICS

Following is a discussion of commonly encountered coverage issues. Most disputes center around the language found in the construction contract and the specifications. For this reason, it is critical that the agency specifically sets out the insurance requirements for its contractors in the specifications and that it reviews all submitted documents closely to ensure compliance with the specifications and contract.

Insurance policies are typically printed on standard forms. Some of those forms are printed by the ISO, while other forms may be prepared by an underwriter for an insurance company. Occasionally, when there is a special or atypical risk, a separate policy, called a manuscript policy, may be prepared to cover that risk. The typical policy will contain insuring provisions, exclusions, definitions, and general conditions. The policy will also contain a declarations page that describes the details of and the amounts of coverage, the period of coverage, and the cost of the premium. Most policies also contain endorsements, which are provisions that either add to or limit the basic insurance policy. The endorsements should be listed by number on the declarations page. While all policies contain exclusions, exclusions to coverage are typically construed by courts against the insurer.[8]

A. Types of Coverage

The most common type of coverage at issue in construction disputes is what is known as CGL coverage. A CGL typically provides coverages using Coverage A for bodily injury, which includes fatalities and property damage, and Coverage B, which includes personal injury and advertising injury. In most disputes involving construction projects, issues arise as to coverages available for the additional insured. Two main types of disputes generally occur in litigation: whether the injury or damage was incurred in the course of ongoing operations and whether liability "arises out of the operations" of a named insured. The scope of the coverage available to the additional insured is usually explained by way of an endorsement, typically referred to as an Additional Insured Endorsement or Contractor's Endorsement, and is subject to most of the terms and conditions of the CGL form. The specifics of endorsements and the problems they present are discussed in more detail below.

A less used form is the ISO form "Owners and Contractors Protective Liability Coverage Form-Coverage for Operations of Designated Contractor" (OCP or Owner's Protective). The name would seem to indicate that it is coverage that should be used for construction projects. However, the coverage provided under the Owners Protective is even more limited than the coverage of an additional insured on a CGL policy. An Owners Protective policy should not be confused with an Owner Controlled Insurance Policy (OCIP), which is more fully discussed in Section III.F of this digest. An Owners Protective policy is a protective liability policy, which is typically purchased by a contractor for the sole benefit of another person or organization. The person or organization purchasing the Owners Protective policy will pay the entire premium, but the purchaser receives no real benefit from the purchase of the policy (other than to satisfy some contractual obligation on a project). A project owner typically is only protected by an Owners Protective policy in two situations: 1) if the owner is vicariously liable for the actions of the general contractor; or 2) if the owner is directly liable for the acts or omissions in the general supervision of the operations of the general contractor.

Many CGL policies define who has insurance either under a section commonly titled "Who Is An Insured" or by endorsement. The determination of coverage for additional insureds is usually found in the endorsement. Endorsements can be written to provide additional insured coverage on either a scheduled basis (where the additional insured is listed on the endorsement itself) on the declarations page, or on a blanket basis where the additional insured designation is required by specification or other contract provision. There has been much litigation over the interpretation of the forms, as they determine the amount and nature of the coverage. A large body of case law addresses variations of these forms and how the courts interpret them. A full analysis of case law is beyond the scope of this work.[9] This digest's focus is primarily for use in understanding some of the more commonly used forms and terms, and options for future contracts.

The scope of protection afforded to an additional insured is typically found first by looking at an endorsement to a CGL, referred to as a "Contractor's" endorsement or "Additional Insured" endorsement. The language can vary substantially, but common language including such terms is noted in the following: "Additional insured is any person or organization, called an additional insured, whom you are required to add as an additional insured due to a written contract or agreement relating to your business."

Additional insured provisions also typically include a number of limitations as follows: "In order to be an additional insured, the written agreement or contract must be: 1) in effect during the term of this policy, and 2) executed prior to the bodily injury, property damage, personal injury, or advertising injury giving rise to a claim under this policy."

The policies also typically limit additional insured coverage by stating that the person or organization

[8] *But see* Western World Ins. Co. v. Penn-Star Ins. Co., No. 07-CV-604, 2009 U.S. Dist. LEXIS 75595, at *1 (S.D. Ill. Aug. 25, 2009).

[9] For more information on this topic, reference can be made to Donald S. Malecki & Jack P. Gibson, The Additional Insured Book (Int. Risk Mgt. Inst., 5th ed. 2004).

is an additional insured with respect to (or in some cases only with respect to): 1) "premises you own, lease, or occupy"; or 2) "your work for that additional insured." Most policies and endorsements define the terms "your work," but even with definitions included in the policy, they can be subject to a wide variety of interpretations.

There are often exclusions within the policy or endorsements, which provide that the insurance does not apply to "property damage":

> That particular part of real property on which you or any of your contractors or subcontractors working directly or indirectly are performing operations, if the 'property damage' arises out of those operations;
>
> or
>
> That particular part of any property that must be restored, repaired, or replaced because 'your work' was incorrectly performed on it.

1. Typical Disputes

A common dispute in litigation involves a claim or lawsuit arising out of a construction project. The question normally is whether the additional insured is entitled to a defense of the claims under the policyholder's policy. While most states hold that the duty to defend is broader than the duty to indemnify, states can often be left "holding the bag" so to speak for months, if not years, before coverage issues are decided. A carrier may outright deny coverage, provide coverage pursuant to a reservation of rights agreement, and/or file a declaratory judgment action seeking a determination by the court as to whether coverage is afforded under the policy.

There can be protracted and expensive disputes involving coverage for claims and lawsuits at the time of the injury, fatality, or property damage within the construction project. Disputes revolve around the interpretation of the following phrases: a) what is considered to be "arising out of" the work of a contractor; b) how to determine property when referring to "that particular part of" property; c) what is considered to be "your work"; and d) what are ongoing operations. Courts frequently consider how to define these phrases and a voluminous body of caselaw has emerged that defines these terms of art. More information on the precise definitions of these terms and how courts have interpreted them over the years can be found in the following pages.

a. Arising Out of.—As to the definition of "arising out of," many states hold that proximate causation is not necessary in order for there to be coverage so long as the liability is coincident or related to the actions of the named insured.[10] The Arkansas Supreme Court held in 2003, after substantial litigation, that "arising out of" does not require proximate cause; only a causal connection.[11] Likewise, in *Vitton Const. Co. v. Pac. Ins. Co.,*[12] there was significant litigation regarding coverage before the court ultimately concluded that "arising out of broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship."[13] Other jurisdictions, such as Texas, interpret the additional insured endorsement to provide coverage to the additional insured so long as there is a causal connection between the named insured's work and the additional insured's liability for damages.[14]

Where there is no requirement that there be proximate cause with the actions of the named insured, there is a good argument to be made that if the incident occurred while the contract between the state and contractor was in place and the named insured has engaged in some relevant activity, then coverage applies.[15] However, that being said, the state and contractor can still end up in a significant dispute with the insurance carrier as to whether the state is entitled to a defense if suit is filed, thus potentially putting the state in a position of having to expend significant amounts for defense before coverage is actually determined.

b. Particular Part of Property.—Some litigation involves disputes over what is considered "a particular part" of property. While many cases have addressed the issue of what is considered work performed on a particular part of property, insurance carriers may still engage in litigation before coverage is determined.[16] In *Columbia Mut. Ins. Co. v. Schauf,*[17] the court noted that the exclusion for property damage to that particular part of the property upon which operations are being performed applies to the "property on which the insured is performing operations, not

[10] Taurus Holdings, Inc. v. United States Fidelity & Guaranty Co., 913 So. 2d 528 (Fla. 2005).

[11] Hishaw v. State Farm Mut. Ins. Co., 353 Ark. 668, 122 S.W.3d 1 (Ark. 2003).

[12] 110 Cal. App. 4th 762, 2 Cal. Rptr. 3d 1 (Cal. Ct. App. 2003).

[13] *Id.* at 767.

[14] *See* Admiral Ins. Co. v. Trident NGL, Inc., 988 S.W.2d 451 (Tex. App. 1st District 1999).

[15] *See* Alan D. Windt, Insurance Claims and Disputes: Representation of Insurance Companies and Insureds § 1130, at 11-478 (West, 5th ed. 2009); Phillip L. Bruner & Patrick J. O'Connor, Jr., Bruner & O'Connor on Construction Law § 11.155 (West 2010).

[16] Drubow v. Mike Check Builders, Inc., 442 F. Supp. 2d 676, 681 (E.D. Wis. 2006). *See also* Standard Const. Co. v. Maryland Cas. Co., No. 01-2006N, 2002 U.S. Dist. LEXIS 26650 (W.D. Tenn. 2002).

[17] 967 S.W.2d 74 (Mo. 1998).

the area in which the insured is performing operations."[18] In *Transp. Ins. Co. v. Piedmont Construction Group, LLC,*[19] the insured contracted to renovate a dormitory and when the plumbing subcontractor negligently ignited wood scrap, the entire dormitory was damaged. The carrier claimed that because the contractor's renovation contract was for the dormitory, coverage for the entire loss was excluded. The court disagreed with the carrier, finding that "particular part" of the property applied only to the area in which the plumbing subcontractor was working at the time the fire was started, not the entire building. To hold otherwise would render the entire policy illusory.[20] Similarly, in *Western World Ins. Co. v. Penn-Star Ins. Co.,*[21] in finding that the property exclusion did not apply, the court noted that the injured parties were not the individuals for whom the contractor's work was being performed, and thus broadly construed the exclusion in favor of the insured.

c. Your Work.—Many policies define "your work" as "[w]ork or operations performed by you or on your behalf; (and/or) [m]aterials, parts or equipment furnished in connection with such work or operations."[22] While such language may seem to be without much room for interpretation, it can result in questions relating to the scope of the work, whether the operations were completed at the time of the incident, and whether the claims themselves constitute an occurrence sufficient to trigger coverage. In *Brinkmann v. Amerisure Ins. Co.,*[23] Brinkman and JDN Development entered into a contract for Brinkmann to perform site work on a shopping center. The site work consisted of excavation, rough grading, and asphalt paving. Brinkmann hired two subcontractors, Pillari and Trap Rock, to perform the site work. JDN ultimately sued Trap Rock, complaining of defective asphalt work and other defects. Trap Rock filed a third-party complaint against Brinkmann for indemnity or contribution. Brinkmann forwarded the third-party claim to its carrier, Amerisure. Amerisure ultimately denied coverage to Brinkmann, stating in part that there was "no occurrence" because the only damage was to the concrete itself, which was designed by a subcontractor. The court held that the claims against Brinkmann were not limited to Brinkmann's own work, and thus required Amerisure to provide a defense.

d. Ongoing Operations.—Many additional insured endorsements in construction contracts include language amending the ISO GCL, Section II, Who is an Insured clause, to provide that the definition is amended as to Who is an Insured,[24] "but only with respect to liability arising out of your ongoing operations performed for that insured." Carriers have taken the position that coverage for the additional insured exists only if the claim arose out of the additional insured's operations and was discontinued when the operations were complete. For example, in the case of *Carl E. Woodward v. Acceptance Indemnity Ins.,*[25] Woodward, the general contractor, had entered into a subcontract with DCM Corporation for concrete work on a condominium project. Woodward was an additional insured on DCM's policy. DCM worked on the project for several months in 2006, but the project was not completed until 2007. The condominium association sued the general contractor and others claiming faulty construction, primarily due to the concrete work. The general contractor tendered the defense to the subcontractor's carrier. The court upheld the carrier's denial of coverage, stating in part that the liability did not arise out of the subcontractor's ongoing operations. Instead, the breach arose from the completed construction. Since the contractor was not an additional insured for completed operations, there was no coverage under DCM's policy for the claims against Woodward.

There are many other cases that focus on different aspects of the language "ongoing operations." In *Valley Ins. Co. v. Wellington Cheswick,*[26] a condominium association sued the owner, developer, and general contractor for faulty construction. The subcontractors were required to name the owner, developer, and general contractor as additional insureds under the subcontractor's CGL policy. The court declared that ongoing operations, which were not specifically defined in the policy, meant "simply those things that the company does"[27] and even though the property damage "may not have occurred during these ongoing operations, the liability did."[28] Thus, the owner, developer, and general contractor were found to be covered as additional insureds. Similarly, in *BP*

[18] *Id.* at 81.

[19] 301 Ga. App. 17, 686 S.E. 824 (Ga. App. 2009).

[20] *Id.* at 828.

[21] Case No. 07-CV-604, 2009 U.S. Dist. LEXIS 75595 (S.D. Ill. Aug. 25, 2009).

[22] *See* Dale K. Forsythe and Scott W. Stephan, *"Your Work" Exclusions in CGL Policies,* http://www.waymanlaw.com/pdffiles/Your%20Work%20CGL%20Exclusions.pdf.

[23] Case No. 4:11cv1125, 2012 U.S. Dist. LEXIS 170199 (E.D. Mo. Nov. 30, 2012).

[24] *See* National Ground Water Association, Sample CGL Section II form, http://www.ngwa.org/documents/insurance/ngwasamplegeneralliabilityform.pdf.

[25] 743 F.3d 91 (5th Cir. 2014).

[26] Case No. C05-1886, 2006 U.S. Dist. LEXIS 81049 (W.D. Wash. Oct. 20, 2006), *vacated on other grounds* (2007 U.S. Dist. LEXIS 38072 (May 24, 2007)).

[27] *Id.* at *20, citations omitted.

[28] *Id.*

Air Conditioning Corp. v. One Beacon Ins. Group,[29] the court found that since the injury or damage was incurred "in the course" of operations, coverage was available to the additional insured.[30] The *Woodward* case and other cases emphasize the need to ensure that there is proper coverage for both ongoing operations and completed operations.

2. Recent ISO Changes

ISO is the far most common type of form used in commercial insurance policies, and there have been many versions of such forms over the years for additional insureds. All of the versions of the forms are beyond the scope of this digest, but some common provisions are discussed herein. As previously mentioned, ISO made significant changes to several additional insured forms in 2013, most of which went into effect for policies written on or after April 1, 2013. The full impact of the form changes had not been determined at the time of this publication. However, one of the more important provisions in the 2013 ISO forms is an indication that that privity of contract will not be required in order for the state to take advantage of the additional insured provisions.[31]

Many additional insured endorsements provide that a person who is performing work for a named insured will be an additional insured when "you and such person have agreed in writing that such person or organization is an additional insured."[32] In the past, problems have arisen when a subcontractor has agreed to add the general contractor as an additional insured on its policy where there is no written agreement between the subcontractor and the general contractor. In that situation, the addition by the subcontractor's carrier of the general contractor as an additional insured may have no effect because there was no written agreement between the subcontractor and the state, or no written agreement between the subcontractor and the general contractor.

