

Risk Management and Insurance In Contracting



**New York State Council of Contracting
Agencies (CCA)**

Lead presenter, David E. Winans, Esq.

dwinans@dot.state.ny.us

May 18-19, 2011

Objectives of this Presentation

1. Introduce basic risk management principles.
2. Describe contractual protection.
3. Explain how insurance is used as a risk management tool.
4. Describe the basic kinds of insurance and what it covers in public contracts.
5. Introduce CCA model specifications.
6. Explain how to assure contractor compliance.



Loss exposures associated with public contracts



Public projects are risky business!

Somebody could get hurt because of a defective product.



Contractor may not do the work right.
Loss of “the work” (property).



Bodily injury (BI) or death to contractor employee.



Property damage (PD), BI or death
of third party because of “the
work.”



PD, BI or death because of defects in the work after completed.



PD, BI or death because of a latent condition or something known to the public entity.



Risk Management

The process for making and carrying out decisions that will minimize the adverse effects of accidental loss.



The organized treatment of loss exposures by...

Exposure Avoidance



Just Don't Do It!

Retention

- ◆ Going bare-back
- ◆ Retain any loss exposure that can be controlled when you can absorb the loss.

Those who fail to plan...
...plan to fail.



Loss Control

- ◆ Trying to “be safe.”



- ◆ Organized programs for inspection and prevention.



Loss Reduction



Lower the severity of losses that may be unavoidable.
Band aid after the fact.

Duplication of Safeguards



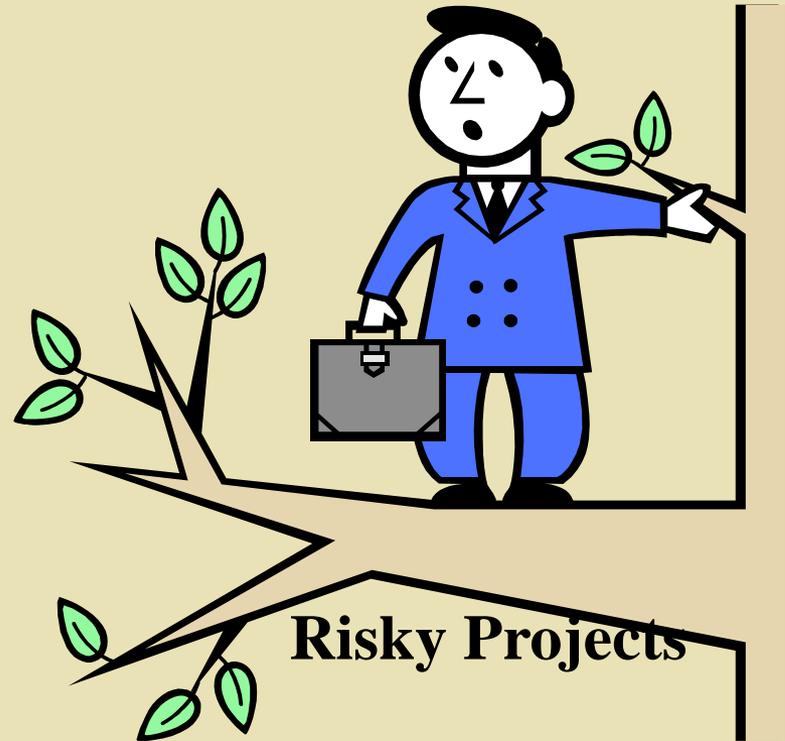
Belts and suspenders

Contracting the Loss Exposures to Others

- ◆ Control of the premises or the work
- ◆ Delegating the means and methods to independent contractor
- ◆ Indemnity provisions



Insurance



- ◆ Assure contractor's financial responsibility.
- ◆ Make the contractor buy insurance for NYSDOT.

Contractual Protection

- ◆ Assure that vendors stand behind products.
- ◆ Central to all public contracts.
- ◆ Contractor controls site, means and methods of work.
- ◆ Contractor is independent.
- ◆ Contractor is financially responsible.
- ◆ Contractor must **save public entity harmless.**



