INFORMATION MEMO

Making and Managing City Contracts

Understand what constitutes a contract (a handshake? A verbal "OK"?) and why all contracts should be in writing. Find contract drafting tips. Learn how to manage risks in contract provisions through defense and indemnification language, insurance requirements, and special considerations for construction contracts. Links to sample hold-harmless and other indemnification language, including suggestions for AIA contract modification. Contains model independent contractor agreement and insurance requirement policy.

RELEVANT LINKS:

I. What is a contract?

A contract is a legally binding agreement between parties to do or not do something. A contract requires an offer and acceptance. A contract is formed when one party (the "offeror") makes an offer which is accepted by the other party (the "offeree"). The contract should clearly spell out the terms of the agreement without ambiguity.

There must be mutual promises between the parties, which in legal terms are known as "consideration." These mutual promises define the rights and obligations of the parties. According to traditional legal doctrine, if one party makes a promise and the other party offers nothing in exchange for that promise, the promise is unenforceable. This is known as a "gratuitous promise," which is said to be "unenforceable for lack of consideration." Lack of consideration, however, is rarely a problem for promises made in the context of a business relationship.

Contracts are an essential part of doing business. Cities enter into many types of contractual arrangements. They can range from the mundane to the extremely complex. Even the simplest contracts should be carefully reviewed and thoroughly understood to protect the city's rights. A contract establishes which party is responsible for a particular risk. When used properly, contracts are an effective way to manage risk.

A. Written vs. verbal contracts

Although most oral contracts are legally enforceable, all of a city's contracts should be in writing, regardless of their nature or the dollar amount involved. If a contract is not in writing, it may be very difficult to prove the terms of the contract and to enforce those terms if the other party does not meet its obligations. In addition, the process of writing down the contract's terms and signing the contract forces both parties to think about, and be precise about, the obligations they are undertaking.

RELEVANT LINKS:

A written contract is likely to be more complete and thorough than an oral agreement. If the parties enter into an oral contract, they may have different recollections of what they agreed on. A written agreement eliminates disputes over what was promised.

Minn. Stat. § 513.01.

State law, known as the Statute of Frauds, requires that certain types of contracts, in order to be valid and enforceable, must be in writing:

- A contract that by its terms is not to be performed within one year from its making.
- A contract to answer for the debt, default, or doings of another.
- A contract or undertaking made upon consideration of marriage, except mutual promises to marry.
- A contract or undertaking to pay a debt which has been discharged by bankruptcy or insolvency proceedings.

Unless required by law to be in writing, verbal contracts are valid and enforceable contracts—a handshake is not required. Nevertheless, a city should try not to use verbal contracts.

B. Construction and contracts for goods and services

Minn. Stat. § 412.311, subd. 1.
Minn. Stat. § 429.041, subd. 2.
LMC information memo, *Competitive Bidding in Cities.*

Minn. Stat. § 16C.285.

Understand the kind of contract you are entering into. A construction contract is a one-time, job-specific contract in which you have no ongoing working relationship with the contractor after the job is finished. Many construction contracts, depending on their dollar amount, must be awarded to lowest responsible bidder. In addition, certain construction contracts are subject to the "responsible contractor" statute.

A service contract is typically a long-term contract in which you have an ongoing working relationship with the contractor for a fixed period of time. Service contracts can be made with any contractor you want and the contract can usually be terminated by either party with notice.

LMC information memo, *Competitive Bidding in Cities.*

A contract for the purchase of goods is used when the city purchases physical items such as a police car, copy machine, or office supplies. Some contracts may be subject to the competitive bidding laws.

II. Authority to contract

Minn. Stat. § 412.221, subd. 2.

State law specifically allows statutory cities to enter into contracts, providing, in part, "[T]he council shall have power to make such contracts as may be deemed necessary or desirable to make effective any power possessed by the council."

RELEVANT LINKS:

Minn. Stat. § 410.33.

Minn. Stat. § 471.59, subd. 1.

Home rule charter cities usually find similar power in their charters to enter into contracts, but in the absence of such authority, charter cities may rely on the authority granted in state law which provides, "[I]f a city charter is silent on a matter that is addressed for statutory cities by chapter 412…then the city may apply the general law on the matter."

Another statute that frequently comes into play in contracts between governmental units authorizes two or more "governmental units" to enter into contracts to "jointly or cooperatively exercise any power common to the contracting parties." A "governmental unit" includes political subdivisions such as cities, counties, towns, school districts, and the state of Minnesota. In addition, a "governmental unit" is defined to include an "independent nonprofit firefighting corporation."

A contract with another governmental unit is typically referred to as a "joint powers" contract. One area where this "joint power" is commonly used is in contracts with other governmental units related to fire departments and the provision of firefighting services. These contracts have special considerations that should be addressed that are outside the scope of this discussion.

III. Contract drafting tips

See Appendix A, Contract Drafting Checklist.

Disputes involving the interpretation of written contracts are one of the largest sources of commercial litigation. A well-drafted contract will help prevent litigation and, ultimately, save your city time and money. If litigation is necessary, however, it will be easier to protect the city's interests if the contract terms are clear. Even if you do not draft contracts, it is helpful to understand the basics of contract drafting. A basic understanding of contracts will help you to review and understand the contracts to which your city is a party. The following are some basic contract tips:

A. Get it in writing

See Section IV, *Managing risks in contract provisions.*

See Appendix C, Sample independent contractor agreement.