As noted above, one of ISO's new forms, "Additional Insured—Owners, Lessees or Contractors—Automatic Status for Other Parties When Required in Written Construction Agreement,"[33] provides additional insured protection to any person or organization that the named insured is required by written contract or agreement to name as an additional insured under the named insured's policy. While this endorsement helps to clear up the privity of contract issue, it does not eliminate other policy exclusions or limitations that may apply, thus raising the possibility that protracted litigation will be needed before there is a determination as to whether coverage is in fact available for a particular claim.

There is also concern that the 2013 ISO forms will require a more extensive analysis of the underlying contract to determine the full extent to which the policy will provide coverage based on the terms and conditions in the underlying contract. This can be a concern where the underlying contract is not clear as to the scope of the work, indemnity, and the like. A side-by-side comparison of the 2013 forms to the earlier forms can be found in Appendix D. It should be noted that ACORD®'s "notes of use" for its forms specifically state that old forms should not be used as they are not updated to comply with new state and other legislative requirements.[34]

3. Professional Liability Issues

Another issue that has generated substantial litigation for additional insureds is whether coverage is available for claims arising out of acts, errors, or omissions relating to the rendering of professional services, which will often be applicable to design professionals such as engineers.[35] Most CGL policies exclude coverage for liability arising out of the rendering of acts, errors, or omissions relating to the execution of professional services. Thus, if a claim arises from an accident where someone has claimed that a construction design caused or contributed to the cause of the accident, it is possible that no coverage may be afforded even where the proposed insured is named as an additional insured under a general contractor's policy. However, some courts have held that in determining whether coverage is excluded, courts should not look at the title or character of the person performing the work, but rather the act itself, thus opening up the possibility of coverage.[36]

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[29] 33 A.D.3d 116, 821 N.Y.S. 2d 1 (2006).

[30] *Id.* at 121.

[31] Pence & Wright, supra note 7.

[32] *See* Carolyn L. Morehouse, *Changes to Standard CGL Insurance Forms Impact Coverage for the Construction Industry,* Construction Law Corner eNewsletter, Fall 2013.

[33] ISO form (CG 20 38 04 13), see Robert J. Marshburn, *New Additional Insured Forms Required Contract Revision,* Feb. 2014, paper available at http://parma.com/sites/default/files/files/pdf/e6_insurancewithbobmarshburn.pdf.

[34] *See ACORD Certificates, Frequently Asked Questions,* https://www.acord.org/standards/forms/documents/acordcertificatesfaq_201004.pdf (last visited Jan. 30, 2015).

[35] Cf. Aetna Fire Underwriters Ins. Co. v. Southwestern Engineering Co., 626 S.W.2d 99, 101 (Tex. App. 1981) (There was a contract for placement of phone lines, and a firm contracted with a company to do excavation work, including the identification of lines. The court held the professional services exclusion, which excluded "engineering services," was inapplicable because the acts of digging and locating lines did not involve the specialized application of engineering skills and services).

[36] *See* Marx v. Hartford Acc. & Indemnity Ins. Co., 183 Neb. 12, 13, 157 N.W.2d 870, 871–72 (1968); Harad v. Aetna Cas. & Sur. Co., 839 F.2d 979, 984 (3d Cir. Pa. 1988).

Other courts have held that the professional services exclusion is not applicable to claims of negligent hiring or supervisions.[37] In revising its professional liability endorsements in 2013, ISO added language that the professional liability exclusions arise "even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training, or monitoring of others caused by that insured"[38] as long as the occurrence that caused the damage involved the rendering of professional services. This type of language could lead to protracted disputes about coverage, and again calls into question whether CGL coverage alone is sufficient coverage for many construction projects.

The professional liability coverage issue is of particular interest to state agencies in the context of design and construction plans. When an agency develops its design plans in-house, a traffic control plan may be contained in the plans to provide guidance for traffic for the contractor during various phases over the course of the project. The contractor likely cannot deviate from the provided traffic control plan without specific written permission from the agency. If an accident occurs within the work zone, and the provided traffic control was implemented, the contractor is likely to defend the case stating that it simply used the traffic control plan that was provided, and that it deferred to the expertise of the agency. In *Harlan v. APAC,*[39] APAC was the prime contractor on a pavement overlay job where plaintiff Harlan was injured when he changed lanes on the highway. Harlan contended that additional signing should have been used to warn travelers of the difference in pavement elevation. APAC's defense was that they complied with the plans provided by the state. The court found that the contractor had an independent duty to provide a reasonably safe roadway for the traveling public, and denied APAC's motion for summary judgment, stating that the contractor must exercise its own judgment when evaluating the safety of the traffic control plan and the safety of the construction zone. In *Harlan*, the issue of professional liability insurance was not reached since the design plans were not prepared by a consultant, but by an engineer employed by MoDOT. If the facts had been changed just slightly and the traffic control plan designed by a consultant, the defendant contractor would almost certainly have brought the design consultant into the suit.

The authors observe that CGL coverage alone, whether written under ISO or otherwise, does not appear to be sufficient for most construction projects. In order to adequately address potential claims, states either have CCIP, OCIP, or a CGL with multiple insuring endorsements for a particular project. Part of the problem with requiring many types of coverages beyond just a CGL is that general contractors or subcontractors may not be able to acquire such coverage, or even if they can, it may be prohibitively expensive. In addition, having several types of insurance in place for many different contracts can raise a host of other issues, such as which coverage may be primary, what may be excess, and whether pro-rata sharing of defense and indemnity is required. Given these issues, the authors have included commonly used provisions for construction contracts that have helped to alleviate the concerns about further restrictions in the 2013 forms. More information on alternative language may be found in Section V of this digest.

B. Duty to Defend, Indemnify, and Provide Insurance

An indemnification or "hold harmless" agreement is a contractual arrangement where one party to a contract assumes the liability inherent in the activity, thus relieving the other party of legal responsibility for that activity. The obligation to indemnify is independent of and separate from the obligation to provide insurance coverage. An agreement to insure is simply "an agreement to provide both parties with the benefit of insurance regardless of the cause of the loss (excepting wanton and willful acts)."[40] An agreement to insure is different from the agreement to indemnify in that when an agreement to insure is used, "the risk of loss is not intended to be shifted to one of the parties,"[41] but to the insurance company. Indemnity, as compared to insurance, provides for

[37] *See* National Fire. Ins. Co. v. Lewis, 898 F. Supp. 2d 1132 (2012) (involved professional liability of a doctor, but court said claims were "intertwined" and thus professional liability exclusion not applicable); Capitol Indemnity Corp. v. Especially for Children, Inc., Civ. No. 01-2425, 2002 U.S. DIST. LEXIS 17121, Aug. 29, 2002 (issue of day care provider's right to coverage where there was a professional liability exclusion; court held that most look at the separate claims and what conduct is really at issue, and ultimately concluded exclusion inapplicable); Transcon Ins. Co. v. Caliber One Indemnity, 367 F. Supp. 2d 994 (2005) (must look at nature of act alleged); *see also* Steven Plitt, Joshua D. Rogers, Daniel Maldonado, Jordan Plitt, Lee R. Russ, Thomas F. Segalla, Couch on Insurance, Section 101.60 (West Group, 3d ed. 1997).

[38] *See* Exclusion–Contractors–Professional Liability, Commercial General Liability Endorsement form CG 22 79 04 13.

[39] 360 S.W. 3d 826 (Mo. App. 2011).

[40] Indiana Erectors, Inc. v. Trustees of Indiana University, 686 N.E.2d 878, 880 (Ind. App. 1997).

[41] *Id.*

protection of one party from third-party claims, and is an obligation of the company whether or not the company's insurance carrier decides to cover a loss. The indemnity obligation may even include the negligence of the indemnitee itself.[42] Some states allow for limited indemnity only, providing for an indemnitor to protect the other party to the contract from third-party claims only to the extent of the indemnitor's negligence. Many state courts have construed anti-indemnification laws to invalidate agreements to procure insurance for another party's negligence.[43] Other states still allow broader indemnity agreements. It is important to have both hold harmless and additional insured language in the construction contract or specifications because if the insurance company denies coverage for a particular event, the contractor can still be held responsible for an accident or injury due to the indemnification obligation.

CGL policies normally include at least two liability-related responsibilities of the insurer: the duty to defend and the duty to indemnify. Courts frequently state that the duty to defend is broader than the duty to indemnify. What that means is the insurer must hire legal counsel to defend the insured against a covered suit, even if coverage for the underlying claim may not exist. Additionally, the duty to defend includes a responsibility to cover all legal fees and costs. If a policyholder, or a state agency with additional insured or a named insured status under the policy, is faced with a covered third-party claim, the insurance carrier must defend the claim. If the facts support the basis of the claim, the carrier will also have a duty to pay any monetary award entered against the insured for covered claims.

Disputes over whether a claim triggers an insurer's duty to defend are common. Coverage issues often include items such as whether the insurance is primary (discussed below in more detail), whether the damage or injuries occurred during a covered time period, or whether the damage or injury arose out of the contractor's activities. However, many courts have noted that the duty to indemnify is completely separate from the duty to defend, and "[t]o extricate itself from a duty to defend a suit against the insured, the insurer must demonstrate that there is no possibility of coverage."[44]

An insurer will generally not be able to recover the cost of defending any claim from the insured even if it defends the claim and later proves that the allegations were not covered by the policy.[45] The burden is on the insurer to prove which of the specific defense costs were allocated to the covered claims versus noncovered claims, if it seeks repayment of costs from the insured. When the insurance carrier refuses to provide a defense, it is opening itself up to a claim of bad faith by the policyholder (generally the contractor) or other named insureds under the policy (such as the state).

A claim of bad faith may be made when the insurer unreasonably breaches the insurance policy, i.e., fails to defend its insured, and denies coverage without a reasonable belief that the underlying suit is not covered. In most jurisdictions, if an insurer fails to provide a defense that it was contractually obligated to provide, it will be found to have breached its obligations to the insured and may be held liable for all damages that normally would be expected to flow from that breach.[46] This naturally includes payment of defense costs, attorney fees, and any judgment that resulted from the failure to defend.

C. Breach of Contract

There is no bright line rule to determine when a contractor has breached a construction contract, nor when the governmental agency is actually harmed by the alleged breach. "Breach of contract" is a term of art that means a party has failed or refused to perform all or part of an agreement. It may be difficult to tell when a contract has been breached. For instance, in a situation where a contractor allows insurance to lapse and the coverage was intended by the parties to be in effect for a number of years after a job is completed, the agency will likely never know of the breach if a claim is not made against the policy.

The question of when the breach, or the harm, occurred is very important because of the statute of limitations. Tort and contract actions can only be filed for a certain period of time, depending on the jurisdiction, after a negligent act or contract breach.

Consider a situation where a contractor is required to have coverage for products-completed operations for at least 1 year after completion of the work, naming the agency as an additional insured. If the work is completed before the end of the year, and an incident occurs more than a year later, there may not be any breach. In *LaMorte v. City of New York,*[47] Roadway Contracting, Inc., had a contract with Consolidated Edison Company of New York

[42] *See* Waterwiese v. KBA Construction Managers, Inc., 820 S.W.2d 579 (Mo. App. 1991).

[43] *See, e.g.,* BP Chemicals, Inc. v. First State Insurance Co., 226 F.3d 420 (6th Cir. 2000).

[44] Interstate Bakeries Corp. v. OneBeacon Ins. Co., 686 F.3d 539, 543 (8th Cir. 2012).

[45] *See* Sherwood Brands, Inc. v. Hartford Acc. & Index. Co., 698 A.2d 1078, 1083 (Md. 1997).

[46] S*ee, e.g.,* American Casualty Co. of Reading, PA v. Health Care Indemnity, Inc., 613 F. Supp. 2d. 1310, 1323 (M.D. Fla. 2009).

[47] 107 A.D.3d 437, 967 N.Y.S.2d 331 (2013).

from December 2000 to December 2002. The specifications required Roadway to have products-completed operations coverage for at least 1 year after completion of its work. Roadway was discharged from services on January 2001 because of claimed poor performance. A bicyclist sustained an injury in May 2002 due to claimed improper work by Roadway. The court held there was no breach because Roadway had in fact met its contractual requirements. Its work was completed when it was terminated in January 2001, and it maintained the insurance until January 2002. Since the bicyclist was injured in May 2002, there was no coverage for the agency, and thus no breach.

1. Physical Injury

Another problem that may be encountered in determining when or whether a breach has occurred is whether there is actual damage as a result of the work performed by the contractor. Most CGL policies contain a provision that coverage is not triggered unless there is physical injury to property such as a change in the shape, size, color, or other material dimension, rather than just an economic loss. In *Travelers Insurance Co. v. Eljer Manufacturing, Inc.,*[48] the insured manufacturer of the Qest Qick/Set II (Qest) polybutylene plumbing system sought coverage for the costs of replacing leaky plumbing systems, including plumbing systems installed in homes where the systems were replaced prior to the development of an actual leak. The damages sought against the insured manufacturer were the costs of replacing the system and diminution in value of the homes. The Illinois Supreme Court concluded that the mere installation of the Qest plumbing system, without some physical injury to the home itself, did not constitute an alteration in appearance, shape, color, or other material dimension. Therefore, there was no property damage and no coverage. This type of situation can be particularly problematic to agencies that have to expend significant costs to repair or replace property on which a contractor failed to properly perform services, and yet could be left without coverage because it is merely viewed as an economic loss.[49]

2. Occurrence Versus Claims-Made Policies

Most policies carried by general contractors performing construction for state agencies are occurrence policies rather than claims-made policies, as the occurrence policies are easier to administer and provide more certain coverage. The two types of policies are quite different. In fact, most states specifically required occurrence policies instead of claims-made policies. Occurrence coverage is insurance that provides coverage for the act when it occurs—regardless of when it is reported. Occurrence policies need only to be in effect on the date that an accident causing damage occurs in order to trigger coverage. A claim asserted against the insured may be brought well after the accident. Coverage would then revert back to the policy that was in effect at the time of the accident. Contrast the claims-made policy, which covers claims made during the policy period, regardless of when the negligence or damage occurred. As the name indicates, claims-made policies provide coverage for claims made during the time the policy is in force. However, claims-made policies provide coverage only so long as the insured continues to pay premiums for the initial policy and any subsequent renewals. Once the contractor stops paying the premium, coverage stops for any claims not known or made to the insurance company during the coverage period. A state with a claims-made policy therefore runs the risk of an unknown or unreported claim being made, but not covered because the claim was made outside of the coverage period. To continue coverage after the coverage period, the contractor must purchase a tail. Tail coverage (or the Extended Reporting Endorsement) is an endorsement that extends the claims reporting period after the policy is ended. Tail coverage must be purchased to continue risk protection afforded under the policy. This type of coverage is fairly impractical for a state agency.