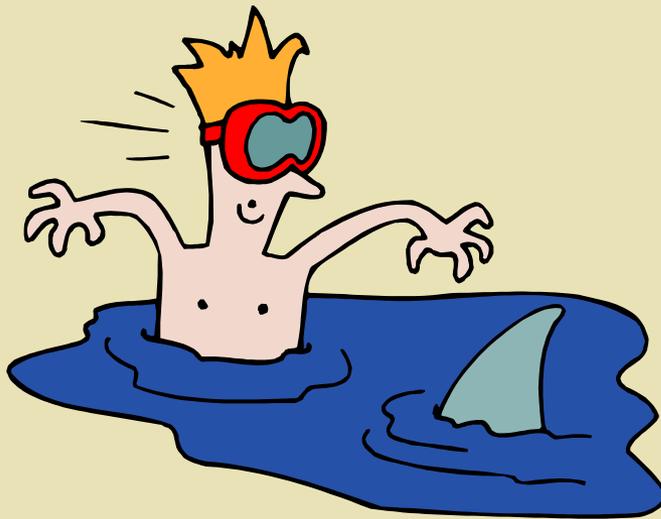
Contractual Protection



Allocate the risk of loss to those who are best able to prevent it

Contractual Indemnity

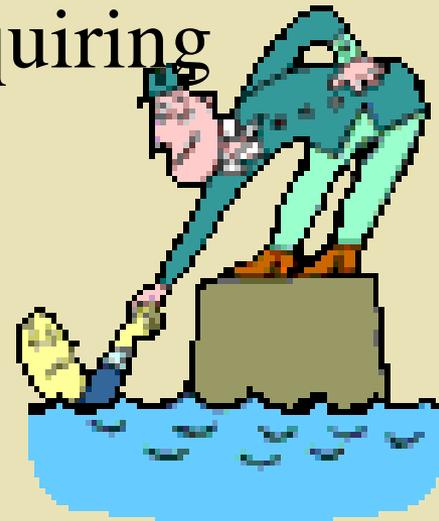
- ◆ DEFENSE and INDEMNIFICATION.
- ◆ New York law prohibits making another party hold owner harmless unless, and then limited only to the extent of owner negligence.
- ◆ Indemnity extends to any claim arising from “the work.”



Contractual Indemnity

- ◆ Works in most cases where work being delegated.
- ◆ Few unpleasant cases of “finger pointing.”
- ◆ We avoid many disputes by requiring insurance.

“To the fullest extent permitted by law, the Contractor shall indemnify and save harmless the State... from ... claims... **arising from the contractor’s work under this contract...**”



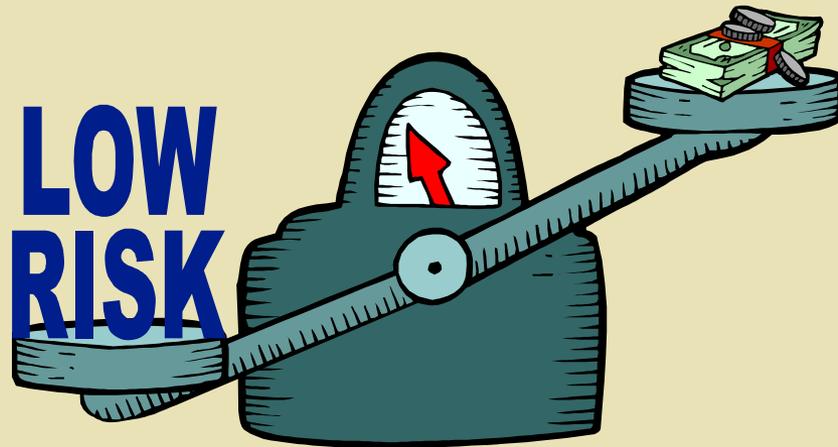
Insurance

Transfer of the financial consequences of a loss exposure to the insurer in exchange for the payment of a premium.



Insurance Works Where...

- ◆ There is a pure risk beyond control.
- ◆ Losses of predictable value occur at a known probability and regularity.
- ◆ Losses can be spread between a large number of insureds.
- ◆ Everybody won't have a loss at once.





Insurance Necessary Where...

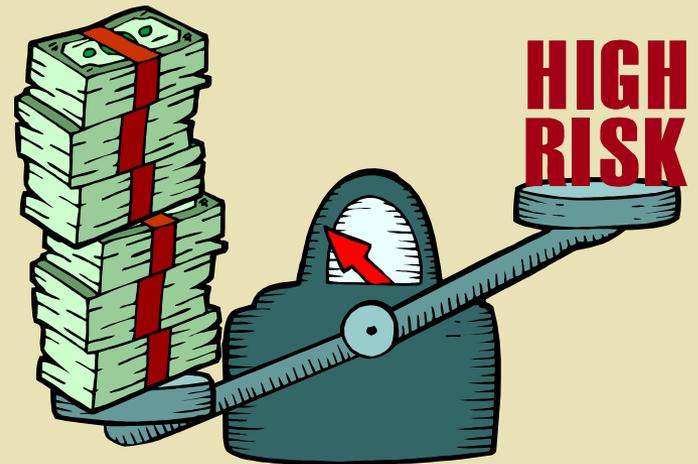
- ◆ There is any question about the **financial responsibility** of a contractor.
- ◆ There the expertise of professional risk management and adjustment are required or will add value.

