

# Understanding Construction Contractual Risk Transfer

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# Background

- Civil Engineering Degree from UW- Madison
- Worked in Construction for 25 years
  - Project Manager for Ryan Companies
  - Project Executive for Mortenson Construction
- Program Technical Specialist – Construction for CIC for past 6 years



# Objectives

- **To give a working understanding of the basic tools of contractual risk transfer.**
- **Review contracts with a better understanding of how to evaluate contracts based upon CIC minimum requirements.**
- **Understand Certificates of Insurance and what to look for.**

# Why are Contracts Important in Construction?

- Contractors generate claims, disputes and lawsuits
- On average, it takes 5 to 7 years for a construction defect claim to surface.
- Top CD issues: WATER.
  - Roofing Systems, Foundation/Soils, Curtain Walls, HVAC
  - Emerging: Air Quality/Odor
- Peak claim activity -policy years '05, '06, '07, '08
- For every \$3 of indemnity, CIC roughly pays \$1 of Legal



# What is Contractual Risk Transfer?

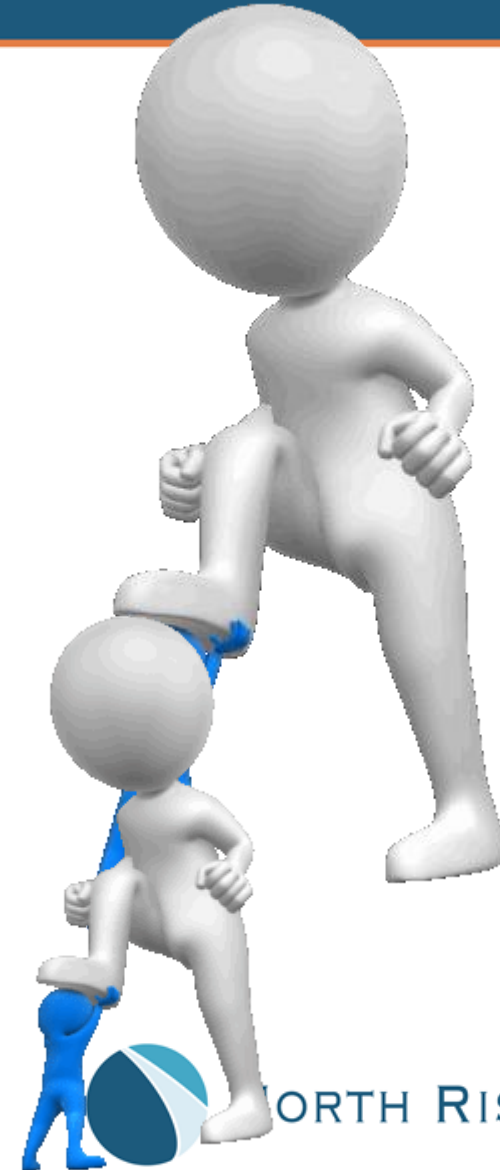
...mechanism through which liability for risks is allocated by contract at the beginning of a business relationship to the party with the most control over that risk, and who is therefore in the best position to manage and control that risk.

# The Most Basic Form of Risk Transfer



# Important Terms/Concepts

- Indemnification
  - Indemnatee vs. Indemnitor





# Three Types of Indemnity

- **Broad Form**
  - Assume all legal liability regardless of fault
- **Intermediate Form**
  - Indemnitor (lower tier) assumes all legal liability except when the indemnitee is 100% or solely at fault
- **Limited Form**
  - Indemnitor only pays that portion of any loss that is directly related to its percent of fault

# What Difference Does it Make?

- If indemnity clause unenforceable in state where project is located, reverts to common law indemnity = limited form indemnity.
  - MN, IA, IL allow limited form only
  - WI allows all three forms
- Common drafting tip: “To the fullest extent permitted by law...”