See Appendix D, Certificate of Insurance Quick Reference Guide

- Agreements should be in writing even if the law does not require it. A written agreement is less risky than an oral agreement, because you have a document that clearly spells out each party's rights and obligations in case of confusion or disagreement.
- Proofread the contract very carefully.
- Use and understand the standardized wording or "boilerplate" provisions contained in most contracts that help to protect the city in the event of a lawsuit.
- Obtain a certificate of insurance from the contractor showing proof of the contractor's insurance and required endorsements.

RELEVANT LINKS:

Sample language for bid specifications.

- Ensure the contract supplements insurance requirements with a properly worded defense and indemnification provision in the city's favor. Include these expectations in the bid specifications.
- Specify city-favorable Insurance Service Office (ISO) endorsements for additional insured language.
- Written contracts can only be modified in writing. Make sure both parties approve the changes.

B. Keep it simple

- Contracts should be clear, specific, and focused.
- Sentences should be short to avoid unnecessary complexity and ambiguity.
- You do not need legalese such as "heretofores" and "party of the first part" to make a contract enforceable. Instead, create short, clear sentences with simple, numbered paragraph headings that alert the reader to what's in the paragraph.
- If the agreement is confusing or ambiguous, the general contract rule will apply that the contract will be construed against the party drafting the contract.
- Contracts should be consistent in tone, grammar, and word usage.

C. Identify each party correctly

You need to include the correct legal names of the parties in the contract so it is clear who is responsible for performing the obligations under the agreement (and who you have legal rights against if things go wrong).

D. Spell out all obligations

- The body of the agreement should spell out the rights and obligations of each party in detail. Don't leave anything out. If you discuss something verbally and shake on it but it is not in the contract, it will not be enforceable. Define important terms.
- If you do forget to include something, create a short written amendment. Or, if you have not signed the agreement, you can handwrite the change into the contract and have the parties initial the change.

E. Look at sample agreements

- Usually other cities have entered into similar contracts that often can serve as a model for your city. But do not assume just because another city executed it, that it must be a good model.
- Sample agreements in many areas are available through the League of Minnesota Cities.

LMC Research Service
Research@lmc.org
651.281.1200
800.925.1122

RELEVANT LINKS:

- Using a listserv is often a good way to solicit sample agreements from your colleagues in other cities.

1. Service agreements

See Appendix A, Contract Drafting Checklist.
See Appendix B, Sample insurance requirements policy.
See Appendix C, Sample independent contractor agreement.

While no agreement is appropriate for every circumstance, a simple sample independent contractor agreement is available at the end of this memo that may serve as a good starting point for many city agreements. In addition, there is a contract checklist and sample insurance requirements.

2. Construction agreements

There are a number of widely used form contracts in the construction industry. These forms have been drafted by various stakeholders and have been used extensively for many years. While these forms are not necessarily appropriate for all circumstances and may reflect biases or perspectives that make them inappropriate in certain contexts, they are valuable resources. The most commonly used construction form documents are the following:

- American Institute of Architects (AIA). AIA Contract Documents deliver a comprehensive suite of over 100 contract documents that address the full spectrum of design and construction projects–large and small.
- If your city is engaged in a construction project and you are using AIA forms, you can find suggested changes to the General Conditions of the Contract for Construction, Document A201-2007 and Standard Form of Agreement between Owner and Architect, Document B101-2007 using the agreements negotiated by the International Municipal Lawyers Association (IMLA) and the AIA. The documents are available online to IMLA member cities that have an AIA license.

Model Construction Documents, International Municipal Lawyers Association.

- Engineers Joint Contract Documents Committee (EJCDC). EJCDC is a coalition of engineering stakeholders in the project delivery process. The current edition of the construction documents was revised in 2013. It includes an integrated series of 21 documents coordinated with engineering agreements and assumes the design engineer is involved during construction.
- Associated General Contractors of America (AGC) -- ConsensusDOCS. AGC is a leading association for the construction industry. AGC publishes the ConsensusDOCS Standard Construction Contracts. ConsensusDOCS is a family of standard contract documents and offers more than 100 different design and construction contract documents covering all methods of project delivery. The DOCS in ConsensusDOCS is an abbreviation for the Design, Owner, Contractor, Subcontractor and Surety organizations represented in the ConsensusDOCS Coalition. A comprehensive update was published in 2011.

RELEVANT LINKS:

- Design Build Institute of America (DBIA). DBIA is an organization that defines, teaches, and promotes best practices in design-build. Design-build is an integrated approach that delivers design and construction services under one contract with a single point of responsibility. Owners select design-build to achieve best value while meeting schedule, cost, and quality goals. In 2010, DBIA completed a significant revision to the full set of DBIA Contract Documents.

F. Comply with competitive bidding laws

Minn. Stat. § 471.345, subd. 3.

LMC information memo, *Competitive Bidding in Cities.*

Cities must use the competitive bidding process for contracts if the cost is expected to exceed $100,000; if the contract is for the sale, purchase, or rental of supplies, materials, or equipment; or the contract is for the construction, alteration, repair, or maintenance of real or personal property. Some exception may apply.