As odd as it seems, there can be litigation over when an injury or harm occurred in the context of whether an accident occurred within the policy period. That issue has been litigated several times, with one of the most extensive disputes in South Carolina. In *Bowman v. Standard Fire Ins.,*[50] the plaintiffs claimed injuries due to an accident involving an accumulation of water on a highway that they alleged had been improperly constructed. The accident occurred in March 1998, several years after the construction was completed in 1990. The court in *Bowman* examined ISO forms from 1973 and 1985, as well as the carrier's own form, in determining whether there was coverage for the claim, eventually finding in favor of the insurance company and denying coverage for the claims based on the language of the policy.

Coverage questions regarding when the harm occurred could be further complicated by the

[48] 197 Ill. 2d 278, 757 N.E.2d 481 (2001).

[49] S*ee also* Vernon Williams & Son Const. Co. v. Continental Ins. Co., 591 S.W.2d 760, 764 (Tenn. 1979); Standard Construction Co. v. Maryland Cas. Co. No. 01-2006V, 2002 U.S. Dist. LEXIS 26650 (W.D. Tenn. May 15, 2002).

[50] 397 F. App'x. 886 (4th Circ. 2010).

application of indemnity agreements in conjunction with the contract indemnity provisions, often resulting in protracted and complicated litigation.[51]

3. Failure to Provide Insurance in Compliance with DOT Specifications

Many times, when refusing coverage, an insurance company will state that the coverage requested or demanded is excluded by endorsement or other language found in the policy. This response actually gives rise to the agency's claim for breach of contract against the contractor: the contractor is required by its contract with the agency to procure the coverage outlined in the specifications, and the carrier's denial of coverage shows that the contractor has breached its contract with the agency. In that situation, the contractor potentially has a cause of action against the insurance agent and the state has a cause of action against the contractor.[52] An agent or broker can be liable for negligent procurement of insurance when "with a view to compensation," he (or she) undertakes to provide insurance and negligently fails.[53] This is because an agent or broker owes a fiduciary duty of care to the insured.[54] If an insurance company fails to comply with the state's specifications and therefore fails to provide the required coverage for the contractor, the covenant to provide insurance has clearly been breached.

Cases in which an insurance agent has breached a duty to procure insurance generally refer to the cause of action based on a claim of negligence, although some courts have determined that the action is properly based in contract law.[55] A state may be able to file an action against the insurance company for failure to procure insurance on its behalf pursuant to a privity argument or language in the specifications.[56]

The survey results and research reveal that it is important to anticipate the potential liability situations that may arise, including negligence of all parties, professional liability, and failure to properly implement the provisions of the contract. In fact, due diligence requires a thorough and thoughtful review of potential issues. Once all the risks are assessed, the agency can obtain appropriate coverage at the beginning of the contract period to avoid the possibility that there will not be any available recovery at all in the event of a loss, whether from pursuing a breach of contract claim against a contractor, or pursuing one against the carrier.

D. Waiver of Sovereign Immunity

Several courts have considered whether a waiver of sovereign immunity occurs when a contractor purchases insurance on behalf of the agency or adds the agency as an additional insured or additional named insured. Multiple state courts have held that the legislature or general assembly is the only entity with authority to waive sovereign immunity on behalf of the state.[57] Similarly, "a municipality cannot waive its immunity unless it has explicit statutory authority to do so."[58] Multiple state courts have held that postjudgment interest is not subject to sovereign immunity.[59]

While some state courts have held that sovereign immunity is not waived by the purchase of insurance, other states allow a waiver under some conditions. In order to address that potential problem, a statement could be made in the standard specification that sovereign immunity is not waived. Additionally, protection of the state's sovereign immunity caps can potentially be accomplished if the contractor's insurance policy clearly states that sovereign immunity is not waived by the purchase. In *Parish v. Novus Equities Company,*[60] the issue before the court was whether procurement of liability insurance waived sovereign immunity for alleged economic damages to the plaintiffs. The court stated, "a public entity retains its full sovereign immunity when the insurance policy contains a disclaimer stating that the agency's procurement of the policy was not meant to constitute a waiver of sovereign immunity."[61] The *Parish* court further noted that coverage would not be available to the plaintiffs in

[51] *See* Capitol Environmental Services v. North River Ins. Co., 778 F. Supp. 2d 623 (E. Dist. Va. 2011).

[52] *See* Lopez v. Hartford Acc. and Indemn. Co., 495 So. 2d 375 (La. App. 3d Cir. 1986).

[53] Alldredge v. Allstate Ins. Co., No. 4:14-CV-1186, 2014 U.S. Dist. LEXIS 99771, at *8 (N.D. Ala, July 23, 2014).

[54] *See* Aden v. Fortsh, 169 N.J. 64, 776 A.2d 792 (N.J. 2001).

[55] *See* McAlvain v. General Insurance Co. of America, 97 Idaho 777, 554 P.2d 955 (1976).

[56] *See, e.g.,* Vargas v. N.Y. Transit Auth., 60 A.D.3d. 438, 874 N.Y.S.2d 446 (2009).

[57] *See* Georgia Dep't of Natural Resources v. Center for a Sustainable Coast, Inc., 294 Ga. 593, 755 S.E.2d 184 (2014); Edmonson County v. French, 394 S.W.3d 410 (Ky. App. 2013), Lynch v. Dep't of Transp., 2012 Ill. App. (4th), 111040, 979 N.E.2d 113 (2012 filed).

[58] Fiat Motors of North America Inc. v. Mayor and Council of City of Wilmington, 498 A.2d 1062, 1068 (Del. 1985).

[59] *See* Wilmer v. Board of County Commissioners of Leavenworth, Kansas, 916 F. Supp. 1079, 1080–81 (D. Kan. 1996), and Lienhard v. State, 431 N.W.2d 861, 862 (1988), where the Minnesota Supreme Court held that postjudgment interest could be paid above the State's cap on tort damages.

[60] 231 S.W.3d 236 (E.D. Mo. 2007).

[61] *Id.* at 246.

that action because the policy only covered tangible property, not economic losses.

Similarly in *Wright v. Gaston County,*[62] the insurance provision reviewed by the court read as follows:

> By accepting coverage under this policy, neither the insured nor States waive any of the insured's statutory or common law immunities and limits of liability and/or monetary damages (including what are commonly referred to as liability damages caps), and States shall not be liable for any claim or damages in excess of such immunities and/or limits.[63]

The court found that since the language of the applicable statute and the exclusion clause in the insurance contract were clear, sovereign immunity was not waived. The insured has the burden of showing exclusion to coverage, as noted in *Manner v. Schiermeier,*[64] where the insurer relies on a policy exclusion as a basis for denying coverage. However, "it has the burden of proving that such an exclusion is applicable," and the exclusion clause will be strictly construed against the insurer.[65]

Many jurisdictions provide that the procurement of insurance is a waiver of governmental immunity to the extent of the tort claim covered by the insurance policy. In *Cunningham v. Riley,*[66] the court stated "a county may waive sovereign immunity by purchasing liability insurance, but only to the extent of coverage provided."[67] Other states hold that the waiver is not automatic upon the procurement of insurance unless provided in the insurance policy.[68]

Based on the holdings of the cases reviewed herein, and other similar holdings, the contractor's insurance carrier should specifically state that sovereign immunity is not waived in the policy. The construction specification should also clearly articulate that sovereign immunity is not waived by the agency requiring insurance to be purchased on its behalf.

E. Primary Coverage

Coverage by the contractor must be primary and not "excess" or "secondary" to effectively protect the agency. The significance of primary coverage is that it provides the first layer of coverage to a person or entity. The specification and insurance policy should specifically set out that the contractor's coverage is considered primary so that the contractor's insurance is the first to cover any claim. If the contractor's insurance is primary, it will be exhausted before any insurance carried by the state or any funds allowed due to a waiver of sovereign immunity are accessible to the parties. An umbrella, or excess policy, is used to provide coverage above the underlying primary limits.

CGL insurance is normally primary unless the policy expressly states that it is not primary coverage. Only after primary coverage is exhausted, or it is determined that no underlying coverage exists, does the umbrella policy become primary and thus available to the insured party. If the state maintains any other insurance or self-insurance, it should be considered excess only and should not be used to contribute to or combine with other insurance.

Coverage disputes sometimes arise among insurance carriers when multiple policies with multiple types of insurance have been purchased for a project and more than one policy is claimed to be primary or excess. To remedy this problem, the courts have adopted a rule that when competing policies carry similar "other insurance" clauses, the courts should disregard the clauses as being mutually repugnant and simply order all the insurers to share the loss. A primary insurer, thus, cannot use the "other insurance" clause to require an umbrella carrier to share in its liability.[69]

F. Owner Controlled Insurance Policies (OCIP) and Contractor Controlled Insurance Policies (CCIP)

Both an OCIP and a CCIP, also known as a wrap up, have the same general premise: essentially, they are package policies that cover virtually every type of risk and liability for a particular construction project. These policy types have not been widely used, but are becoming more accepted as they consist of a single policy with a single insurer, and avoid the administrative and substantial legal problems that many persons and organizations on projects are having with their own insurance. Most package policies are written with large deductibles, and are typically used with projects that involve multiple years and millions of dollars.

As the names indicate, OCIP is a package policy purchased by the owner of the property, while a CCIP is a package policy purchased by the general

[62] 205 N.C. App. 600, 698 S.E.2d 83 (filed 2010).

[63] *Id.* at 89.

[64] 393 S.W.3d 58, 63 (Mo. 2013).

[65] Sexton v. Omaha Prop. & Cas. Ins. Co., 231 S.W.3d 844, 848 (Mo. Ct. App. 2007).

[66] 169 N.C. App. 600, 611 S.E.2d 423 (2005).

[67] *Id.* at 424. *See also* Pittsburgh Elevator Co. v West Virginia Board of Regents, 310 S.E.2d 675, 689 (1983), where the court stated "where recovery is sought against the State' liability insurance the doctrine of constitutional immunity, designed to protect the public purse, is simply inapplicable." The court limited plaintiff's recovery to the benefits of the insurance policy.

[68] *See* McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959); Reeves v. City of Jackson, 608 F.2d 644 (5th Cir. 1979).

[69] LeMars Mutual Insurance Co. v. Farm and City Insurance Co., 494 N.W.2d 216, 219 (Iowa 1992).

contractor of the project. The package typically includes CGL, worker's compensation, and every other type of insurance that may be needed for a particular project. Because of the scope of insurance involved, it can be complicated and expensive to put in place, but the benefits can be significant.

As mentioned above, disputes can arise in the typical CGL context as to whether the incident occurred because of professional liability in the rendering of or failing to render certain services. There can be issues as to whether the incident occurred to a particular part of property. By combining all necessary coverages through a package policy, these types of problems can be avoided because a single policy with a single carrier will address the claims, subject to a few exclusions. The use of a package policy can help standardize jobsite safety procedures, and allow for better staffing and safety audits. Also, since all enrolled parties are covered under one policy, issues about multiple attorneys being needed to provide defenses, and the possibility of cross-claims and even counterclaims, can potentially be avoided. The policy specifically includes a Named Insured Endorsement, an example of which is below:

NAMED INSURED ENDORSEMENT

Policy Declarations, "Named Insured" is amended to include as Named Insureds:

All contractors and/or subcontractors/consultants for whom the Owner or Owner's agent is responsible to arrange insurance to the extent of their respective rights and interests.

Coverage afforded by this policy is automatically extended to contractors who are issued a Worker's Compensation policy under this OCIP. All other contractors not issued a Worker's Compensation policy must be endorsed onto the policy to be afforded coverage under this policy.

"Named Insured" does not include vendors, installers, truck persons, delivery persons, concrete/asphalt haulers, and/or contractors who do not have on-site dedicated payroll.[70]

All other terms, conditions, and exclusions remain the same.

There can be some disadvantages to this coverage, aside from the administrative burden of ensuring the proper coverages are in place. One potential disadvantage is that a contractor could submit claims for non-contract injuries, and those may be difficult to determine. However, with the proper carrier and risk management, that disadvantage could be eliminated entirely. Another potential disadvantage is determining who has the responsibility for what aspect of the project, but with the proper partnering and definitions, those problems can be avoided.

Under an OCIP, aggregate and per occurrence limits apply to all contractors and subcontractors for the term of the project. There are options for extending completed operations coverage beyond the completion of the total project, not just the contractor's or subcontractor's portion of the project.

IV. COMMON COVERAGE ISSUES

Most of the litigation involved with construction contracts ultimately boils down to issues of interpretation of the insurance policy language. In a perfect world, agencies would be able to assume that the insurance carrier will supply coverage to comply with its specifications. However, agencies should be aware that carriers will not always comply with the specifications and will not always provide coverage that is in line with the agencies' expectations. For instance, if the specifications call for the agency to be named as an additional insured, the agency intends to be named as an additional insured without exception or subject to endorsements that water down or exclude the coverage. Only by a careful review of the policy and endorsement language can the agency be certain that the proffered coverage is acceptable. All of the issues discussed in this section ultimately concern the language of the insurance policy. The following topics were common concerns among state agencies responding to the survey.