Insurance: The Dark Side



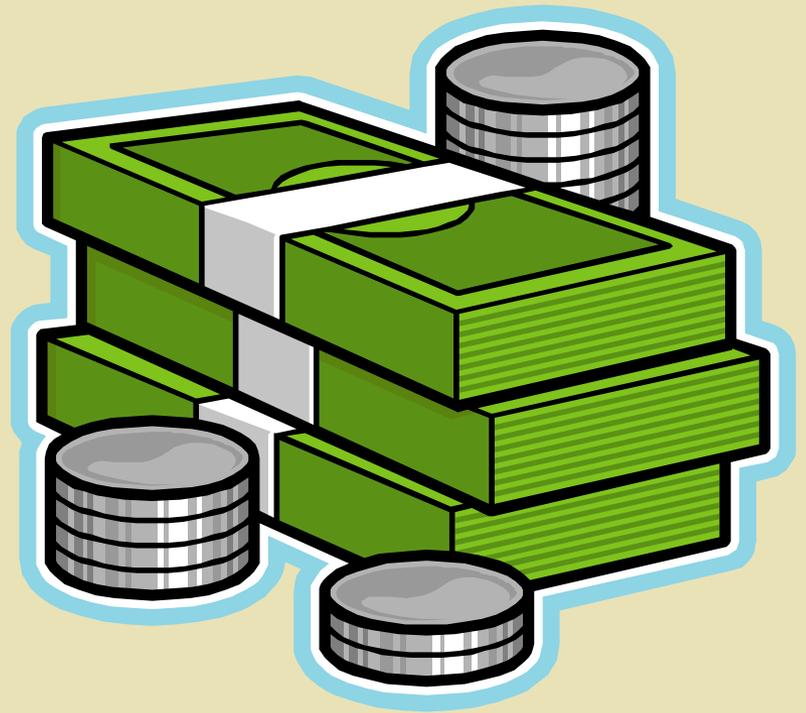
Insurance: The Dark Side

- ◆ Adverse selection- only people who need insurance will buy it.
- ◆ Moral and morale hazards- causing a loss deliberately, or “who cares, we have insurance.”



Insurance: The Dark Side

- ◆ It adds cost- about 15% of the cost of the insurance goes to underwriting.
- ◆ Defending claims is expensive too.



Insurance: The Dark Side

Denial of Coverage



- ◆ After a claim, if....
- ◆ Agency fails to comply with a policy condition.
- ◆ Denial must be timely (10-30 days).
- ◆ Notice of claim requirement.

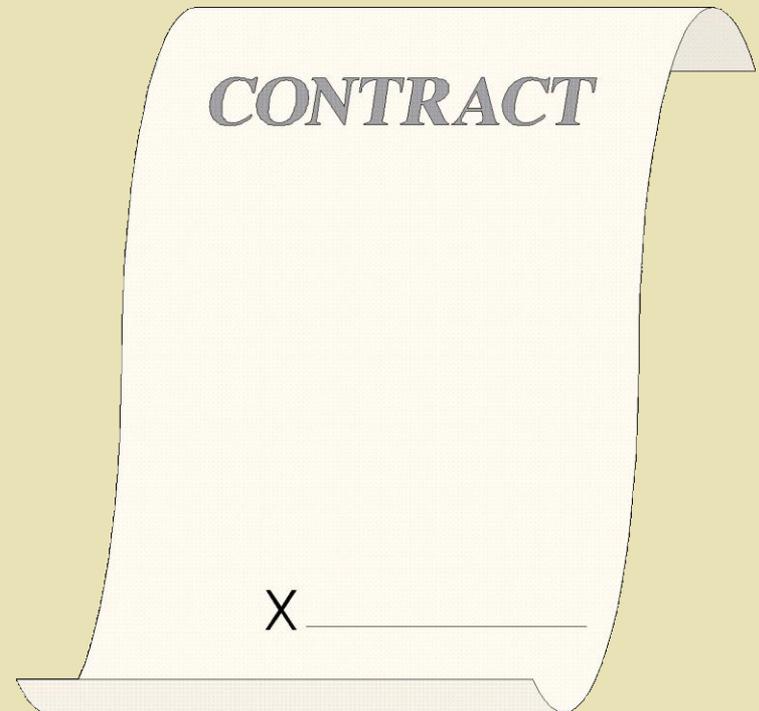
Insurance: The Dark Side Disclaimer of Coverage

- ◆ After a claim, if....
- ◆ Claim is “excluded.”
- ◆ Denial must be timely (10-30 days).
- ◆ Pollution.
- ◆ Not arising from “work” or “operations.”