G. Comply with the Responsible Contractor Law

Minn. Stat. § 16C.285.

- The law applies to publicly-owned or financed projects if the estimated cost exceeds $50,000 and is awarded pursuant to a lowest responsible bidder selection method or a best value selection method. A project means the "building, erection, construction, alteration, remodeling, demolition, or repair of buildings, real property, highways, roads, bridges, or other construction work."
- Contractors must meet certain minimum criteria to be eligible to be awarded a construction contract. The city's solicitation document must include certain information related to the law.

H. City attorney review of contracts

- Have your city attorney review all contracts prior to their execution. Even seemingly simple contracts may have implications that you may not recognize.
- It is always a good idea to have another person review the contract.

I. LMCIT review of contracts

LMCIT Contract Review Service.

LMC information memo, *LMCIT Liability Coverage Guide, see Section III-I, Joint powers entities.*

- LMCIT staff can assist in reviewing contracts, especially provisions related to insurance and liability.
- Joint powers agreements present special issues that you should have LMCIT review.
- All police service contracts must be reviewed by LMCIT. All other contracts are optional, but LMCIT review is suggested.

RELEVANT LINKS:

- Cites may be entitled to expenditure rating deductions for contracted services. If risk is appropriately transferred to the service provider for certain services, LMCIT will deduct the expenditure from the city's total expenditures, which will reduce the city's liability premium.

J. All parties must sign the contract

- Contracts are typically signed by the mayor and the city's clerk or administrator on the city's behalf. Charter cities may have different requirements.
- A motion by the city council is required to authorize the contract prior to its signing. A resolution may be adopted, but is not required, to show the city council's action.
- The person signing the agreement for the other party must have legal authority to bind that party.

IV. Managing risks in contract provisions

Risk is the possibility of suffering harm or damage. Risk management is the process of identifying and analyzing risk and then either accepting or mitigating the risk. Simply put, risk management is a two-step process: determining what risks exist and then handling the risks in a way best-suited to the city.

Some contracts are for the purchase of goods. For example, the city may buy rock salt to use on streets in the winter. A contract to purchase goods is usually a relatively simple contract, but that can vary depending on the nature of the goods. Other contracts are for the purchase of services. For example, a city may hire an architect to design a new city facility, hire a firm to operate its sewer system, hire a tree trimmer to prune trees in the city park, or contract with an attorney to provide legal services for the city. These types of service contracts are usually more complex, and often there is more that can go wrong.

Cities sometimes are presented with form contracts by certain professionals, such as architects and engineers. City officials may be told that these are just "standard" forms and to just go ahead and sign them. While what you are being asked to sign may in fact be a standard form, it may not adequately protect the interests of the city, and, in some cases, it may be unfair to the city. Such forms are usually drafted by professional associations and, as one might expect, are designed to protect that association's members. It would be prudent to have your city attorney review such contracts prior to signing.

No contract is risk free. Every time the city enters into a transaction, there is the possibility that something could go wrong. Thus, in every contract, a city should take reasonable steps to mitigate the risk. However, even when risk is mitigated, there is still some level of risk.

RELEVANT LINKS:

A city must determine its acceptable level of risk.

There are three standard mechanisms that cities and contractors use to allocate risk:

- Include defense and indemnity provisions in the language of the contract between the city and the contractor. In construction and design contracts, these provisions are regulated by state law and may limit the ability of the city to require a contractor to indemnify the city for the city's negligence.
- Require appropriate types (commercial general liability, automobile liability, workers' compensation, professional liability, etc.) and amounts of insurance.
- Have the city endorsed as an "additional insured" on the contractor's commercial general liability (CGL) policy. In addition, the city should be added as an additional insured to umbrella/excess policies and certain types of specialty insurance.

Minn. Stat. § 337.02.
Minn. Stat. § 604.21.

A. Defense and indemnification

A contract often requires one of the parties to pay, i.e., indemnify, the other party for a loss it suffers in fulfilling the terms and conditions of the contract. Indemnification may be simply described as the obligation of one party (the indemnitor) to reimburse a second party (the indemnitee) for the losses that second party incurs or the damages for which it may be held liable.

Hold-harmless agreements, also referred to as indemnification provisions, are commonly found clauses in most contracts. Depending on the scope of the indemnification provision, it may transfer some or all of one party's liability to another party. The indemnitor agrees to pay the indemnitee if the indemnitee suffers a loss.

Cities should recognize which type of indemnification is being used in order to gauge the likelihood of liability transfers. It is helpful to know which type of hold-harmless agreement is being used. There are three basic types of indemnity clauses that can be part of hold-harmless agreements:

- Broad Form—Transfers the entire risk of loss from the customer to the service provider regardless of fault.
- Intermediate Form—Liability is shifted to the service provider for damages caused "in whole or in part" by the service provider. Under this form, the service provider could be liable for up to 100 percent of the claim, even if it is only 10 percent at fault. The only time the service provider would not be liable would be if the customer was solely at fault.

RELEVANT LINKS:

- Limited Form—The service provider assumes liability only for its own negligence. The limited form is a restatement of the common law principle which states that one is liable for the consequences of his or her actions that lead to injury or damage. Most municipal contracts will use the limited indemnification approach. This means that each party will be responsible for its own negligence.