A. Coverage for Accidents in the Construction Zone

Many agencies expressed concern about coverage for accidents that occur within their construction zones. Usually the coverage questions relate to whether the accident occurred due to activities arising out of the contractor's operations or the contractor's failure to perform the work in accordance with the specifications and plans. For instance, in a situation where a construction vehicle or equipment strikes a member of the traveling public, the contractor can easily make the argument that the accident arose out of the activities of the contractor and should expect to be covered by either the CGL or automobile liability policy. A more difficult situation would be where the plaintiff alleges that deficiencies in design plans led to his or her injuries. If the plans were prepared internally by the transportation agency, an argument can be made that the engineer who designed the plans is protected by a discretionary immunity. In *Texas Department of Transportation v. Hathorn,*[71] a fatal accident occurred when a

[70] Tracy Alan Saxe, *Construction Wrap-Ups: Owner and Contractor Controlled Insurance Programs,* in Construction Law Handbook, § 19.03[B] (2009).

[71] No. 03-11-00011-CV, 2012 Tex App. LEXIS 5906 (July 19, 2012).

vehicle hydroplaned in a rainstorm and struck a parked dump truck. Plaintiffs alleged that the Texas Department of Transportation's (TxDOT) design of the cross slopes on the highway caused the accident to occur. The court found that the state and the individual employee were protected from liability due to the state's discretionary immunity doctrine. Other states allow immunity for the individual employees, but not their employers.[72]

If the state transportation agency did not design the highway plans internally, a claim for negligent design can likely be made against a consulting engineer or the contractor. The consulting engineer should be protected by his or her professional liability insurance for malpractice errors and omissions, assuming damages are related to the insured's performance of professional services. The consultant does not enjoy the protection of discretionary immunity afforded to state engineers.

Another related issue is whether coverage is available to a state transportation agency when an alleged roadway deficiency is either caused or allowed to remain by the actions or inactions of the transportation agency. The carrier will ultimately look to the language of the policy to determine coverage. If the facts can be construed such that the state's sole negligence caused the accident, coverage will likely ultimately be denied unless the contractor agreed to indemnify the state for its own negligence.

B. Status of Additional Insured and Additional Named Insured

Regardless of whether the entity has been named as an additional named insured or an additional insured, it is insured to some extent under the contractor's policy. The most significant difference between the two usually comes from language in the additional insured endorsement that limits the coverage extended to the additional insured to liability arising out of operations performed by or on behalf of the named insured. This means that typically the coverage will only be available for damages incurred by the additional insured if there is some connection with the operations of the named insured (the contractor). For example, if an accident occurred within a contractor's construction zone and the contractor had implemented a traffic control plan that was developed by the state, both entities would likely be covered because the claim arose out of operations performed by the contractor. Essentially, coverage to the additional insured would be available if the allegations (and proof) were that the contractor and the state agency were both negligent in regards to an activity that occurred within the construction zone.

When the agency is an additional named insured, it is closely associated with the first named insured (the contractor) and enjoys very broad coverage. This may include entities such as bonding authorities or other entities whose operations nearly always involve the first named insured. By adding an entity as an additional named insured, the contractor extends coverage under its liability policy to all operations of the entity. It should be noted that additional named insureds do not necessarily share all the privileges and responsibilities of the named insured, such as the obligation to pay premiums, cancel coverage, and receive notice of cancellation.

One of the disadvantages to the additional insured or additional named insured status is the agency's loss of control over the litigation. Typically in a CGL policy, the insurer has the right to direct the litigation, such that the insured may benefit from the insurance protection but lose control over the defense of the claims made against it.

The agency may also be concerned about the possibility of its own insurer being required to participate with the named insured's company in defending claims against them both. One of the reasons that the additional insured status is requested is so the agency can obtain a given amount of primary coverage under the liability policy. Many times an additional insured will be covered by its own policy and its contractor's policy and the carriers will have to closely examine the language of the policies to determine which is primary. It is not unheard of for this issue to be litigated if the policies have conflicting clauses, which can cause delay in the underlying litigation and uncertainty for the agency, particularly if the agency does not know whether it is covered for the underlying claim.

Another concern the state may have with regard to additional insured coverage is the contractor's deductible. If the contractor has a high deductible, it must have the resources available to meet the deductible, otherwise the coverage anticipated by the state will never be used. For this reason, the agency must be certain that the coverage is truly primary, and the carrier has a duty to defend both the agency and the contractor. The state should be certain that the contractor's insurance policy would be applied, in full, before any coverage the state may have is reached.

C. Prevention of Lapse in Coverage

The contractor must always have insurance in place during the course of the project. Every state that answered the survey indicated that it considered

[72] *See, e.g.,* Heins Implement Co. v. Mo. Highway and Transp. Comm'n, 859 S.W.2d 681 (Mo. 1993).

the contractor to be in breach of its contract if insurance was not in place, and all of the state specifications require insurance to be in place before the project begins. Each specification further provides that the contractor will be in breach of the contract if insurance lapses without a replacement. Many of the specifications also require notification by the contractor to the state 10 to 30 days in advance of lapse of coverage. The problem is that if the contractor responsible for the potential lapse does not notify the state, the state may not know about it. For that reason, the state requires the insurance carrier to notify it of a potential lapse in coverage. A certificate holder as noted on the certificate of insurance is entitled to receive notice of cancellation.

Many times, the insurance carrier does not want the responsibility of notification and may include language in the policy to the effect that it will attempt to notify the certificate holder in the event of a change in or lapse of coverage. Under most policies, a notice of cancellation is only provided to the first named insured or named insured as the owner of the policy.

To address this problem, ACORD® insurance producers changed the language in the ACORD®-25, which is the certificate of liability.

A revised edition of the ACORD®-25 was published in October 2009. One of the more significant changes was to the language referencing policy cancellation provisions. Following is a comparison of the old and new text:

> *Old Text.* Should any of the above described policies be cancelled before the expiration date thereof, the issuing insurer will endeavor to mail X days written notice to the certificate holder named to the left, but failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives.
>
> *New Text.* Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions.[73]
>
> The notes describing the reason for the change are as follows:
>
> The word "endeavor" was removed because policy cancellation provisions generally do not use the word "endeavor." Only a policy can obligate an insurer to provide notice of cancellation. Unless a policy's provisions explicitly provide for notice to a party also listed as the certificate holder on the certificate of insurance, the insurer is not obliged to notify that party. The new language is compliant with state insurance regulatory requirements in all states, and specifically responsive to bulletins issued last year by the South Dakota Insurance Department. Since the form is national, not state-specific and is filed where required, only the version of the form containing the new language should be used in all states. Certificates of insurance may be viewed as a summarized reflection of an insurance policy and are only informational. The policy is the definitive source for its provisions, not the certificate. If any party in addition to the first named insured desires a copy of a cancellation notice in the event the policy is cancelled, that party should be expressly endorsed onto the policy as a cancellation notice recipient.[74]

To avoid a failure of communication and potential lapse in coverage, the agency should request certificate holder status at the time it is added to the policy. This status entitles the agency to receive notice of policy cancellation. An alternative would be to require the carrier to use the ACORD® 25 certificate, or its equivalent.

D. Uncertainty of Coverage

One of the first problems the state will face in a lawsuit involving allegations of negligence of both the contractor and the state is uncertainty of insurance coverage. After a claim is tendered to the insurance carrier, the carrier will do one of three things: accept the tender, decline the tender, or accept under a reservation of rights. If the carrier issues a reservation of rights letter, the state may not be assured of coverage until a jury verdict is reached and fault is apportioned among parties.

While the agency does not want to receive a reservation of rights letter, because it normally indicates that the defense is being accepted conditionally, the letter itself is an appropriate response by an insurance company that does not have enough information to decide whether to defend a claim. In *Passiac Valley Sewerage Com'rs. v. St. Paul Fire and Marine Ins. Co.,*[75] the court stated that an insurance company "acted appropriately in proffering a defense while preserving its rights through the issuance of reservation of rights letters…by reserving rights and providing defense costs on covered claims, an insurer fulfills its defense obligations."[76]

The reservation of rights letter must clearly and timely communicate to the insured if it is delaying a decision on coverage for the claim or if it is accepting the defense. The letter should outline the factual basis of the suit and the applicable policy provisions. If the tender is accepted, the company should inform the insured of the conditions of acceptance and then state that if further factual information is discovered that affects the available coverage, the carrier may modify its position and seek reimbursement for defense costs and any indemnity payment made.

[73] *See ACORD® Frequently Asked Questions,* https:/www.acord.org/standards/forms/documents/acordcertificatesfaq_201004.pdf.

[74] *See ACORD® June 28, 2010 Forms Notice,* https://www.acord.org/standards/forms/documents/20100628_acordformsnotice.pdf.

[75] 206 N.J. 596, 21 A.3d 1151 (2011).

[76] *Id.*

If an insured does not respond to the reservation of rights letter, the lack of response can be construed as consent to the reservation.[77] If the agency is not satisfied with the conditions set out in the reservation of rights letter, it can hire its own counsel to defend it and pursue the insurance company for costs, or file a declaratory action against the insurance company demanding that the court determine whether or not coverage exists. While the costs of these actions should be recoverable by the agency if it is determined that the carrier should have provided a defense and did not, those options take time and resources away from the defense of the claim.

E. Rights of the Insurer and Rights of the Insured

All the parties to the insurance contract have basic rights and fiduciary obligations to each other. The following paragraphs discuss the most basic obligations of the parties.

1. Rights of the Insurer

There will likely be a provision in the insurance contract that requires the agency to notify the insurance carrier as soon as possible after receiving notice of the suit. The insurance company does not have a duty to defend until after it has been given proper notice of the suit. If appropriate notice is not given, the carrier may refuse to defend. Notice is typically accomplished by a tender of the defense as discussed in the following sections of this digest. In order for a carrier to successfully claim that it has been prejudiced by late notice of the suit, it has to be able to show the court that the lack of timely notice materially impacted or prejudiced its ability to defend the claim. A 15-month delay in notification has been held to be unreasonable and to materially impact the defense of the claim.[78]

Insurance carriers must take their obligations as fiduciaries very seriously as there can be severe financial repercussions if the obligations are breached. The duty to defend is determined by a careful review of the allegations in the complaint or petition. The insurer will compare the allegations in the petition to the language of the policy in order to make a coverage decision. The insurer is required to defend the claim if the allegations in the petition arguably or potentially state a claim for which the state could be responsible. Facts known to the insurer, or ascertainable through a reasonable investigation, may also create a duty to defend. Additionally, the carrier has a duty to defend allegations that appear to be within the policy's coverage even if it may not ultimately be obligated to indemnify the insured. While the burden is on the insured to prove there is coverage under the policy, the insurer has the burden to prove when exclusion applies.[79]

Once the defense has been accepted, the insurer will send a letter outlining the terms of its defense. Under the terms of the typical CGL policy, the insurer has complete control of the litigation, including the right to select an attorney for the defense of the claim or to settle the claim. The insured has no authority to compel the carrier to settle or to compel it to go through the litigation process.

The insurance carrier has the right to expect cooperation from its insured. If the insured (the state) refuses to cooperate with the defense, in such a manner that the insurance company is substantially prejudiced, the insurer will be relieved of its responsibility to defend. It is important to recognize that if the carrier is relying on a duty to cooperate provision in requiring the agency to assist in the investigation of the claim, safeguards should be put in place to avoid a waiver of privilege in case the carrier does not ultimately end up defending the state. For example, if underlying litigation is occurring during the investigation of the claim, the agency should be careful about the method and manner of communication regarding the investigation by the carrier so it can avoid the potential for information that may be adverse to the agency being improperly disclosed.

In a typical construction contract, the insurance carrier has the right of subrogation, which means it has the right to attempt to recover the money it has paid on the claim from another party, essentially standing in the shoes of the insured.[80] The right of subrogation may be waived by the insurer, either via contract or simply by its failure to attempt collection at the time of settlement, or by taking other affirmative actions to preserve its rights to subrogate.

Both the insurer and the insured have a good faith and fair dealing obligation to the other, which means that both parties agree that neither of them will do anything to keep the other party from receiving the benefits of the agreement. To fulfill its implied obligation of good faith and fair dealing, an insurance company must give at least as much consideration to the interests of the insured as it gives to its own interests. Breaching the implied

[77] THE LAW OF LIABILITY INSURANCE, Section 5.17 (Rowland H. Long, ed., Matthew Bender 1988).

[78] E.B. General Contracting v. Nationwide Ins. Co., 189 A.D. 796, 592 N.Y.S.2d 455 (N.Y. 1993).

[79] Valentine-Radford v. American Motorists Ins. Co., 990 S.W.2d 47 (Mo. App. 1999).

[80] *See* S.S.D.W. Co. v. Brisk Waterproofing Co., 76 N.Y. 2d 228, 556 N.E.2d 1097 (N.Y. 1990).

obligation of good faith and fair dealing requires the insurance company to unreasonably, or without proper cause, act or fail to act in a manner that deprives the insured of the benefits of the policy.[81] If an insurance company refuses to defend a claim, and the agency in good faith believes that the claim is one that is covered by the contractor's insurance policy, the agency may consider a bad faith cause of action against the carrier. Bad faith cannot be established by just the failure to exercise reasonable care: a breach of the implied covenant of good faith and fair dealing involves something more than a breach of the contract or mistaken judgment. There must be proof that the insurer failed or refused to discharge its contractual duties not because of an honest mistake, bad judgment, or negligence, "but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement."[82] "The covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive. …[A]n insured plaintiff need only show, for example, that the insurer unreasonably refused to pay benefits or failed to accept a reasonable settlement offer; there is no requirement to establish subjective bad faith."[83]

2. Rights of the Insured

Some policies contain specific language requiring prompt notice of a claim or suit, as well as cooperation in the investigation of a claim. As discussed above, while the definition of "prompt" can be debated, it makes sense for the agency to put the insurance carrier on notice of any potential claims as quickly as possible. If the agency receives a reservation of rights letter in response to its tender, it has the right to expect the carrier to clearly communicate its position with regard to coverage.