Types of Insurance for Public Entity Contracts

- ◆ Contractors often have MORE insurance.
- ◆ Agency requires only what Agency needs.
- ◆ Agency requires only what is available.
- ◆ These are the basic types.



Types of Insurance for Public Contracts

Workers' Compensation and Disability



- ◆ Required by State Finance Law section 142.
- ◆ Premium rated by business and payroll.
- ◆ Typically costs 5-10% of payroll.

Types of Insurance for Public Contracts

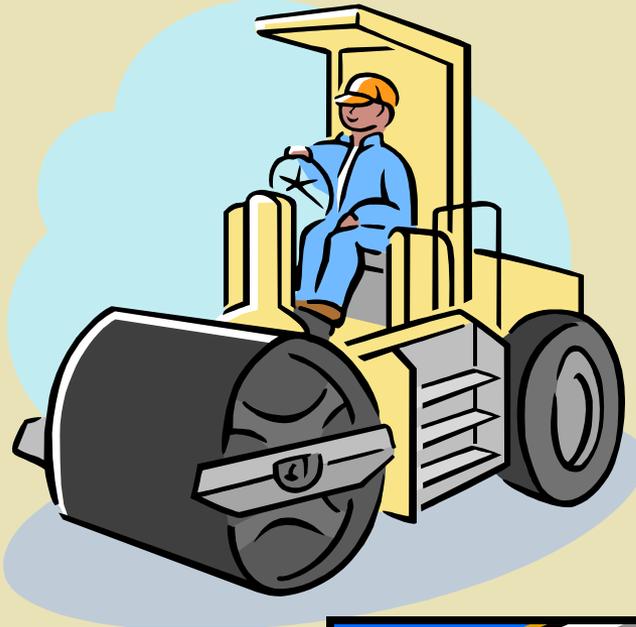
Commercial General Liability (CGL)

- ◆ Loss that an insured “becomes legally obligated to pay” (usually negligence)
- ◆ Covers liability assumed by contract in most cases.
- ◆ Coverage for “completed operations.”
- ◆ Agency becomes additional insured.
- ◆ Premium based on payroll.
- ◆ Very expensive for some types of business.



Commercial General Liability

The Dark Side



- ◆ No coverage for environmental exposures for equipment.
- ◆ Aggregates can be eaten up on other jobs.
- ◆ Insurer may try to dodge responsibility.
- ◆ Policies may exclude losses from NY Labor Law or claims by workers (most expensive type of claims).

Commercial General Liability

The Dark Side



- ◆ Insurer may try to dodge responsibility.
- ◆ Additional insured coverage is limited.
- ◆ Independent negligence of agency will NOT be covered.
- ◆ Gray area of “general supervision” and “site defects.”

Types of Insurance for Public Contracts

Commercial Automobile Policy

- ◆ Covers registered cars and trucks.
- ◆ Liability and no-fault.
- ◆ Includes coverage for fuel spills.
- ◆ Does not cover mobile equipment.



Types of Insurance for Public Contracts

Excess (umbrella) Liability Insurance Policy



- ◆ Excess over CGL and Auto.
- ◆ \$1 million doesn't buy what it once did.
- ◆ Premium is about 25% of CGL premium for up to \$5 million.