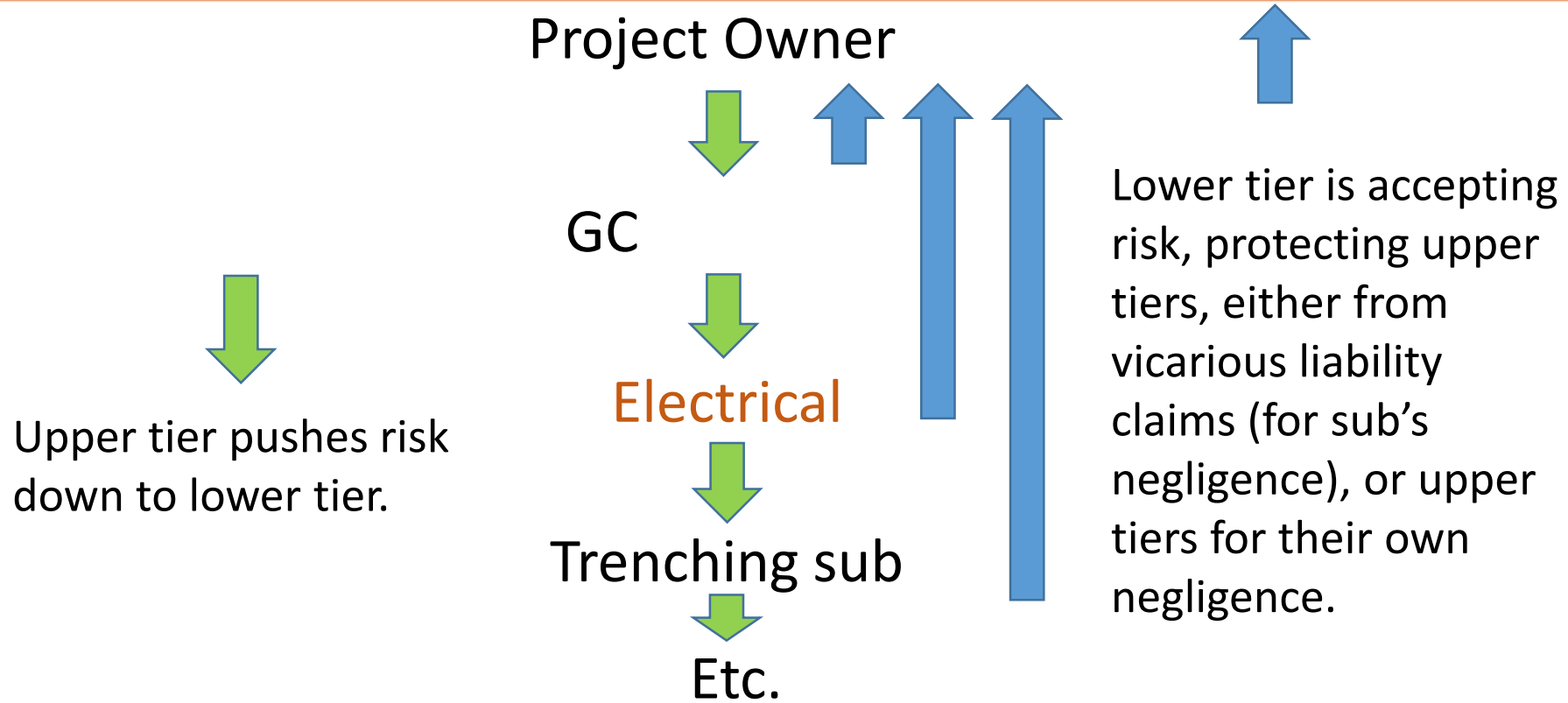
## Risk Transfer: A Double-edged Sword

Sometimes you will be the one passing the risk...



Sometimes you will be the one accepting others' risk.

On some jobs you will do both!





## Indemnity

## Hold Harmless

The right to be protected from **3<sup>rd</sup> party** liability claims by indemnitor.