In many states, the insured has the right to refuse a defense that is subject to reservation. If the insured refuses the defense, the insurer must decide whether to withdraw the reservation and defend the suit, file a declaratory action to have a court decide whether coverage is in place, or refuse to defend.[84] In *Rhodes v. Chicago Ins. Co.,*[85] the court held that when an insured refuses a defense because it is offered subject to a reservation of rights, the carrier must pay for the insured's defense and the insured is "unrestricted by conditions in the policy," [86] meaning that the insured no longer has the obligation of good faith toward the carrier. Other courts have held, however, that the insurer has not breached its duty to defend by issuing a reservation of rights letter, but can satisfy its obligations later by reimbursing the insured for its costs of defense.[87]

If a tender request is sent and no response is received while litigation is continuing, an agency has the option of filing a declaratory judgment action and getting a court to determine coverage. One of the difficulties in pursuing such an action is that there is then companion litigation. Some states, such as Missouri, do not allow a stay of underlying litigation while the coverage case is pending. In that situation, the agency may have to pay for the defense of the underlying case while also paying for litigation of the declaratory judgment action. Further, under the Uniform Declaratory Judgment Act,[88] which many states have adopted at least partially, a declaratory judgment action can be dismissed as not being ripe.

There may be a question as to whether the agency has been harmed by the lack of a response to a tender until there is a judgment against the agency. The fact that the agency is paying legal fees may not be enough to show harm in order to have a court determination on a request for defense and/or indemnity before the underlying litigation is concluded. Some caselaw indicates that the harm or breach does not actually occur until the agency is obligated to pay a judgment.[89] Of course that means the statute of limitations on the breach of contract action does not begin to run until the state is obligated to pay a judgment.

V. OBSERVATIONS

The following observations are based upon the concepts of due diligence, legal research, survey responses, and interviews with key state agency

[81] *See* Allsup's Convenience Stores, Inc. v. The North River Insurance Company, 127 N.M. 1, 976 P.2d 1 (N.M. 1998).

[82] Century Surety Co. v. Polisso, 139 Cal. App. 4th 922, 949, 43 Cal. Rptr. 3d 468, 487 (2006).

[83] *See* Bosetti v. United States Life Ins. Co. in the City of New York (2009) 175 Cal. App. 4th 1208, 1236, 96 Cal. Rptr. 3d 744, 769 (2006).

[84] Richmond v. Georgia Farm Bureau Mutual Ins. Co., 140 Ga. App. 215, 231 S.E.2d 245 (1976).

[85] 719 F.2d 116 (5th Cir. 1983).

[86] *Id.* at 121.

[87] *See* National Mort. Corp. v. American Title Ins. Co., 41 N.C. App. 613, 255 S.E.2d 622 (1979).

[88] Uniform Declaratory Judgments Act, drafted by the National Conference of Commissioners on Uniform State Laws, 1922, http://www.uniformlaws.org/shared/docs/declatory%20judgments/udja%201922.pdf.

[89] *See* Burns and McDonnell Engineering Co. v. Torson, 834 S.W.2d 755 (Mo. App. 1992).

personnel. The authors assume, for the purpose of these items, that standard specifications are incorporated by reference into the road and bridge construction contracts and only unusual (or job special) provisions can be found in the contract.

A. Components of the Commonly Used Provisions

A section on commonly used provisions in state specifications was developed as part of this research project. The following elements are considered to be essential provisions, ensuring that an agency will obtain the anticipated benefits of a contractor's insurance coverage:

1. Indemnification

Indemnification is the complete shifting of liability for loss from one party to the contract to another party to the contract and one of the ways the agency can be certain that the contractor will be responsible for its actions or inactions on the job site if insurance coverage is declined for any reason. Agencies require their contractors to indemnify and hold them harmless, thereby ensuring a layer of protection that is separate from insurance. In a typical state construction contract, the general (or prime) contractor is required to indemnify the state agency for any claims, losses, or expenses that the state incurs for bodily injury or property damage arising out of the general contractor's operations, materials, parts, or equipment.

2. Type of Insurance

CGL coverage alone, whether written under ISO or otherwise, is not sufficient for most road and bridge construction projects. States either have CCIP, OCIP, or CGL coverage with multiple insuring endorsements in place for a particular project to adequately address claims that may arise. Regardless of the means chosen, states provide clear delineation in the specifications as to the obligations of a general contractor to the state, including the general contractor's responsibility for actions of subcontractors, and/or a required endorsement setting forth the obligations of the contractor while eliminating the application of some otherwise common exclusions such as for professional liability or for that particular part of the work. Additionally, states require the policy in its entirety to be submitted, along with an affirmation of coverage.[90]

While it is preferable from a liability standpoint for an insured state to be named as an additional named insured on the contractor's CGL policy, some states do not permit entities or other persons to be listed as an additional named insured. A suitable policy will list the appropriate state entity as an additional insured with some form of endorsement to avoid the common exclusions noted above. A sample additional insured endorsement can be found in Appendix G.

To avoid a failure of communication in the case of a potential lapse in coverage, the agency requires certificate holder status. This language entitles the agency to receive a notice of policy cancellation from the insurer. In addition to requiring certificate holder status, the agency could require the carrier to use the ACORD® 25 certificate, or its equivalent.

3. Proof of Coverage Requirements

The pertinent parts of the policy or the applicable endorsements must be submitted to the agency prior to the issuance of the Notice to Proceed. The certificate itself is not proof of insurance (as is clearly printed on most forms) and should not be accepted without additional confirmation of coverage. If the agency does not have the insurance forms to review prior to the beginning of the work, it cannot be sure it has the appropriate coverage. Just one word in an endorsement or other part of a policy can change the entire meaning of the insurance policy. Small, seemingly insignificant, changes in policy language may cause the state to pay for damages that it intended to protect itself from when requiring the contractor to procure the insurance coverage.

4. Affirmation of Coverage

The agency requires affirmation or confirmation of coverage by the insurance provider or the contractor. The affirmation is likely to be more enforceable if signed by the contractor, because the contractor, rather than the insurance company, is contractually obligated to the state to procure the appropriate coverage. Examples of forms that have been developed by state agencies can be found in Appendix B. While the affirmation may not completely ensure the agency that the required insurance has been purchased and is provided, when combined with the appropriate insurance coverage, the affirmation is an additional written promise by either or both the contractor and the insurance carrier that it reviewed the coverage requirements and has complied with them.

5. Notification of Accidents or Claims and Response to Tender of Claims

Prompt notification is made by the state to the insurance company and contractor when an incident or accident occurs in the construction zone. The state has a contractual responsibility to place the contractor and its insurance company on notice at

[90] *See* the Commonly Used Provisions in State Specifications in Section V.

the time it becomes aware of a potential incident or accident. The insurance policy may include requirements to notify the contractor or insurance company as soon as an incident occurs or the agency becomes aware of it. Conversely, the agency requires the contractor to give notice of accidents in a timely manner so that the state can do its own investigation before crucial evidence disappears. Communicating freely between the entities on these issues assists the agency in developing good relationships and assuring coverage for covered incidents.

In order to trigger the insurance carrier's duty to defend, the insured must tender its defense in accordance with the conditions of the policy, since tendering the defense is a precondition to coverage. The standard CGL conditions require the insured to give notice of any suit filed against it as soon as practicable, furnish the insurer with the details of timing of service, and to forward the insurer all the legal papers it receives on a timely basis. The tender must include an affirmative request for a defense under the policy. This is done by stating that the insured is requesting indemnity and defense for the claim, and including an accident report, copy of the policy, and any other pertinent information, such as the petition, with the demand. Notification should be sent via certified mail or other verifiable and reliable means to ensure that the state can document the date of the tender.

If a claim must be made, a tender letter to both the contractor and the carrier should be made as soon as is practicable. There can be multiple potential carriers so the tender is sent to all carriers. In the event the agency does not know the identity of all carriers, the notice is sent to those that can be identified with a request to those carriers and the contractor to notify all other possible carriers of the tender. It may also be appropriate to send a tender letter to the insurance agent for the contractor.

The waiting time for a response to a tender of defense is generally no more than 60 days. Defense expenses can begin from the moment a state is served with a lawsuit.

6. Prevention of Lapse of Coverage

Prevention of lapse in coverage, especially for nonpayment by the contractor, is very important to the agency. All the state transportation agencies require proof of adequate insurance to be made prior to the issuance of the Notice to Proceed. Difficulty lies in confirming that the coverage remains in place during the entirety of the project. The agency ensures that protection is written into the specifications in the form of a requirement that the contractor inform it at least 30 days in advance if insurance is to lapse. The state also requires status as a certificate holder to be noted on the certificate of insurance, or alternatively, to require the contractor's insurance company use the ACORD® 25 form. Additionally, it should be noted in the insurance policy or endorsement that the insurance company will inform the agency at least 10 days in advance when a policy is about to lapse. The agency also makes it clear that lack of insurance is a breach of contract and that work will stop until appropriate coverage is back in place.

7. Addendum to Coverage

The agency, after review of the endorsements and policies submitted by the contractor or the contractor's insurance carrier, may determine that the appropriate coverage was not provided prior to the issuance of the notice to proceed. The agency should be able to simply contact the contractor or carrier and request that appropriate coverage is promptly issued. If corrective action is not taken quickly, the contractor or carrier may be able to claim that the coverage requirements have been waived by the agency's failure to demand the coverage outlined in its specifications. Additionally, the state is in a much better position to demand coverage while the project is ongoing than after the project is complete.

8. Financial Rating and Size

Many agencies, such as Caltrans, the Nebraska State Department of Roads, Wyoming Department of Transportation, and Michigan Department of Transportation, require insurance companies to have a particular financial rating, such as AM Best and a Financial Size category of VII, before they will accept the contractor's insurance coverage. This is to ensure that the agency will be able to look to very solid insurance carriers should there be a claim. If a carrier is not financially strong and capable of paying claims made against it by third parties, the contractor, or the state itself, it will be insolvent quickly when claims are made.

B. Frequently Used Internal Processes

The following processes were identified in responses to the survey and, depending on the needs of the agency, may be good additions to the agency's standard specifications or procedures. The individual state responses are discussed in more detail at Section II of this digest.

1. Retainage Documentation of Insurance Coverage

Certificates of insurance, endorsements, and policies are kept indefinitely as claims can occur long after the official completion and acceptance date of the project. If the certificates, endorsements, and other important documents cannot be located, it will

be difficult to make a claim against the appropriate insurance carrier and ensure coverage for a claim. In many states, breach of contract claims can be made for up to 10 years after the ending of a contract. Tort claims are typically limited to 3 to 5 years after the incident by applicable statutes of limitation, but those periods of time can be extended under some circumstances. Many states keep a database of submissions organized by the contractor name or project name.

2. Tiered Insurance

Several agencies indicated that they tied the required insurance amount and excess coverage to the amount or value of the construction job. They also considered, of course, the risks inherent in the job. If an agency were to allow the use of tiered coverage, smaller and/or minority contractors could be able to bid on contracts that would otherwise be unavailable to them due to the costs of insurance.

3. Attorney's Fees

Anticipating litigation, some states set out in their specifications certain obligations of the contractor to pay for legal fees. Kansas provides in its specifications that defense costs plus interest are to be paid by the contractor if the claim is a result of the contractor or sub-contractor's actions or inactions. In Utah, the Department of Transportation may require the contractor to represent it, or may choose to retain separate counsel. The agency will pay for its own attorney's fees, costs, and expenses if it utilizes its own counsel. After judicial or other determination of fault, costs are apportioned between the agency and the contractor. Still other states agree for their counsel to stay in the case and defend the agency, requesting payment only for their expenses.

4. State Specific Certificate of Insurance

Rather than using the standard ACORD® form, some transportation agencies, including those in Maine, Massachusetts, and New York, have their own insurance certificates. New York will not accept the use of the ACORD® form. Use of the specially tailored certificates allows easy verification of appropriate coverage. The contractor and/or the insurance carrier must fill out the form. Examples of these state specific certificates are provided in Appendix B. The benefits of developing and using a form tailored to the particular agency's needs may be tremendous. This benefit must be weighed against the insurance industry's preference for standard forms.

5. Retainage and Rejection of Further Work

Minnesota and Washington have the ability to retain payments from the contractor either from the job under construction or any other job, if they find it necessary to protect their interests. Minnesota states as follows in its specification:

> The Department may retain money due to the Contractor under this or any other contract with the Department that the Department deems necessary to protect its interests with respect to suits, actions or claims arising on account of the Contractor's operations or in consequence of any act, neglect, omission or misconduct of the Contractor.

If money is due the contractor for payment of work on a construction job, it may be withheld by the agency until it has received satisfactory evidence that the claim will be defended or it has been settled. Additionally, if the contractor or its insurance company either ignores a tender of defense or rejects it, the agency may respond by taking that contractor off its approved bidders list and rejecting any further bids by that contractor due to past experience with the contractor itself or its insurance carrier. Minnesota can refuse to accept insurance provided by a particular carrier or agent based on past performance.

6. Prequalification of Contractors

In some states, a contractor, either before bidding on a project or during an ongoing project, can submit its insurance documents to the risk management office for preapproval. If the contractor is preapproved, it gets an approval certificate for the policy period and appropriate level of construction work so that, upon award, it can begin work immediately rather than wait on its insurance carrier to obtain coverage.

7. Self-Insurance

Some agencies are willing to accept a contractor's self-insurance policy in lieu of coverage from a commercial broker. Self-insurance is offered by some of the larger contractors who have decided to accept some of the risk of loss as an operating expense. If the agency is willing to accept such coverage the circumstances should be clearly outlined. Some states require a declaration by a certified public accountant that the successful bidder has sufficient funds and resources to cover a self-insured deductible or retention if necessary. The agency must also be assured that policy deductibles and other out of pocket obligations can be met if necessary.

C. Commonly Used Provisions of State Specifications

A careful review of the specifications submitted by the 28 states, as well as other specifications that are available to the public, was done in order to develop the following sample.

> Contractor's Responsibility for Claims for Damage or Injury. The contractor and its insurance provider shall indemnify and save harmless the *State of X,* the Department of Transportation, and the department's agents, employees and

assigns from all claims or suits made or brought for bodily injury, death or property damage, arising from performance of the work to the extent of:

(a) The negligent acts or omissions of the contractor, subcontractors, suppliers or their respective officers, agents, or employees;

(b) The creation or maintenance of a dangerous condition of or on the Department's property or right of way, which condition occurred due to the acts or omissions of the contractor, subcontractors, suppliers, or their respective officers, agents or employees, or for which the contractor had knowledge of or could have had knowledge of the condition in time to warn of or repair said condition;

(c) The failure of the contractor, subcontractors, suppliers, or their respective officers, agents, or employees, to perform the work in accordance with the plans and specifications.