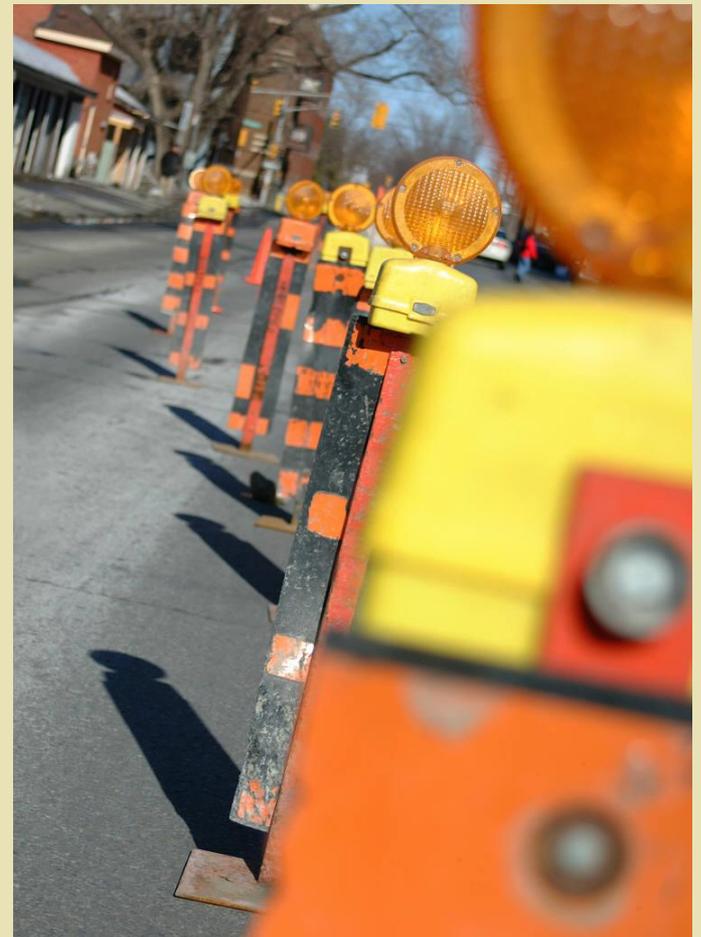
Types of Insurance for Public Contracts Owners & Contractors Protective Liability Policy (OCP)

- ◆ Policy bought for Public Entity.
- ◆ Premium based on contractor payroll.
- ◆ Site specific.
- ◆ Finger pointing less likely with at least some contractor involvement.
- ◆ Provides primary coverage
- ◆ Duplicate coverage where contractor is negligent.



Types of Insurance for Public Contracts Owners & Contractors Protective Liability Policy (OCP)

- ◆ Expensive coverage for small projects.
- ◆ Duplicate coverage where claim stems from contractor work or operations.
- ◆ Less of a gray area for general supervision and site conditions.
- ◆ Less costly on big jobs where same carrier writes the CGL.



Types of Insurance for Public Contracts

Builders' Risk

- ◆ Covers physical damage to buildings in the course of construction.
- ◆ Must be written on a completed value form.
- ◆ The amount of the insurance must be the anticipated full value of the completed building.



Types of Insurance for Public Contracts

Professional Liability- Errors & Omissions

- ◆ Covers liability for the failure to use the degree of skill expected of a person in a particular field.
- ◆ Professional Liability coverage is required whenever any part of the contracted activity requires the services of a professional consultant.

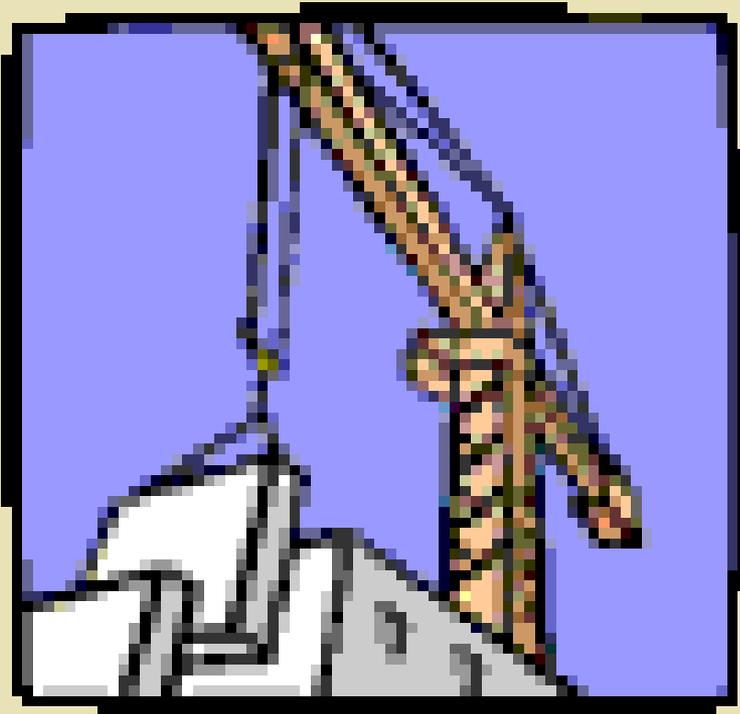


Putting Insurance Requirements in Public Contracts

- ◆ Develop an insurance specification with your legal advisor or risk manager before getting bids or quotes.
- ◆ Always assure that you are using a good indemnity clause recommended by your legal advisor or risk manager.
- ◆ Commit to the limits that you will require for each contract or types of contracts.



Council of Contracting Agencies Model Insurance Requirements



- ◆ Flexible.
- ◆ Depends upon the type of work.
- ◆ Depends upon the value of the contract.
- ◆ Necessary protection.
- ◆ NO unnecessary costs.