There are special considerations for defense and indemnification for joint powers contracts.

There is no one hold-harmless provision that fits every situation. In each situation, the parties will have to first determine whether a limited, intermediate, or broad form of indemnification is proper. For example, if the city is hiring a contractor, you might try to use a broad form of indemnification, i.e., transfer all liability to the contractor. If the contractor reads the agreement, it is likely the contractor will not agree to this provision. It may be that after negotiation, the parties agree to use the limited form of indemnification, i.e., each party will be responsible to the extent of its own negligence.

Hold-harmless agreements frequently serve a useful purpose in clarifying the obligations of both parties. However, there are a number of ways they can significantly add to the costs of doing business if their effects are not anticipated. For example, if one party is in a superior bargaining position, the other party may not have much opportunity to negotiate specific contract terms. The party with less leverage is often left with less desirable terms. Too often, the realization of the consequences of the obligation comes only after the provision has been activated by an injury or damage.

The city's attorney should review contracts and hold-harmless provisions. Unfortunately this does not always occur, sometimes for budget reasons, but this can end up costing the city more money in the long run. While city staff and insurance agents should not act as attorneys, they may play an important and valuable role in looking at the contract and pointing out specific areas that should be reviewed by the attorney. In addition, cities should remember to use LMCIT's Contract Review Service to help in reviewing indemnification provisions.

A contractor is usually amenable to amending the indemnification provision in a contract, especially if you can demonstrate it is unfair to the city.

1. Contractual indemnity (anti-indemnification) in construction contracts

Minn. Stat. § 337.05, subd. 1.

In the 2013 legislative session, the Minnesota Legislature amended the anti-indemnity law dealing with indemnification and insurance provisions in construction contracts.

RELEVANT LINKS:

The amendment limits the ability of one party to require another to provide insurance for the other's negligence or intentional acts. The new law applies to "building and construction contracts" entered into on or after Aug. 1, 2013.

Minn. Stat. § 337.01, subd. 3.

For purposes of this statute, an "indemnification agreement" means an "agreement by the promisor to indemnify or hold-harmless the promisee against liability or claims of liability for damages arising out of bodily injury to persons or out of physical damage to tangible or real property," and a "building and construction contract" means a "contract for the design, construction, alteration, improvement, repair, or maintenance of real property, highways, roads, or bridges." The term does not include contracts for the repair of machinery or equipment used for electric, gas, steam, and telephone utility production, transmission, or distribution purposes.

Minn. Stat. § 337.01, subd. 2.

Indemnity clauses have historically been used in construction contracts to require subcontractors to not only indemnify the general contractor for damages caused by the subcontractor's defective workmanship, but also to indemnify the general contractor for the general contractor's own negligence. Similarly, a construction contract might contain a provision requiring the general contractor to indemnify the owner of a project, such as a city, for the owner's negligence.

Most states, including Minnesota, prohibit to some degree contractually shifting one party's negligence to another party. These statutes are known as "anti-indemnity" statutes.

a. 1984 Minnesota legislation

Minn. Stat. § 337.02.

Minnesota's anti-indemnity statute became effective on Aug. 1, 1984. The statute prohibited indemnity agreements in construction contracts except to the extent the underlying injury or damage is attributable to the negligent or wrongful act of the entity that has agreed to the indemnity obligation. There were, however, some narrow exceptions. In particular, the statute allowed for a condition requiring a party to purchase insurance "for the benefit of others" without regard to who caused the injury or property damage.

Minn. Stat. § 337.05, subd. 1.

In a typical construction contract provision, a subcontractor would agree to indemnify the general contractor for all fault, including all fault attributable to the general contractor, and to purchase insurance coverage for the benefit of the general contractor, which is sufficient to insure the indemnity obligation. The contract also required the general contractor to be named as an "additional insured" on the subcontractor's policy.

RELEVANT LINKS:

In construction contracts between a city and a general contractor, the city could require the general contractor to purchase liability insurance that would cover not only the general contractor's negligence, but also the city's negligence. The construction contract would also require that the city be added as an "additional insured" to the general contractor's insurance.

The theory was that it would be less expensive for one insurance company and one attorney to defend both the city and general contractor than for the city and general contractor to each have their own insurer and attorney, allowing each attorney to argue about how to allocate blame. Having co-defendants blame each other can be beneficial for plaintiffs and costly for all defendants.

b. 2013 Minnesota legislation

Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co., Inc., 825 N.W. 2d 695 (Minn. 2013).

The insurance exception did not always live up to its promise of economic efficiency. Following a Minnesota Supreme Court ruling and intense lobbying by subcontractor trade groups, the Minnesota Legislature decided to narrow the anti-indemnity law in construction contracts.

The new legislation, amending Minn. Stat. § 337.05, subd. 1, significantly limits when a party to a construction contract can insure and indemnify another party. The amendment applies to contracts entered into on or after Aug. 1, 2013, and expressly bars "[a] provision that requires a party to provide insurance coverage to one or more other parties, including third parties, for the negligence or intentional acts or omissions of any of those other parties, including third parties. …" Such provision "is against public policy and is void and unenforceable."

c. Exceptions to new legislation

Minn. Stat. § 337.05 subd. 1(c).