The obligations of indemnification and defense as noted herein are independent obligations of the contractor and are therefore independent of the requirements for insurance that are noted in this specification. In the event that the contractor's insurance carrier fails to provide coverage for defense or indemnification to the Department as set forth in this section, the contractor is not relieved of the obligation to indemnify the Department, pay legal fees and expenses associated with the defense of the Department, and/or pay any judgment rendered against the Department as a result of the contactor's actions or inactions. In addition, the contractor shall be liable for the actions of the subcontractors for any liability of the Department, which is claimed to arise out of the performance, liability, or work of the subcontractors, other than the intentional torts of the subcontractors, and if the subcontractors fail to have appropriate coverage for the loss claimed, the general contractor shall defend, indemnify, and hold harmless the Department from any such losses or claims.

Indemnification. The contractor will not be required to defend, indemnify, or hold harmless any other person, including the State, the Department, or the Department's agents, employees, or assigns, for any acts, omissions, or negligence of other persons, excepting its contractors and subcontractors.

No benefit to Third Parties. Neither the Department, nor the contractor, by execution of a contract, intends to, or creates a new or enlarges an existing cause of action in any third party. This provision shall not be interpreted to create any new liability that does not exist under the statutorily limited waiver of sovereign immunity, or to waive or extinguish any defense that either party to this contract or their respective agents and employees may have to an action or suit by a third party.

Contractor's Responsibility for Work. From the earlier of the date of commencement of the work or the effective date of the notice to proceed, and until any work is accepted by the engineer, the work shall be in the custody and under the charge and care of the contractor. Issuance of payment on any part of the work done will not be considered as final acceptance of any work completed up to that time.

Insurance Requirements. The contractor shall procure and maintain, at the contractor's expense, until acceptance of the project by the engineer, insurance for all damages and losses imposed by law and assumed under the contract, of the kinds and in the amounts noted in these specifications. Before the contractor begins the work, the contractor shall require its insurance company or companies to furnish to the engineer evidence of such insurance showing compliance with these specifications as more specifically described below.

All insurance required in these specifications shall be issued in occurrence policies in a form acceptable to the engineer, and shall remain in force until all work required to be performed under the terms of the contract is satisfactorily completed as evidenced by formal acceptance by the engineer. Each policy or policy's declaration pages or certificate of insurance shall provide that the policy shall not be materially changed or canceled until the engineer has been given at least 30 days advance notice in writing. If any policy is canceled before the contract work is complete, a satisfactory replacement policy shall be in force, with notice and evidence of insurance submitted to the engineer, prior to the effective date of cancellation of the former policy. Failure to comply with this requirement will be considered a material breach of the contract.

All evidence of insurance and notices shall be submitted to: *Address of Department.* Failure to furnish evidence of proper insurance, or complete insurance policies when requested, will result in the temporary suspension of work as provided in these specifications, and may result in other claims or actions for breach of contract or otherwise, as may be recognized at law or in equity.

Contractor's Liability Insurance. The contractor shall carry commercial general liability insurance and commercial automobile liability insurance from a company authorized to issue insurance in the State with a minimum rating of AM Best and a Financial Size category of VII. Each such policy shall name the Department and its employees, as additional insureds, in amounts sufficient to cover the sovereign immunity limits for State public entities as calculated by the appropriate authority (or as otherwise required by the agency). These amounts are X for any one person in a single accident or occurrence and X for all claims arising out of a single accident or occurrence. Each policy shall be endorsed to cover liability arising from blasting, if applicable, other inherently dangerous activities, and underground property damage. Each policy shall be endorsed to include broad form general liability, contractual liability, and completed operations coverage for a period of three years.

Detailed Insurance Requirements. The contractor is obligated to secure policies of commercial automobile liability insurance and commercial general liability insurance as follows:

a) On an occurrence basis, in accordance with these specifications;

b) The Department and the State, and their employees, shall be named as additional insureds, both as to defense and indemnity for all claims and suits for negligence for any acts or omissions arising out of or related to the construction contract, whether such claims are for personal injury, death, or property damage. The additional insured provision shall include coverage for claims and suits arising out of or related to the construction contract for any acts or omissions except intentional acts, whether such claims or suits assert liability in whole or in part against the State, the Department or its employees, or the contractor or its employee;

c) The insurance shall provide primary coverage to the Department and its employees both as to defense and indemnification as to both property damage and liability;

d) In an amount sufficient to cover the sovereign immunity limits for public entities as published annually in the appropriate authority (or as otherwise required by the agency);

e) For a term which covers the entire period of time of the construction contract until such contract is formally accepted by the engineer; and

f) The agency shall be identified as a certificate holder.

Sovereign Immunity Not Waived. In securing the insurance noted above, the contractor shall provide the insurance carrier with a copy of the specifications, as well as a copy of the construction contract, at the time the request for coverage is made to the carrier. The policy issued by the carrier shall specifically state that coverage by the contractor does not waive sovereign or governmental immunity.

Affidavit of Coverage. The contractor shall file an affidavit attesting that the contractor's insurance carrier has been provided the necessary information in accordance with this section, and that the necessary coverage has been secured or is in the process of being secured in accordance with the applicable provisions. The contractor's affidavit shall also attest that the contractor will cause such coverage to be updated as required by these specifications and applicable law.

Certification of Coverage. The contractor shall provide the Department with proper certificate(s) of insurance, and all endorsements, within ten (10) days of the commencement of the construction contract. The certificate shall state on its face any and all exclusions to required coverage, and the insurer shall provide the Department with a certified copy of the policy within ninety (90) days of the commencement of the construction contract. Failure to obtain the mandated coverage and to comply with any required annual increases constitutes a material breach of the contract between the parties. The contractor agrees to procure an addendum to its insurance policy should it be determined that the insurance procured does not comply with these specifications.

Notice of Claims and Acknowledgment of Coverage. The Department will provide timely notice to the contractor of any claims or lawsuits that it receives. If the Department demands that the contractor defend the suit and/or indemnify it, the contractor or its insurance company will acknowledge that demand within 20 days of receiving it and verify coverage and intent to defend within 60 days of receipt of the claim or lawsuit.

Failure to comply with this provision constitutes a material breach of the contract between the parties and the Department may withhold funds due the contractor on any job until such time as the Department is satisfied that funds are available to pay the claim, defense of the case has been agreed upon, or the claim is resolved. Any failure by the Department to report claims or accidents in compliance with reporting requirements of the insurance company shall not affect coverage.

Subcontractor's Coverage. If any part of the contract is subcontracted, each subcontractor, or the contractor on behalf of that subcontractor, shall obtain the same commercial general liability insurance and commercial automobile liability insurance coverage. The commercial general liability insurance shall name the same entities specified herein as additional insureds, and shall have the same separation of insureds conditions. The policy shall specifically state that coverage by the contractor does not waive sovereign or governmental immunity.

Workers' Compensation Insurance. The contractor shall furnish evidence to the engineer that, with respect to the operations the contractor performs, the contractor carries workers' compensation insurance, or is qualified by the applicable Workers' Compensation authority as self-insured, and carries insurance for employer's liability sufficient to comply with all obligations under state laws relating to workers' compensation and employer's liability. The contractor shall require each subcontractor on the project to furnish the same evidence to the engineer. This evidence shall be furnished to and approved by the engineer prior to the time the contractor or subcontractor commences work on the site of the project.

CONCLUSION

One of the most fundamental concepts in risk management is allocation of risk. A road or bridge construction project necessarily entails a myriad of risks: risk that the project won't be built within the budget; risk that it won't be built in compliance with standards; risk of serious injury and death by employees of the agency and contractor; and the risk of serious injury or death to members of the traveling public. In order to appropriately allocate the risks of the project, the agency must consider whether to accept a particular risk or to allocate the risk to another party. State agencies have generally decided that it is cost effective to assign most of the risk associated with its construction projects to the entity that is best able to control it: the contractor.

To determine current state practices, a comprehensive survey was sent to all state Departments of Transportation. Most of the responding agencies indicated that they do not review insurance policies or endorsements, but instead rely on the contractor's insurance carrier to provide the required coverage and review only the certificate of insurance provided by the carrier. Few states have comprehensive processes in place to ensure that the required coverage has been obtained. Due diligence requires that the agency make sure insurance and indemnity provisions are in place before the work begins. If a contractor's actions or inactions cause an accident, the contractor should be responsible for the damages, not the transportation agency.

If coverage is not confirmed prior to the issuance of the Notice to Proceed, years may pass before anyone reviews the insurance policy language. That review will occur, generally, after an accident has occurred and the agency receives notice of a claim or that litigation is pending. Once the parties are in litigation, even assuming the contractor and the

transportation agency are mutually aligned to defeat the claims of the plaintiff, the parties, and ultimately the courts, will look to the policy and contract language to determine the rights of the parties as to the defense and indemnification. While the courts tend to construe exclusions and exceptions to coverage against the carrier, clear and unambiguous provisions will be given their plain meaning and a transportation agency that failed to review an insurance policy to ascertain the extent of its coverage may find itself without coverage. While the transportation agency at that point still has remedies such as withholding payment from the contractor or removing the contractor from its approved list, it may nevertheless pay millions of dollars in satisfaction of a settlement or judgment.

Based upon the survey results and agency interviews, the observations contained in this paper were made. The team's observations include regular review, by counsel, of contract specifications and language and of each certificate of insurance, endorsement, and policy prior to the issuance of the Notice to Proceed. A careful review of the documentation will diminish the possibility of later litigation between the transportation agency and the contractor, if it is discovered that the coverage identified in the certificate of insurance is not the coverage actually provided in the policy. When a review is done early in the process, it is easy for the transportation agency to simply request an addendum to the coverage and bring the policy into compliance with an addendum.

Because a state transportation agency can be held responsible for the actions of its road and bridge construction contractors while they work on state roads, the agency must be protected from the risk of liability and responsibility for the contractor's actions. The most certain way for the state to avoid the risks of liability is to ensure that appropriate insurance coverage is in place before the contractor begins working.

APPENDICES

The resources found in the Appendices section of this digest were developed for agency contract administrators. Several of the documents used as appendices were submitted by the states with their survey responses. The appendices include documents to be used by the contractor affirming appropriate coverage, checklists for the agency, sample letters to contractors, and definitions of commonly used terms.

APPENDIX A—SURVEY

Survey On NCHRP 20-6, Study Topic 20-04, Due Diligence for Insurance Coverage in Transportation Construction Contracts

You are being asked to respond to this survey to obtain information on your agency's current practice and to learn what problems, if any, the agency is experiencing with its administration of construction contractor insurance. The survey contains a request for insurance policies that your agency has obtained from its construction contractors. We ask that one of the policies selected be in compliance with your insurance requirements or specifications and the other policy submitted either be non-compliant or non-traditional in some way. The survey contains questions that should be directed to your legal counsel as well as the individual(s) responsible for construction contract administration.

Your cooperation in completing the following survey is appreciated. Please respond to all questions that apply to your state, city, or multi-jurisdictional agency.

Please return your responses by May 10, 2014 to:

Terry Parker
Parker Corporate Enterprises, Ltd.
1922 N Twain, Nixa MO 65714
tparkerlaw@aol.com
417-839-5119

Feel free to use and attach additional comments if space is not sufficient below. However, if the requested insurance documentation is voluminous, please send it on a disc or contact Terry Parker at the above address to use the "dropbox" program. If you have additional questions, please feel free to contact Terri Parker, at the above number.

Agency Name

_____

Name of Employee

_____

Job Title_____

Contact Number _____

Email Address_____

Number of years in this job. _____

****

1. What types of insurance must a contractor carry in order to do road construction work for the agency, i.e., general liability, worker's compensation, excess coverage, etc.? Please include amounts of coverage.

_____

_____

_____

2. Is the contractor required to name the agency either as an additional insured or additional named insured? If your answer is “yes”, please indicate which designation is required?

_____

_____

_____

3. Is the contractor required to indemnify and hold the agency harmless?

_____

4. Has the agency been in litigation with a contractor in the past five (5) years over the contractor's failure to provide the insurance coverage required by the agency?

_____

4(a). If your answer is “yes”, please provide details.

_____

_____

_____

5. How does the contractor provide proof of insurance, i.e., the entire insurance policy, a certificate of insurance, or another document?

5(a) Does the contractor or insurance company have to affirm that they are providing the coverage required by the agency?

_____

_____

_____

6. Does proof of insurance have to be provided before work can begin on the construction project?

_____

6. (a). If your answer is “yes”, how much time typically elapses between the award of the project and the notice to proceed with work?

_____

_____

_____

7. Please provide the names, positions, and job descriptions of employees that review the information provided by the contractor if not the person named above.

_____

_____

_____

8. Do you use a checklist during the insurance review process?

_____

8(a). If your answer is “yes”, please provide a copy.

9. How frequently is excess or umbrella coverage used for these projects in order to comply with project requirements?

_____

_____

_____

9(a). Where used, have issues been encountered when claims are presented as to defense and indemnity? If so, please describe.

_____

_____

_____

10. Do you have suggestions, based on your training and experience, as to what form(s) might be used to avoid disputes as to coverage (both for defense and indemnity) when a claim arises?

_____

_____

_____

10(a). If there is no form that you have found particularly useful, is there language you would propose to avoid disputes when claims are presented?

_____

10(b). If your answer is “yes”, please provide the language.

_____

_____

_____

11. Is insurance is purchased on the state's behalf?

_____

11(a). If your answer is "yes", is sovereign immunity waived?

_____

12. Please provide a copy of the specification or contract provision that outlines the insurance coverage required for contractors.

13. Please provide copies of two (2) road construction insurance policies that have been received by your agency recently. One of the policies selected should be in compliance with your insurance requirements or specifications and the other policy submitted either be noncompliant or nontraditional in some way.

****

THANK YOU FOR YOUR TIME AND INTEREST IN THIS PROJECT!