Model Insurance Requirements

Recommended Types of Insurance.

- ◆ Always require workers' compensation/DBL.
- ◆ Almost always require general liability.
- ◆ Require auto whenever automobiles are used for the work.
- ◆ Require excess limits depending upon the size.
- ◆ Everything else... order off the menu.



Model Insurance Requirements

Additional Insured Protection

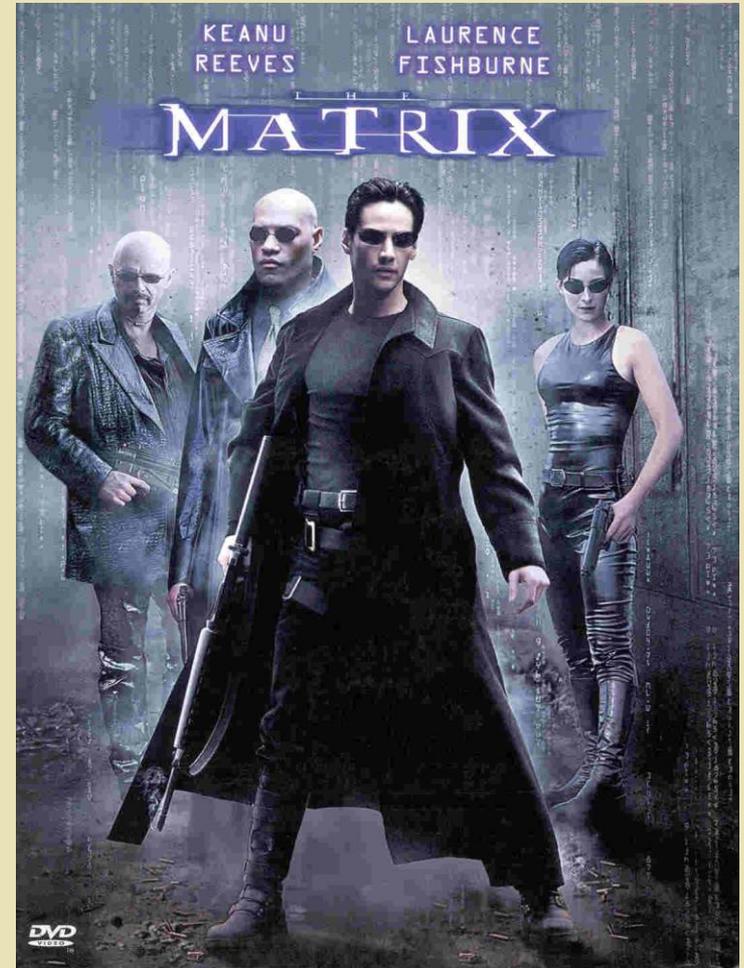
- ◆ In case you get sued because of the contractor's work.
- ◆ Need to be endorsed to policy.
- ◆ Auto and general liability risks.



Model Insurance Requirements

Limits of insurance that should be required.

- ◆ Risks tend to be relative.
- ◆ Cost of insurance is relative.
- ◆ CCA recommends a matrix approach.
- ◆ Tied to expected contract value.



Suggested Typical Insurance Requirements

Goods or Commodities Contract

- ◆ Insurance as an indication of contracting responsibility.
- ◆ Responsible to claimants injured by defective products sold to you and used by your employees or others.
- ◆ \$2/\$2 million CGL with products' liability endorsement.
- ◆ Workers' compensation/disability.



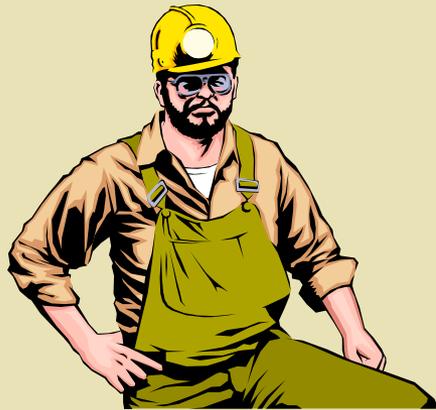
Suggested Typical Insurance Requirements

Small Services Contract



- ◆ No roofs, ladders or scaffolds, or falling hazards.
- ◆ \$2/\$2 million CGL with additional insured endorsement.
- ◆ Commercial auto (\$1 million) only if using vehicles for job (commuting doesn't count).

Suggested Typical Insurance Requirements Construction Contract



- ◆ Less than \$10 million value
- ◆ \$5/\$5 million CGL & excess with additional insured endorsement.
- ◆ \$1 million auto.
- ◆ Commercial auto (\$1 million) if using vehicles for job
- ◆ OCP for \$1 million.
- ◆ Environmental.