The new law "does not affect the validity of a provision that requires a party to provide or obtain workers' compensation insurance, construction performance or payment bonds, or project-specific insurance, including, without limitation, builder's risk policies or owner- or contractor-controlled insurance programs or policies."

(1) Project-specific insurance

The phrase "project-specific insurance" is not clear. If the city requires the general contractor to provide "project-specific insurance," the city would not be prohibited from requiring the contractor to assume the city's negligence. Broad indemnification language may be combined with "project-specific insurance" to provide the broadest coverage and defense of cities as project owners. The statute language is clear that "project-specific insurance" includes "builder's risk policies or owner- or contractor-controlled insurance programs or policies."

RELEVANT LINKS:

A builder's risk policy is a property insurance policy that is designed to cover property in the course of construction. Most builder's risk policies include the city, the general contractor, and all subcontractors as named insureds. Since a builder's risk policy is property coverage insurance covering all the parties, it does not affect general liability issues.

(2) OCIPs and CCIPs in construction contracts

Two other forms of "project-specific insurance" sometimes seen in the construction industry are owner- and contractor-controlled insurance programs. An owner-controlled insurance program (OCIP) or "wrap up" is an insurance policy held by the city as the property owner during a construction project. An OCIP is typically designed to cover virtually all liability and loss arising from the construction project. The OCIP package usually contains a CGL policy and a workers' compensation policy.

Similarly, a contractor-controlled insurance program (CCIP) is a type of wrap-up policy in which all participants involved in a building project are covered by a single policy. The policy sponsor is the general contractor. The policy provides coverage for the city as well as contractors and subcontractors that are working on the job site.

OCIPs and CCIPs are typically used in very large construction projects. They have not been seen much in Minnesota. There can be advantages and disadvantages in using OCIPs and CCIPs. LMCIT does not see the use of OCIPs and CCIPs as a viable tool for most cities to insure projects under the new anti-indemnity legislation. If a city wants to buy an OCIP or require a CCIP, it should work closely with its insurance broker to explore the costs and make sure there are no gaps in coverage.

(3) Other project-specific insurance in construction contracts

The 2013 amendment to Minn. Stat. § 337.05, subd.1, leaves open the question as to whether there are other types of "project-specific insurance" a city might require to avoid the prohibition against the general contractor indemnifying the city for the city's negligence.

There is an argument that a city could require a general contractor to buy liability insurance that applies only to the specific construction project referred to in the construction contract. Similarly, the city could require the general contractor to provide endorsements to its insurance coverage so that the per-occurrence and aggregate limits will not be diluted by other projects the contractor is involved it.

RELEVANT LINKS:

The problem with such an approach is that it would seem to be an end around what the Legislature specifically tried to prohibit, i.e., the transfer of negligence to a non-negligent party. The safest approach for a city would be to require only the types of "project-specific insurance" specified in the statute. Any other types of "project-specific insurance" will likely be opposed by general contractors and could be ruled void by a court of law.

The 2013 amendment to Minn. Stat. § 337.05, subd. 1, leaves open the question as to whether there are other types of "project-specific insurance" a city might require to avoid the prohibition against the general contractor indemnifying the city for the city's negligence.

Minn. Stat. § 337.05 subd. 1(d).

The law "does not affect the validity of a provision that requires the promisor to provide or obtain insurance coverage for the promisee's vicarious liability, or liability imposed by warranty, arising out of the acts or omissions of the promisor."

Minn. Stat. § 337.05, subd. 1(e).

The law also "does not apply to building and construction contracts for work within 50 feet of public or private railroads, or railroads regulated by the Federal Railroad Administration."

d. Action required

The new anti-indemnity legislation will certainly require most general contractors and project owners to modify contract language relating to insurance and indemnification.

Cities, as project owners, will need to make sure they do not enter into construction contracts requiring a general contractor to defend and indemnify the city for the city's negligence, even though the general contractor may have purchased liability insurance to cover such claims, unless specifically covered under the limited exceptions to the new legislation as set forth above. Such a contract provision would be void and unenforceable under the revised law.

B. Insurance

See Section IV-B-1-b, *Additional insured provisions.*

Transferring the responsibility for payment to another party is an effective technique only if the other party has the capability to honor its financial commitment. Cities usually require the other party to have insurance to make sure that party can meet its indemnification obligation.

All cities purchase insurance or self-insure to protect the city against losses. Also, when a city enters into a contract, it typically requires the other party to have insurance. Depending on the type of contract, the following are the most common insurance coverages a city may require.

RELEVANT LINKS:

1. Commercial general liability insurance

Commercial general liability insurance (CGL) provides broad coverage for bodily injury or property damage arising out of insured contracts. It includes coverage for bodily injury and property damage arising out of premises, operations, products, and completed operations; and advertising and personal injury liability. LMCIT strongly encourages member cities to make sure that every contractor has liability insurance—typically a commercial general liability policy. LMCIT recommends requiring the city be endorsed as an "additional insured" on the contractor's policy. If you see the term "comprehensive general liability insurance" you should be aware that it is an old term that is no longer used; it may indicate the insurance requirements are out of date.