APPENDIX B—EXAMPLES OF CERTIFICATION/AFFIRMATION OF COVERAGE

C218
(4/2013)

CONSTRUCTION CONTRACT INSURANCE FORMS MAILING ADDRESS (Construction Contracts Only) NYSDOT Contract Management Bureau 50 Wolf Road, **1st Floor, Suite 1CM** Albany, New York 12232	**CERTIFICATE OF INSURANCE** New York State Department of Transportation	**CONSULTANT CONTRACT INSURANCE FORMS MAILING ADDRESS (Professional Services Only)** NYSDOT Contract Management Bureau 50 Wolf Road, **6th Floor, Suite 6CM** Albany, New York 12232

Name & Address of Insured Contractor:	Additional Insured, including the People of the State of New York, Commissioner of Transportation and their employees, and any consultant inspection engineer or inspector and such others as required: (under items b, c and d)
Contract Description:	Contract Number D or C

The subscribing insurance company, authorized to do business in the State of New York, certifies that insurance of the kinds and types and for limits of liability herein stated, covering the work described in the underlying contract herein identified, has been procured by and furnished on behalf of the insured and is in full force and effect for the period listed below.

Type of Insurance	Policy Number	Effective Date	Expiration Date	Limits of Liability (in thousands) Per Occurrence	Aggregate
(a) Workers' Compensation and Disability				**Statutory**	**Statutory**
(b) Commercial General Liability					
Additional Insured Endorsement (identify ISO form or attach copy of endorsement).	Endorsement:				
Completed Operations (if provided under endorsement, identify ISO form or attach copy).	Endorsement:				
Insured-administered deductible or Self-Insured Retention (SIR)* (state amount of SIR)				Deductible/SIR	Deductible/SIR
(c) Commercial Auto Liability.					
Insured-administered deductible or SIR* (state amount of SIR)				Deductible/SIR	Deductible/SIR
(d) Umbrella or Excess Liability.					
(e) Special Protective and Highway Liability					
(f) Railroad Protective Liability					
(g) Professional Liability					
Insured-administered deductible or SIR* (state amount of SIR)				Deductible/SIR	Deductible/SIR
(h) Other (describe)					

* NYSDOT requires disclosure of deductibles and retention levels that are not pursuant to policy provisions, not bonded or otherwise collateralized.

C218
(4/2013)

This is to certify that NAME OF COMPANY (hereinafter called Company) of ADDRESS OF COMPANY (Home Office Address of Insurance Company) has issued to NAME OF INSURED of ADDRESS OF INSURED a policy or policies of insurance effective from the dates listed on the front of this certificate at 12:01 A.M. standard time at the address of the insured stated in said policy or policies and continuing until cancelled as provided herein to provide liability insurance covering the obligations imposed upon such contractor by the provisions of the laws of the State of New York, regulations promulgated therewith and the terms and provisions of Contract D or C .

Such insurance as is herein certified (1) applies to all operations of said insured in connection with the work required by the provisions of the documents forming **the contract**, (2) applies on the effective date stated above, **whether or not the contract documents between the insured contractor and the New York State Department of Transportation have been executed**, and (3) is written in accordance with the company's regular policies and endorsements, subject to the company's applicable manuals or rules and rates, in effect, and the insurance provisions of the contract.

This Certificate is furnished in accordance with the specifications of the New York State Department of Transportation applicable to **NYSDOT's contract with the Named Insured** and covering the operations therein described.

These certificates described herein may not be cancelled without cancellation of a policy to which it is attached. Such cancellation may be issued by the company or the insured giving thirty (30) days' notice in writing is actually received by the New York State Department of Transportation, Contract Management Bureau, 50 Wolf Road, 1st Floor, Suite 1CM, or 6th Floor, Suite 6CM, Albany, NY 12232. No policy referred to herein shall be changed, cancelled or coverage terminated for any reason including expiration of the policy or nonpayment of premiums until thirty (30) days written notice has been received by the Director. Such notice shall be mailed via certified mail or registered mail.

Policy coverage MUST agree with coverage stated on this Certificate. False statements of coverage are punishable under Section 2110 of the New York State Insurance Law.

Notarization

Sworn before me this _____

day of _____, 20___.

_____

Notary Public (attach stamp)

Name and Address of Insurance Company:

By: _____
(Signature of Authorized Representative)
RUBBER STAMP NOT ACCEPTABLE
Title:

Dated: _____
Agency Name and Address:

Dated: _____
Telephone Number:

Form DC-175 (03/14) | Attachment 10 Page 1 of 2

NEW JERSEY DEPARTMENT OF TRANSPORTATION
INSURANCE CERTIFICATE

This certifies that for the policies indicated below have been issued to the insured for the subject Contract for the policy period indicated, that the policies comply with the requirements of Section 152 of the New Jersey Department of Transportation Standard Specifications for Road and Bridge Construction as amended by the Special Provisions, and that all information contained herein is true and accurate.

CONTRACTOR: _____

PROJECT NAME : _____

LOCATION: _____

DP FILE NO: _____

A COMPREHENSIVE GENERAL LIABILITY INSURANCE

Company Providing Coverage: _____
Policy Number: _____
Effective Date: _____
Expiration Date: _____
Limit of Liability: $ _____ per occurrence Combined Single Limit (B.I & P.D.)
Deductible: $ _____

This policy names the State, its officers, employees and agents
As additional insured ☐ Yes ☐ No

ENDORSEMENTS
☐ PERSONAL INJURY
☐ CONTRACTUAL LIABILITY
☐ PREMISES & OPERATIONS
☐ PRODUCTS & COMPLETED OPERATIONS
☐ INDEPENDENT CONTRACTORS
☐ WAIVER OF SUBROGATION
☐ SEVERABILITY OF INTEREST/SEPERATION OF INSUREDS
☐ PER PROJECT AGGREGATE
☐ EXPLOSIONS
☐ DAMAGE TO UNDERGROUND UTILITIES
☐ COLLAPSE OF FOUNDATIONS

B COMPREHENSIVE AUTOMOBILE LIABILITY INSURANCE

Company Providing Coverage: _____
Policy Number: _____
Effective Date: _____
Expiration Date: _____
Limit of Liability: $ _____ per occurrence Combined Single Limit (B.I. & P.D.)

Type of Coverage: ☐ ALL OWNED AUTOS ☐ NON-OWNED AUTOS ☐ HIRED AUTOS

ENDORSEMENTS
☐ WAIVER OF SUBROGATION
☐ SEVERABILITY OF INTEREST/SEPERATION OF INSUREDS

C OWNER'S AND CONTRACTOR'S PROTECTIVE LIABILITY INSURANCE

Company Providing Coverage: _____
Policy Number: _____
Effective Date: _____
Expiration Date: _____
Limit of Liability: $ _____ per occurrence Combined Single Limit (B.I. & P.D.)

ENDORSEMENTS
☐ SEVERABILITY OF INTEREST/SEPERATION OF INSUREDS
☐ PER PROJECT AGGREGATE

D WORKERS' COMPENSATION AND EMPLOYER'S LIABILITY INSURANCE

Company providing Coverage: _____
Policy Number: _____
Effective Date: _____
Expiration Date: _____
Limit of Liability: $ _____ Each accident
$ _____ Disease, each employee
$ _____ Disease, policy limit

ENDORSEMENTS
US LONGSHORE & HARBOR WORKERS COVERAGE AND JONES ACT: ☐ Yes ☐ No

Form DC-175 (03/14)

NEW JERSEY DEPARTMENT OF TRANSPORTATION
INSURANCE CERTIFICATE

CONTRACTOR: _____

PROJECT NAME: _____

E EXCESS LIABILITY INSURANCE

Company Providing Coverage: _____

Policy Number: _____

Effective Date: _____

Expiration Date: _____

Limit of Liability: $ _____ per occurrence

Policy takes effect if the primary policy is impaired or exhausted and has the same terms and conditions as the primary underlying coverage for the following:

- ☐ A COMPREHENSIVE GENERAL LIABILITY
- ☐ B COMPREHENSIVE AUTOMOBILE LIABILITY

F MARINE LIABILITY INSURANCE *(required only if construction operations require marine operations)*

Company Providing Coverage: _____

Policy Number: _____

Effective Date: _____

Expiration Date: _____

Limit of Liability: $ _____ per occurrence

This policy names the State, its officers, employees and agents as additional insured: ☐ Yes ☐ No

ENDORSEMENTS

- ☐ PERSONAL INJURY
- ☐ CONTRACTUAL LIABILITY
- ☐ WAIVER OF SUBROGATION
- ☐ PER PROJECT AGGREGATE

G RAILROAD PROTECTIVE LIABILITY INSURANCE *(if required by Special Provisions)*

Company Providing Coverage: _____

Policy Number: _____

Effective Date: _____

Expiration Date: _____

Limit of Liability: $ _____ per occurrence, $ _____ annual aggregate

ENDORSEMENTS

- ☐ SEVERABILITY OF INTEREST/SEPERATION OF INSUREDS
- ☐ PER PROJECT AGGREGATE

H POLLUTION LIABILITY INSURANCE

Company Providing Coverage: _____

Policy Number: _____

Effective Date: _____

Expiration Date: _____

Limit of Liability: $ _____ per occurrence

$ _____ aggregate

Policy is written on the following basis:

- ☐ Occurrence form, and completed operations coverage to be provided for no less than 2 years after Acceptance
- ☐ Claims made, and Extended Reporting Provision coverage to be maintained for no less than 2 years after Acceptance

This policy names the State, its officers, employees and agents As additional insured: ☐ Yes ☐ No

ENDORSEMENTS

- ☐ BODILY INJURY AND PROPERTY DAMAGE
- ☐ NATURAL RESOURCES DAMAGE
- ☐ ENVIRONMENTAL CLEAN UP INCLUDING RESTORATION
- ☐ LEGAL DEFENSE
- ☐ TRANSPORTATION OF WASTE FROM THE PROJECT LIMITS
- ☐ DISPOSAL LIABILITY
- ☐ WAIVER OF SUBROGATION
- ☐ SEVERABILITY OF INTEREST/SEPERATION OF INSUREDS

The policy does not contain exclusions or limitations for:

- ☐ LIABILITIES ASSUMED
- ☐ LEAD, SILICA, ASBESTOS
- ☐ UNDERGROUND STORAGE TANKS
- ☐ INSURED VS. INSURED EXLCUSION THAT RESTRICTS COVERAGE TO THE STATE
- ☐ PER PROJECT AGGREGATE

Certificate Holder

NEW JERSEY DEPARTMENT OF TRANSPORTATION
REGIONAL CONSTRUCTION ENGINEER
Address: _____

_____

I certify that I am an authorized representative for each of the above indicated insurance Companies, and that all policies have been endorsed to require written notice of cancellation or non-renewal to the named Certificate Holder, 30 days prior to cancellation or expiration of the policy.

Company: _____
Address: _____

_____

Phone: _____

_____ signature

Name: _____

This insurance certificate must be accompanied by an attorney-in-fact letter from each insurance company Certifying that the above is authorized to execute and renew policies on behalf of the company.

TRAFFIC SAFETY SERVICES INC

Project ID: PM-1-999(024)

INSURANCE CERTIFICATION

Certificates of Insurance contain additional pages or language on the certificate which either purports to limit or qualify the information reflected on the certificate of insurance or which purports to change, modify or amend your company's insurance policies. NDDOT policy is to not solicit, review or approve contractors' insurance policies, endorsements or amendments to insurance policies, or insurance documents other than properly completed certificates of insurance. NDDOT contracts specify that contractors are responsible for acquiring and maintaining specified coverage and proof of insurance.

Please sign and date the statement below attesting that your company has insurance coverage consistent with the contract provisions.

The Contractor has, and will maintain in force, insurance coverage (including proof of coverage) consistent with the contract specifications.

CONTRACTOR:

Traffic Safety Services Inc.
Name (Type or Print)

President
Signature/Title

3/12/14
Date

CLA 9310 (Div.80)
A.G. Approved 7-17-86; 7-04; 1-11
RM Consulted 9-6-97

CLA 9310 (Div.80)

APPENDIX C—CHECKLIST FOR COVERAGE REVIEW

MoDOT

Checklist for Evidence of Insurance

Certificate(s) of Insurance:

- ☐ Evidence provided for each type of insurance required in the contract (e.g., "Commercial General Liability", Auto Liability, Workers Compensation with Statutory Limits, and Professional Liability or E&O per the contract specifications)
- ☐ General Liability is on an "occurrence" basis, not "claims-made."
- ☐ Auto Liability covers "any auto" (or non-owned & hired if contractor has no autos).
- ☐ Limits are at least as high as the minimum required in the contract.
- ☐ Workers Compensation provides Statutory Limits and Employers' Liability of $_____.
- ☐ Policies are current and will be suspended (tickler filed) for renewal follow-up if the contract period runs beyond the policy expiration date.
- ☐ Excess Liability policies have coverage periods concurrent with primary policies.
- ☐ Insured name is the same as Contractor named in the contract.
- ☐ The insurer is admitted in Missouri or evidence of insurance submitted as authorized in the contract shall be signed by an agent or broker licensed by the state of Missouri.
- ☐ Descriptions of operations, locations, etc. are correct.
- ☐ Certificate Holder is correct with attention to correct person.
- ☐ Certificate provides for 30-day notification (10 days for non-payment) to Entity of changes or cancellation.
- ☐ Certificate includes signature of authorized representative.

Endorsement(s)

- ☐ **Additional Insured Status** – e.g., Form CG 20 10 11 85 or BOTH CG 20 10 and CG 20 37 if forms with later edition dates provided (usually 10 01 or 07 04 editions).
- ☐ **Primary Coverage**
- ☐ **Waiver of Subrogation**
- ☐ **Notice of Cancellation**
- ☐ **"Blanket" Endorsement covering one or more of the above endorsements required.**
- ☐ **Entity-supplied endorsement provided and signed.**

J:\rogerm1\Checklist for Evidence of Insurance.docx

APPENDIX D—STANDARD ISO ADDITIONAL INSURED ENDORSEMENTS

See Scott P. Pence and William C. Wright, "Not All Additional Insured Endorsements Are Created Equal," *Under Construction,* ABA, vol. 15, no. 3 (Aug. 2013), link within article available at http://www.americanbar.org/publications/under_construction/2013/august_2013/iso_additional_insured_endorsements.html.