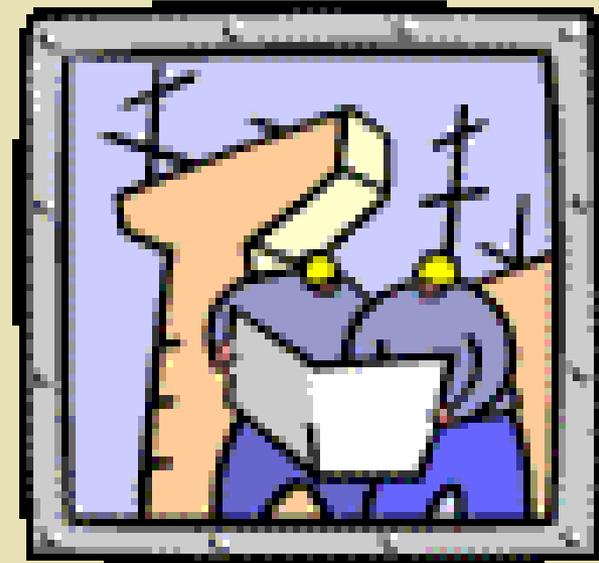
Suggested Typical Insurance Requirements

Mega-Construction Contracts

- ◆ Greater than \$50 million value
- ◆ \$10/\$10 million CGL & excess with additional insured endorsement.
- ◆ \$1 million auto.
- ◆ Commercial auto (\$1 million) if using vehicles for job
- ◆ OCP for \$1 million.
- ◆ Environmental \$10 million.



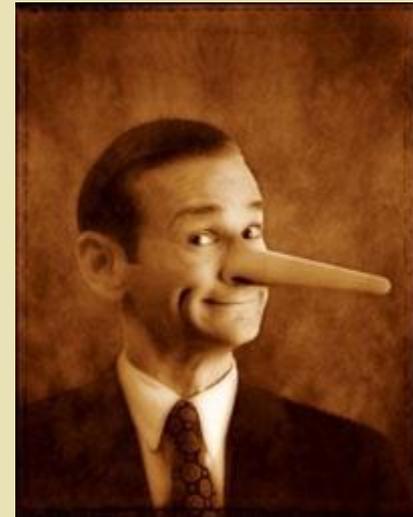
Assuring Protection = Checking Compliance



Nobody starts work until they present proof of insurance

Assuring Protection = Checking Compliance every project

- ◆ Get certificate(s) of insurance.
- ◆ Assure that required insurance is in place.
- ◆ Assure that liability limits meet minimums required.
- ◆ Assure that there are no large deductibles.
- ◆ Assure that policy or policies have been endorsed to add all affected public entities.
- ◆ Keep certificate with project file and follow for life of the contract.
- ◆ Contractors and insurance agents aren't always right.
- ◆ Somebody has to provide notice when there is an accident!!!!



ACORD Certificate of Insurance

- ◆ Association for Cooperative Operations Research and Development.
- ◆ The insurance industry's nonprofit standards developer.
- ◆ Check types of insurance, limits, expiration date and that you are named as certificate holder.
- ◆ Additional insured endorsement is a separate form.
- ◆ Use of questionnaire or different form (high volume) are alternatives but no certificate will create coverage.

ACORD **CERTIFICATE OF LIABILITY INSURANCE** DATE (MM/DD/YYYY)

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 Producer Name Producer Address Producer Phone Number	CONTACT NAME: PHONE: FAX: E-MAIL: ADDRESS: INSURER(S) AFFORDING COVERAGE NAIC # INSURER A: Carter A 12345 INSURER B: Carter B 12345 INSURER C: Carter C 12345 INSURER D: INSURER E: INSURER F:
---	--

COVERAGES **CERTIFICATE NUMBER:** **REVISION NUMBER:**

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 PAID CLAIMS.

TYPE OF INSURANCE	ADDL. INSR. NR.	POLICY NO.	POLICY EFF. DATE (MM/DD/YYYY)	POLICY EXP. DATE (MM/DD/YYYY)	LIMITS
A GENERAL LIABILITY <input type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: POLICY <input type="checkbox"/> PER <input type="checkbox"/> LOC		Policy Number	04/01/2011	04/01/2012	EACH OCCURRENCE TORSION & RENTED PREMISES (Ea occurrence) \$ MED EXP (Any one person) \$ PERSONAL & ADV INJURY \$ GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMP/OP AGG \$
B AUTOMOBILE LIABILITY <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		Policy Number	04/01/2011	04/01/2012	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
C UMBRELLA LIAB <input type="checkbox"/> EXCESS LIAB <input type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS-MADE DED. RETENTION \$		Policy Number	04/01/2011	04/01/2012	EACH OCCURRENCE \$ 1,000,000 AGGREGATE \$ 1,000,000
WORKERS COMPENSATION AND EMPLOYER LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NR) If no, describe under DESCRIPTION OF OPERATIONS below					W.C. STATUTORY LIMITS \$ O.T.S. \$ E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$

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

NYS OGS Contract Number & Project Location

The People of the State of New York, Its Officers, Agents, and Employees are named as additional insureds.