See Section IV-B-1-b, *Additional insured provisions.*

If the contractor does not have liability insurance, the risk to the city and, therefore, to the city's insurer increases substantially. It is because of this increased risk that LMCIT's policy is to strongly encourage cities to require all contractors to have liability insurance. If the city does not require liability insurance and LMCIT responds to a claim, the rates charged by LMCIT to that city may increase.

LMC information memo, *Insurance and Liability Considerations when Hiring Contractors.*

a. Contractor insurance limits

A very common question is what limits of liability coverage the city should require contractors to carry. LMCIT has not established any minimum limits requirement, although as a general guideline LMCIT suggests at least $1,000,000 per occurrence for most types of insurance. The amount of insurance to require depends on the particular project and the risk involved. For smaller projects that are relatively low risk, LMCIT recommends the contractor have a minimum of $1,000,000 in CGL insurance per occurrence and a $2,000,000 annual aggregate.

The per-occurrence limit is the most the policy will pay out for claims arising from a single occurrence. The aggregate limit is the most the policy will pay out for any number of claims during the policy period. The aggregate limit is often double the per-occurrence limit, but there is no such requirement.

For larger projects and projects that are inherently more risky, the city should require higher per-occurrence and aggregate limits. A city should consult with its city attorney for specific recommendations. LMCIT can also provide guidance as to the type and amount of insurance to require. In some ways the question of limits is a secondary consideration. The more critical consideration is making sure the city requires the contractor to have at least some liability insurance.

RELEVANT LINKS:

The reason limits may be less significant than they may seem at first glance has to do with the loss patterns LMCIT has experienced. The overwhelming majority of liability claims LMCIT has seen are relatively small. Since 1980, only a very small percentage of all LMCIT's liability claims have exceeded $100,000 in damages. Therefore, even a very low limit will probably take care of most problems.

While LMCIT generally recommends limits of at least $1,000,000, there really is not a "magic number" for insurance requirements for contractors and licensees. Even if the contractor were to carry a policy with a limit of $1,000,000 per occurrence, there is no assurance this would be enough to fully protect the city.

The reason is that both the contractor and the city are insureds under the policy, and both could have some liability in a single occurrence. The contractor, as the named insured, and the city, as an additional insured, share the coverage. If the contractor's liability uses up some of the $1,000,000 available under the policy, there would not be enough limit left in the policy to cover the full potential amount of the city's liability (the city's current statutory liability limit is $1,500,000), plus the contractor's liability for that occurrence. Since there is no statutory limit on the contractor's maximum liability, the same problem can exist regardless of what limits the contractor carries. For example, even if the contractor carries a $2 million limit policy, the contractor might end up with $1.5 million or $2 million or $10 million of liability, not leaving enough limits in the policy to cover the city's exposure. Regardless of what insurance limits the contractor purchases, the city can never be assured the contractor's insurance will be enough to cover the full extent of the city's liability. Thus, there is no special reason for pegging the amount of insurance required of a contractor to the city's statutory $1,500,000 liability limit.

Minn. Stat. § 466.04, subd. 1.

Also, insurance is typically issued in million dollar increments. If the city requires the contractor to have a minimum of $1,500,000 in coverage, it is in practice a $2,000,000 requirement, since contractors cannot typically purchase coverage of $1,500,000. Moreover, if an additional insured endorsement limits coverage, the city may want to require a higher limit.

See Section IV-B-1-b-((2)(c) *discussing the 2013 ISO additional insured endorsements.*

Certainly it is true, though, that the higher the limits the contractor carries, the more likely it is the limits will be sufficient to cover both the contractor's and the city's liability. Besides protecting the city, higher limits also benefit the public; the higher the limit, the more likely it is that there will be adequate resources available to compensate a member of the public injured by the contractor's activities. Thus, having $750,000 of coverage would be better than having $500,000; but having $1,000,000 would be better than having $750,000, and so on. On the other hand, many small contractors may balk at the $1,000,000 requirement, in which case the city might drop the requirement to $500,000.

RELEVANT LINKS:

Even at this level the city would be protected from the vast majority of potential claims.

See Appendix B, Sample insurance requirements policy.

There is, of course, a trade-off that in requiring higher limits, it will cost the contractor more money, which may or may not be reflected in an increased contract price to the city. The issue of how much insurance to require is really a classic matter for council discretion: balancing the burden imposed on the individual contractor against the benefit to the city and to the public. Again, the most critical factor is to make sure the contractor provides evidence of some amount of liability-insurance protection.

b. Additional insured provisions

When you buy an insurance policy from a company and the company issues the policy to you, you are the "named insured." When the city is an "additional insured," it means someone else (a named insured) owns the policy but has added the city to it as a covered party. As an "additional insured," you are now entitled to some set of contractually defined protections from the issuing insurance company.

LMC Underwriting
651.281.1200
800.925.1222

If the city is asked to name the other party as an "additional insured" on the city's liability coverage, contact your LMCIT underwriter.

You should be aware that your rights as an "additional insured" depend on whatever it says in the insurance contract. Some policies have narrowed the protections that additional insureds have under their insurance policies. Thus, you should not automatically assume that as an "additional insured" you have the same rights as the "named insured." You should consult with your agent to find out what rights you have as an "additional insured."