The right not to be sued by the **other party to your contract.**




# Hold Harmless

**Under a Hold Harmless agreement, the party assuming risk agrees not to attempt to recover any portion of damages *from the other contracting party.***



# Hold Harmless

- Agreement not to pursue ***each other*** for losses; acts to waive subrogation rights on behalf of parties respective insurers.
- Often, but not always, tied to the indemnity clause.

- 
- **Requires the indemnitor to “Defend” or fund the defense of its upper tier *from the initial filing* of a claim or litigation.**
  - **Provides cost of defense before liability is determined.**
  - **Can be part of the Indemnification Clause, or can be separate.**

# Is being named an Indemnitee with Defense and Hold Harmless language in a contract enough?



**NO!**





# General Liability Insurance

- Require insurance to back up that “promise.”
- Additionally, require the subcontractor to provide proof of having purchased this coverage with a Certificate of Insurance (COI).




# Certificate of Insurance

- Turn to page 16 of ADV. 1287
- Items to review
- What should you be looking for ?

# Certificate of Insurance (Pg.16)

1 DATE (MM/DD/YYYY)



## CERTIFICATE OF LIABILITY INSURANCE

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER CONTACT NAME: PHONE (A/C No. Ext): E-MAIL: ADDRESS:	FAX (A/C No.): <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 80%;">INSURER(S) AFFORDING COVERAGE</th> <th style="width: 20%;">NAIC #</th> </tr> <tr> <td>INSURER A: Acme Insurance Co.</td> <td></td> </tr> <tr> <td>INSURER B: Buckeye Insurance Co.</td> <td></td> </tr> <tr> <td>INSURER C: Cincinnati Insurance Co.</td> <td></td> </tr> <tr> <td>INSURER D: Diamond Insurance Co.</td> <td></td> </tr> <tr> <td>INSURER E:</td> <td></td> </tr> <tr> <td>INSURER F:</td> <td></td> </tr> </table>	INSURER(S) AFFORDING COVERAGE	NAIC #	INSURER A: Acme Insurance Co.		INSURER B: Buckeye Insurance Co.		INSURER C: Cincinnati Insurance Co.		INSURER D: Diamond Insurance Co.		INSURER E:		INSURER F:	
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INSURER E:															
INSURER F:															

INSURED Should be the correct legal name of the contracting indemnitor – not a parent or subsidiary company.

**COVERAGES**

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PRIOR CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL SUBR INTD WVD	POLICY NUMBER	POLICY EFF. (MM/DD/YYYY)	POLICY EXP. (MM/DD/YYYY)	LIMITS
C	COMMERCIAL GENERAL LIABILITY	X X	#####			EACH OCCURRENCE \$ Should be at least what you are required to provide for your upper tier.
	CLAIMS-MADE <input type="checkbox"/> OCCUR <input type="checkbox"/> GEN'L AGGREGATE LIMIT APPLIES PER: POLICY <input type="checkbox"/> PROJ <input type="checkbox"/> LOC <input type="checkbox"/> OTHER:					
B	AUTOMOBILE LIABILITY					COMBINED SINGLE LIMIT (Per accident) \$
	ANY AUTO ALL OWNED AUTOS HIRED AUTOS SCHEDULED AUTOS NON-OWNED AUTOS					BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
D	UMBRELLA LIAB					EACH OCCURRENCE \$
	EXCESS LIAB DED. RETENTION \$					AGGREGATE \$
A	WORKER'S COMPENSATION AND EMPLOYERS' LIABILITY					PER STATUTE OR OTH-ER \$
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below					E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYER \$ E.L. DISEASE - POLICY LIMIT \$

**CERTIFICATE NUMBER:**

**REVISION NUMBER:**

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

Can be basic or explicit. At a minimum, the project name and location should be listed here, Ex., "Construction of Smith home at 123 Main St., Anytown, USA," or, "Excavation and foundation work at Smith home at 123 Main St., Anytown, USA."

Form # for AI endorsement. Indemnitee should check with its insurance agent and/or attorney whether the form listed meets the requirements of the contract.