30-Day Notice of Cancellation

CERTIFICATE HOLDER New York State Office of General Services Design & Construction Group Division of Contract Administration 35th Floor, Corning Tower, GNARESP Albany, NY 12242	CANCELLATION SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS. AUTHORIZED REPRESENTATIVE
--	--

© 1988-2010 ACORD CORPORATION. All rights reserved.
ACORD 25 (2010/05) The ACORD name and logo are registered marks of ACORD

Workers' Comp. & Disability Certificates

- ◆ NY Workers' Compensation Board requires that separate certificate be used.
- ◆ Workers' Compensation Law Section 57 requires public agency to collect proof of coverage.
- ◆ Disability insurance is also required.
- ◆ Construction contractors will not be exempt.
- ◆ Out-of-state vendors will be exempt.

STATE OF NEW YORK
WORKERS' COMPENSATION BOARD
CERTIFICATE OF NYS WORKERS' COMPENSATION INSURANCE COVERAGE

<p>1a. Legal Name & Address of Insured (Use street address only)</p> <p>Vendor name and address</p> <p>Work Location of Insured (Only required if coverage is specifically limited to certain locations in New York State, i.e., a Wrap-Up Policy)</p>	<p>1b. Business Telephone Number of Insured</p> <p>1c. NYS Unemployment Insurance Employer Registration Number of Insured</p> <p>1d. Federal Employer Identification Number of Insured or Social Security Number</p>
<p>2. Name and Address of the Entity Requesting Proof of Coverage (Entity Being Listed as the Certificate Holder)</p> <p>New York State Office of General Services Design and Construction Group Division of Contract Administration 35th Floor - Corning Tower, GNARESP Albany, NY 12242</p>	<p>3a. Name of Insurance Carrier</p> <p>3b. Policy Number of entity listed in box "1a"</p> <p>3c. Policy effective period _____ to _____</p> <p>3d. The Proprietor, Partners or Executive Officers are <input type="checkbox"/> included. (Only check box if all partners/officers included) <input type="checkbox"/> all excluded or certain partners/officers excluded.</p>

This certifies that the insurance carrier indicated above in box "3" insures the business referenced above in box "1a" for workers' compensation under the New York State Workers' Compensation Law. (To use this form, New York (NY) must be listed under Item 3A on the INFORMATION PAGE of the workers' compensation insurance policy). The Insurance Carrier or its licensed agent will send this Certificate of Insurance to the entity listed above as the certificate holder in box "2".

The Insurance Carrier will also notify the above certificate holder within 10 days IF a policy is canceled due to nonpayment of premiums or within 30 days IF there are reasons other than nonpayment of premiums that cancel the policy or eliminate the insured from the coverage indicated on this Certificate. (These notices may be sent by regular mail.) Otherwise, this Certificate is valid for one year after this form is approved by the insurance carrier or its licensed agent, or until the policy expiration date listed in box "3c", whichever is earlier.

Please Note: Upon the cancellation of the workers' compensation policy indicated on this form, if the business continues to be named on a permit, license or contract issued by a certificate holder, the business must provide that certificate holder with a new Certificate of Workers' Compensation Coverage or other authorized proof that the business is complying with the mandatory coverage requirements of the New York State Workers' Compensation Law.

Under penalty of perjury, I certify that I am an authorized representative or licensed agent of the insurance carrier referenced above and that the named insured has the coverage as depicted on this form.

Approved by: _____
(Print name of authorized representative or licensed agent of insurance carrier)

Approved by: _____
(Signature) (Date)

Title: _____

Telephone Number of authorized representative or licensed agent of insurance carrier: _____

Please Note: Only insurance carriers and their licensed agents are authorized to issue Form C-105.2. Insurance brokers are NOT authorized to issue it.

C-105.2 (9-07) www.wcb.state.ny.us

Risk Management and Insurance In Contracting



Council of Contracting Agencies

Lead presenter, David E. Winans, Esq.

dwinans@dot.state.ny.us

Thank You!