(1) Cities should be named as additional insureds

Generally, a city should make sure it is named as an "additional insured" on the contractor's CGL policy (and umbrella/excess policies if applicable). This means when a claim comes in and the city is named in the suit, the city and LMCIT can simply tender defense of the lawsuit to the contractor's insurance company. Additional insured requirements are often used to reinforce indemnification agreements. The effect of the additional insured status is similar to the effect achieved by an indemnification agreement. Essentially, the city obtains a direct contractual relationship with the service provider's insurance carrier.

If someone is injured as a result of the contractor's activity, the injured party is likely to sue both the city and the contractor. If the contractor has adequate insurance that names the city as an additional insured, that insurance policy would respond to both of those claims.

If the contractor does not have insurance, the city's LMCIT coverage would provide coverage for the claim against the city, but not for the claim against the contractor, assuming, of course, that the particular claim is not excluded under the city's own coverage.

Making sure the city is named as an "additional insured" on the contractor's policy, however, is critical. This means that when the claim comes in and the city is named in the suit, the city and LMCIT can simply tender it to the contractor's insurance company to be defended. That way, LMCIT does not incur the expense of hiring an attorney to defend the city and to pursue subrogation against the contractor and their contractor's insurer. And since defense costs are a major part— nearly a third— of LMCIT's total incurred liability loss costs, anything cities can do to avoid and minimize defense costs is extremely important. The cost saving may also be reflected in lower premiums to the city.

(2) Insurance Services Office endorsement language

But there are some new concerns and complexities with additional insured status that result from coverage changes initiated by the Insurance Services Office (ISO). ISO filed new forms in 2004 revising their additional insured endorsements (Form CG 2010). The new ISO changes are an effort to narrow the circumstances when a contractor's insurance company is obligated to cover an additional insured.

(a) Pre-2004 additional insured endorsement

Before the 2004 changes, additional insureds generally received coverage for claims "arising out of" the named insured's ongoing operations performed for the additional insured. This language gives cities pretty broad protection as additional insureds.

Coverage is not conditioned on the existence or absence of anyone's negligence, and there is no need to figure out if the city or the contractor is more at fault before the insurance company's coverage obligations are triggered. If a claim "arises" out of work the contractor is performing for your city, then both the city and the contractor have coverage under the contractor's commercial general liability insurance policy (CGL).

For example: Andy trips on a piece of pipe left on a sidewalk in a construction zone during a construction project. Andy sues the city and the contractor for negligence. The city is an additional insured on the contractor's CGL policy. This claim "arises out of" work the contractor was performing for the city, because it happened in the zone of construction activity and because construction activities were in the chain of events that led to the mishap.

RELEVANT LINKS:

It does not matter whether it was a city employee or a contractor's employee who left the pipe in Andy's path; the insurance company is obligated to defend and indemnify both the city and the contractor without regard to who was more at fault.

The insurance company will probably seek to have one defense lawyer represent both the city and the contractor. The main thrust of the defense will likely be that Andy is not entitled to recover from either party because he was careless in walking through the construction zone.

Dealing with claims in this way makes considerable sense. This arrangement helps minimize expensive three-way fights where lawyers for the contractor and the city are not only trying to defend against the plaintiff's claim, but are also busy pointing the finger of blame at each other. Sharing a common source of insurance coverage reinforces a community of interest between the city and the contractor and provides for efficiencies in defending the claim. But from the perspective of the company insuring the construction contractor, application of the "arising out of standard" can produce somewhat unintended results.

For example: Fantastic Construction Company (FCC) is awarded a construction contract and begins performing work for the city. Bob, an FCC employee, is injured when he slips and falls while retrieving some tools. The workers' compensation statutes prohibit Bob from suing his employer for negligence. So Bob brings his claim against the city, alleging that it negligently maintained the work site. The city is an additional insured on the CGL insurance policy issued to FCC.

Some courts have concluded that these kinds of claims "arise out of" the work the contractor is performing for the owner, and therefore the owner (city) is entitled to coverage under the contractor's insurance policy. This result is frustrating to some CGL carriers because they are required to cover a claim:

- Aimed solely at the city.
- Based on the city's sole negligence.
- Containing no allegations at all against their named insured, who paid the premium.

In short, to the insurance company, it probably seems like they are giving away coverage to someone with whom they have no real business relationship. It is these very circumstances that the new additional insured endorsements were designed to prevent.

(b) Post-2004 additional insured endorsement

The new additional insured endorsements that ISO issued in 2004 say that additional insureds have coverage for injuries or damages caused in whole or in part by the named insured's acts or omissions. Unlike the old endorsement, coverage under this new one turns on fault. The insurance company has no obligation to respond to suits against the city unless the contractor was at least partially at fault in causing the harm that led to the claim. There are a number of problems with this approach that should cause cities to be wary.

Let's return to our example of Andy, who tripped over a pipe left in the construction zone. Just like last time, Andy brings a claim against the city and the contractor. Under this new fault-based endorsement, however, the insurance carrier's obligations to the city as an additional insured are triggered only when the facts establish that Andy was injured in whole or in part by the contractor's actions. The real problem is that often times it is not until the parties are well down the road in a lawsuit, or until a jury has rendered a verdict, that the relative fault of the defendants is determined. By that time, the city has already been forced to pay for the defense of the lawsuit. If the city is not provided with coverage until then, the value of being named as an additional insured is largely lost.