<p><b>CERTIFICATE HOLDER</b></p> <p>When an indemnitee, YOUR name should be here. Being listed here however does not confer any rights under the indemnitor's policy to you. In order to obtain additional insured (AI) status, thereby conferring your rights under the indemnitor's policy, the "ADDL INSD" box above also needs to be checked.</p>	<p><b>CANCELLATION</b></p> <p>SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.</p> <p>AUTHORIZED REPRESENTATIVE</p>
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# CERTIFICATE OF LIABILITY INSURANCE

**1**  
DATE (MM/DD/YYYY)

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**IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).**

PRODUCER    	CONTACT NAME:	
	PHONE (A/C, No, Ext):	FAX (A/C, No):
	E-MAIL ADDRESS:	
<b>2</b> INSURED Should be the correct legal name of the contracting indemnitor – not a parent or subsidiary company.	INSURER(S) AFFORDING COVERAGE	NAIC #
	INSURER A : Acme Insurance Co.	
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	INSURER D : Diamond Insurance Co.	
	INSURER E :	
INSURER F :		

- 1** The date the certificate was issued should be within 14 days of presentation to you.
- 2** The named insured should be the same business/entity with which you have a contract – not a parent or subsidiary entity.
- 3** Which insurer is providing what coverages? If your contract requires an A-rated insurer, there is no way to check this if the insurers are not listed here.



# Which insurer is providing the GL coverage? Auto? Workers Comp?

INSURED		CERTIFICATE NUMBER:		REVISION NUMBER:	
Should be the correct legal name of the contracting indemnitor – not a parent or subsidiary company.					
INSURER(S) AFFORDING COVERAGE		NAIC #			
INSURER A: Acme Insurance Co.				3	
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INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
C	COMMERCIAL GENERAL LIABILITY	X	X	#####			EACH OCCURRENCE DAMAGE TO RENTED PREMISES (Ea occurrence)
	<input type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC OTHER:						\$ Should be at least what you are required to provide for your upper tier.
B	AUTOMOBILE LIABILITY						COMBINED SINGLE LIMIT (Ea accident)
	<input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> NON-OWNED AUTOS						\$ \$ \$ \$ \$

<b>INSURED</b> <b>2</b> Should be the correct legal name of the contracting indemnitor – not a parent or subsidiary company.	INSURER(S) AFFORDING COVERAGE		NAIC #
	INSURER A :	Acme Insurance Co.	3
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	INSURER C :	Cincinnati Insurance Co.	
	INSURER D :	Diamond Insurance Co.	
	INSURER E :		
INSURER F :			

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INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
C	COMMERCIAL GENERAL LIABILITY	X	X	#####			EACH OCCURRENCE
	CLAIMS-MADE <input type="checkbox"/> OCCUR <input type="checkbox"/>						\$ Should be at least what you are required to provide for your upper tier.
	GEN'L AGGREGATE LIMIT APPLIES PER:						\$
	POLICY <input type="checkbox"/> PROJECT <input type="checkbox"/> LOC <input type="checkbox"/>						\$
	OTHER:						\$

4      5      6      7      8

Cover expected term of contract?

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	AUTHORIZED REPRESENTATIVE <b>10</b>

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# Additional Insured Status (AI)

Additional Insured offers the best protection.

- Makes the upper tier (indemnatee) **a party to the contract** between the subcontractor and its insurer.
- Creates an independent right to benefits under the policy from the sub's insurer regardless of the validity of the contract with the sub.
- There are over 1,200 different Additional Insured Endorsements so we encourage policyholders to discuss this with your Risk Advisor.

# How To Use This Material

- ▶ **Contracts can be tricky.**
- ▶ **Not intended to be a complete discussion of the topic.**
- ▶ **Use what I've discussed today to help determine whether you need to have your attorney look over a particular contract.**
- ▶ **Use what I've discussed today to have better conversations with your attorneys.**