Standard ISO Additional Insured Endorsements

	1985 Broad Form	1993 Broad Form	2001 Broad Form	2004 Intermediate Form	2013 Limited Form
Ongoing Operations	CG 20 10 11 85 Who is an insured is amended to include "the person or organization shown in the Schedule, but only with respect to liability **arising out of** 'your work' for that insured by or for you." (emphasis added)	CG 20 10 10 93 Who is an insured is amended to include "the person or organization shown in the Schedule, but only with respect to liability **arising out of** your **ongoing operations** performed for that insured." (emphasis added)	CG 20 10 10 01 Who is an insured is amended to include "[the identified persons or organizations,] but only with respect to liability **arising out of** your **ongoing operations** performed for that insured." (emphasis added)	CG 20 10 07 04 Who is an insured is amended to include "the identified persons or organizations, "but only with respect to liability for 'bodily injury,' 'property damage' or 'personal advertising injury' **caused, in whole or in part, by**: 1. Your acts or omissions; or 2. The acts or omissions of those acting on your behalf; in the performance of your **ongoing operations** for the additional insured(s) at the locations designated [in the endorsement]." (emphasis added)	CG 20 10 04 13 Who is an insured is defined in the same manner as in the 2004 CG 20 10 Form. However, the following language was added to the 2013 CG 20 10 Form: "The insurance afforded to such additional insured only applies **to the extent permitted by law**." (emphasis added) "If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured **will not be broader than that which you** [the insured] **are required by the contract or agreement to provide** for such additional insured." (emphasis added) "If coverage to the additional insured is required by a contract or agreement, the most [the insurer] will pay on behalf of the additional insured is the amount of insurance: 1. **required by the contract** or agreement; or 2. **available under the applicable Limits** of Insurance shown in the Declarations; **whichever is less**." (emphasis added)
Completed Operations	N/A Completed operations coverage was included under the CG 20 10 11 85.	N/A Completed operations coverage was eliminated under the CG 20 10 10 93.	CG 20 37 10 01 New "CG 20 13" form created to reinstate completed operations. Who is an insured is amended to include "[the identified persons or organizations,] but only with respect to liability **arising out of** 'your work' at the location designated and described in the [endorsement] performed for that insured and included in the **products-completed operations hazard**." (emphasis added)	CG 20 37 07 04 Who is an insured is amended to include "the identified persons or organizations, "but only with respect to liability for 'bodily injury' or 'property damage' **caused, in whole or in part, by** 'your work' at the location designated and described in the schedule of [the endorsement] performed for that additional insured and included in the **products-completed operations hazard**." (emphasis added)	CG 20 37 04 13 Who is an insured is defined in the same manner as in the 2004 CG 20 37 Form. Same limitations as noted above in the CG 20 10 04 13 Form.

27385923.1

APPENDIX E—SAMPLE LETTER TO CONTRACTORS

MoDOT **Construction and Materials**

Missouri Department of Transportation
David Ahlvers, State Construction and Materials Engineer

1617 Missouri Blvd.
Jefferson City, MO 65109
573.751.3689
Fax: 573.522.8416
1.888.ASK MODOT (275.6636)

(EXAMPLE – follow-up letter if insurance verification is incomplete)

Date of Letter

ABC Construction Company
c/o (Insurance Agent)
Address Line 1
Address Line 2

RE: Compliance with Insurance Requirements

The documents you have submitted in compliance with contract _____ are being returned to you for the following reasons:

- ☐ Need original (or certified copy) of (Certificate)/ (Endorsement) / (Policy)
- ☐ Need original signature
- ☐ Additional insured incorrect, should read:_____
- ☐ Description of (operation) / (location) incorrect
- ☐ Insufficient Limits
- ☐ Wrong coverages, i.e., _____
- ☐ Wrong forms, i.e., _____
- ☐ Insurer does not meet minimum requirements
- ☐ Policy has expired or is about to expire
- ☐ Required waiver of subrogation not included
- ☐ Primary language required
- ☐ Other Information:

_____
_____
_____

Please make the necessary changes and return the correct documentation to me. No order to proceed will be issued until the correct forms have been submitted.

Sincerely,

Entity of MoDOT
Title of Entity

Our mission is to provide a world-class transportation experience that delights our customers and promotes a prosperous Missouri.
www.modot.org

APPENDIX F—COMMONLY USED TERMS

Additional Insured. When an agency is named as an additional insured, it has direct rights under the insurance contract. The agency becomes an insured under the policy. The status is requested when the contractor has agreed to indemnify the agency. Coverage may be limited to actions that have a connection with the contractor's actions or inactions but coverage should include the same right of defense in a lawsuit that the contractor is entitled to receive.

Additional Named Insured. When an agency is named as an additional named insured, it has coverage under the insurance contract for all of the operations of the agency, not just those operations related to a particular construction contract.

Aggregate Limits. A contract provision which limits the maximum liability of an insurer for a series of losses in a given time period—for example, a year or for the entire period of the contract.

Bad Faith. Insurance companies owe a duty of good faith and fair dealing to the persons they insure. This duty is referred to as the "implied covenant of good faith and fair dealing" which automatically exists by operation of law in every insurance contract. If an insurance company violates that covenant, the policyholder may sue the company on a "bad faith" claim in addition to a breach of contract claim. The plaintiff in an insurance bad faith case may be able to recover an amount larger than the original face value of the policy, if the insurance company's conduct was particularly egregious.

Business Auto Coverage. Coverage that relates to the contractor's work or service involving the use of motor vehicles. Each state requires automobile coverage for vehicle owners.

Commercial General Liability. Fundamental coverage for bodily injury, property damage, and personal injury arising from the contractor's activities.

Endorsement. Special provisions added to an insurance policy to enhance or restrict its coverage.

Excess or umbrella coverage. Umbrella and excess liability policies provide the insurance limits needed for catastrophic losses. Umbrella coverage is normally coverage above primary liability policies. It provides coverage not available in primary policies, such as contractual liability coverage, business risk, personal injury, and employees as additional insureds. Excess policies do not provide

any additional coverage other than that contained in underlying policies, but does provide additional monetary coverage.

Hold Harmless. This language, which is binding on the entity accepting the responsibility to "hold harmless", shifts responsibility for loss or damage from the actions or activities by one party to the contract to the other party to the contract. It is the contractor's promise to pay for claims caused, in whole or part, by its activities.

Indemnify. Repayment for loss, damage, or injuries. An indemnity contract arises when a contractor takes on the obligation to pay for any loss or damage that has been or might be incurred by the state. The right to indemnity and the duty to indemnify typically stem from a contract, which usually protects against liability, loss, or damage.

Insured. The contractor or state agency that is covered by insurance.

Named Insured. Usually the policyholder (the contractor) who has contracted for insurance coverage and whose interests are protected by the policy. The named insured is specifically identified as being covered in an insurance policy.

Notice of Cancellation. When an agency receives notice of cancellation of the contractor's insurance policy it must immediately follow up with the contractor and/or the insurance company to ensure that coverage for the covered project does not lapse and the agency is unprotected by insurance. The certificate of insurance may provide that the agency, if it is an additional insured, will receive thirty days' notice of the cancellation of a policy. If insurance is cancelled and not replaced, the agency should consider the contractor to be in breach of the contract.

Omnibus Insured. A person or entity that is covered by an insurance policy, but not specifically named in that policy.

Ongoing Operations. This type of coverage protects the contractor and the agency from damages that occur during the course of the construction project. It does not cover the agency or contractor after the project has been completed.

Owner Controlled Insurance Programs (OCIP). An OCIP is an insurance and risk control program that is typically implemented for a single construction project or a series of construction

projects. Instead of each contractor providing its own insurance and passing the cost to the agency (the owner) through the construction contract, the owner of the project purchases certain lines of insurance (such as general liability, excess liability, and workers compensation) to cover most of the contractors on a job site.

Owner's Protective Policy (OPP). This insurance coverage provides for payment on behalf of the insured of all damages the insured becomes legally obligated to pay due to bodily injury or property damage caused by an occurrence rising from either operations performed for the named insured by independent contractors or acts or omissions of the named insured.

Primary Coverage. When the agency has primary coverage, the contractor's insurance is the first policy to cover any claim, with the agency's coverage (if applicable) only to be used after the contractor's insurance limits are exhausted.

Professional Liability. Coverage for errors in professional judgment, such as a mistake in a traffic control plan or construction plans, which lead to damages or injury to the agency or others. This type of coverage should be obtained for services such as engineering, legal, accounting, and insurance brokerage.

Verification of Coverage. Proof that the contractor is supplying coverage that is required by the contract between the agency and the contractor. The agency should be listed as a certificate holder. Verification of coverage as an additional insured cannot be verified by a review of the insurance certificate but must be done by review of the endorsements to the actual insurance policy.

Worker's Compensation. All employers must provide this insurance for their employees, unless they are exempt from this requirement either due to size of the employer or their status as self-insured. Worker's compensation coverage protects the employee in case of injury on the job.

APPENDIX G—PROPOSED ADDITIONAL INSURED ENDORSEMENT

Additional Insured Endorsement

The entity shown below is an Additional Insured under the Commercial General Liability Coverage (CGL) [or Commercial Auto or Builder's Risk or Broad Form as may be applicable]Form:

Department of X
(and include address and contact information)

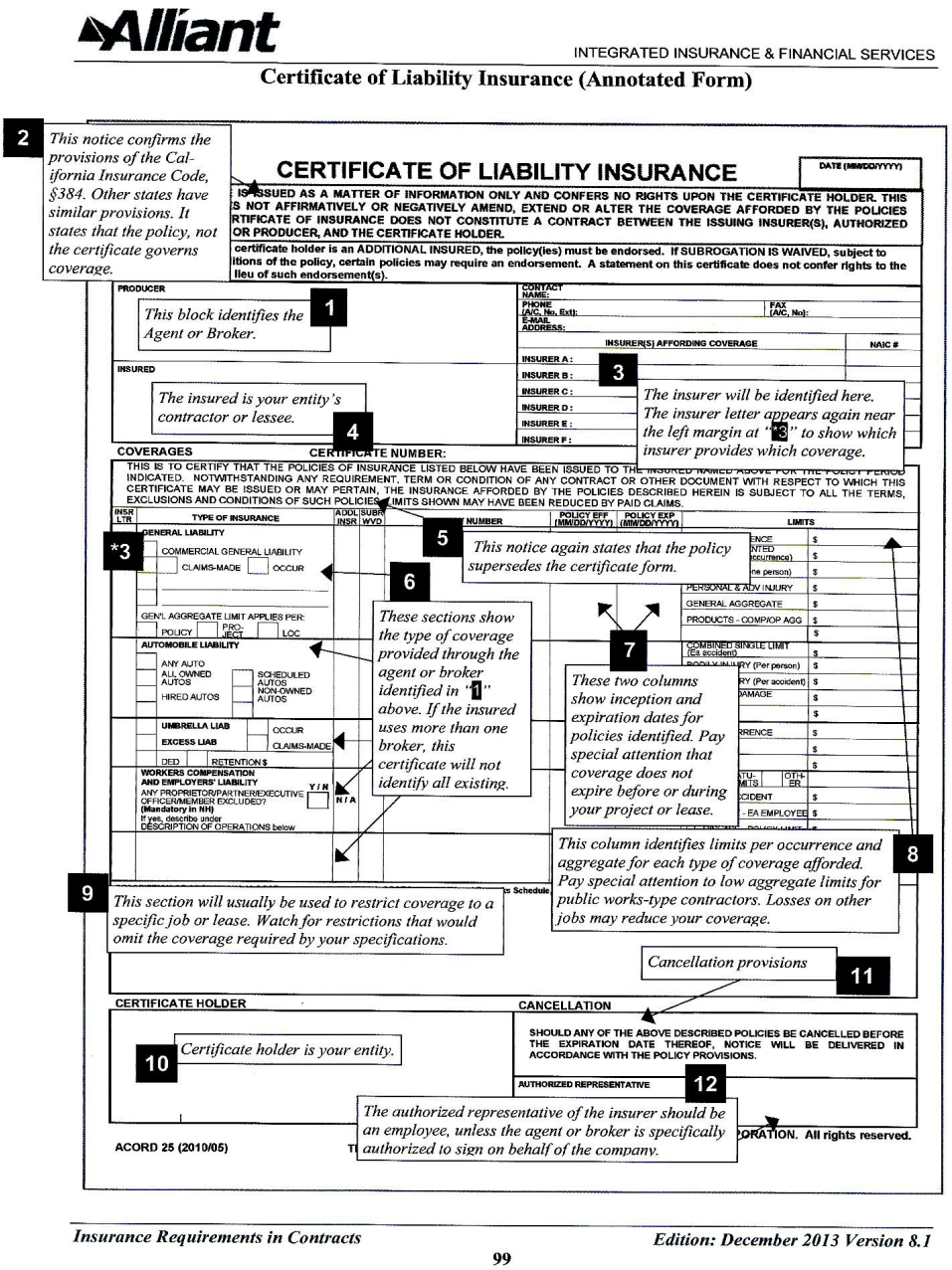
As an additional insured, the foregoing entity is afforded all rights and coverages under the CGL [or Commercial Auto or Builder's Risk or Broad Form as may be applicable] as the named insured with regard to the project described below, and in accordance with the State Specifications for such project:

Describe Project and specifications

The carrier issuing this endorsement further agrees that if any disputes arise between the entity described above and the insurance carrier issuing this endorsement and/or the Named Insured on the policy as to any duty to defend and/or indemnify the additional insured for claims arising out of the above-described project, such disputes shall be submitted to mediation within sixty (60) days after notification of the dispute if an agreement for resolution cannot be reached within thirty (30) days of resolution. The mediator chosen to mediate the dispute shall be chosen from the list of mediators kept by the federal court in the jurisdiction in which the dispute will be mediated.

APPENDIX H—EXPLANATION OF CERTIFICATES OF INSURANCE

This form is a duplicate taken from the "Alliant Insurance Requirements in Contracts, A Procedural Manual," located at http://www.alliant.com/Industry-Solutions/Public-Entity/Documents/IRIC.pdf. The manual contains a statement indicating that it is developed and placed in the public domain to benefit public agencies.



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