The fault-based standard in ISO's new endorsement may also tend to give plaintiffs, like our mythical Andy, a much easier ride through litigation and a more promising prospect for recovery. There is no longer a community of interest between the contractor and city that would suggest a unified defense. The contractor's insurance company has retained counsel to defend the contractor. The city's insurance company has retained counsel to defend the city. To zealously represent their respective clients, both lawyers will need to aggressively pursue the theory that Andy's injuries were caused by the other defendant. From the plaintiff's viewpoint, it's always helpful if the defendants argue your case for you.

The bottom line is that the new ISO additional insured endorsements give cities much less protection because of this new fault-based standard. Commercial insurance companies will be able to rely on this standard as a basis for denying coverage to cities and refusing to pay for defending the cities for so long as there are still open questions about fault. In turn, litigation costs and risks will increasingly come to fall more and more on cities and LMCIT.

(c) 2013 ISO endorsements

In 2013, the ISO rolled out a new line of standard CGL forms and endorsements. Some of these changes expanded coverage, some restricted coverage, and others introduced new requirements.

The 2013 revisions maintain the same language used in the 2004 endorsements, with two important changes. The 2013 endorsements narrow coverage such that insurance afforded to an additional insured (1) only applies as permitted by law, and (2) if such coverage is required by contract, the coverage afforded "will not be broader than that which you are required by the contract or agreement to provide for such additional insured."

Perhaps the most important change that will affect many contracts is language in the new additional insured endorsements that caps the limits of liability available to an additional insured (such as a city) to the lesser of: (1) the liability limits required by the contract; or (2) the limits of the contractor's insurance policy.

For example, let's assume the city required a contractor to have CGL insurance of $1,000,000, but the contractor actually has $2,000,000 in coverage. Under the new additional insured endorsements, the city would only be able to access $1,000,000 as an additional insured.

So how can a city further protect itself? One approach would be to require the city be added as an additional insured under the old forms. In practice, that might be difficult and would require a thorough review of the language in the additional insured endorsement. A simpler approach would be to contractually increase the insurance requirements to equal the contractor's actual amount of insurance as shown on the certificate of insurance that has been provided to the city. Also, a city might add an insurance requirement stating that the contractor is required to provide "$1,000,000 in CGL coverage or the contractor's actual coverage, whichever is greater." The idea is that if the contractor has more coverage than what is required in the agreement, the city can access the higher limits as an additional insured.

The 2013 additional insured changes fit in context with previous ISO changes to the additional insured endorsements. The most recent round of changes clarifies three key points: (1) coverage will not exceed that permitted by law; (2) coverage is restricted to the amount required by contract; and (3) coverage is limited to that which is required by contract. Because of the emphasis on the contract documents, it is important to ensure the parties clearly define the coverage required and state the coverage limits.

(d) City responses to ISO endorsements

It is important to keep in mind that even though ISO files new additional insured endorsement forms, there is no requirement that insurance companies adopt or use these new forms. There is nothing to say that an insurer cannot continue offering the old form; it is often the case that older forms continue to be used even after ISO has introduced new ones.

RELEVANT LINKS:

If there is a market demand—i.e., if a lot of cities are demanding that their contractors provide insurance using the old forms—that probably increases the likelihood that insurers will decide to offer the old forms.

Cities should continue to insist that contractors on construction projects list the city as an additional insured on their commercial general liability insurance policies and any umbrella/excess policies.

(3) Professional service exception

For professional service contractors (e.g., engineers, architects, attorneys, etc.), the city will not generally want to be listed as an "additional insured" on the firm's professional liability coverage. This type of insurance is primarily intended to cover claims the city itself might need to make against the firm for damages caused by the firm's errors, i.e., professional malpractice. In such a scenario the city would not want to be considered an "insured," because many professional liability policies may not cover a claim by an "insured." On a related matter, cities should also be wary of attempts by professional service contractors to limit a city's right to recover damages to a specified dollar amount (e.g., two times the contract amount).

(4) Alternative to additional insured provisions

Another alternative sometimes used in the context of a building construction contract is to have the contractor purchase an insurance product known as an "Owners and Contractors Protective Liability Policy" (OCPLP). This coverage is distinct from the contractor's CGL insurance and is a separate policy purchased specifically for the benefit of the city. The coverage insures the city for claims that might be brought against the city arising out of the contractor's work. It also protects the city from claims arising out of the city's failure to properly supervise the work.

There is some debate as to whether it is better to use an OCPLP or to include the city as an additional insured on the contractor's CGL policy. On one hand, the advantage of the OCPLP is that it is for the sole benefit of the city, and therefore the city does not have to share the insurance limits with the contractor. On the other hand, it is generally thought that a CGL policy affords a little broader coverage and, unlike an OCPLP, usually insures beyond the completion of the project. The point is not to recommend one insurance product over another, but rather to again stress the need for the city to demand some type of insurance from the contractor.

(5) Additional insured provisions in construction contracts

Minn. Stat. § 337.05.

The contractor is responsible for its "vicarious liability" under 2013 amendments to the anti-indemnity statute. "Vicarious liability" is liability that may be imputed to the city arising out of the acts or omissions of a contractor with whom the city has a relationship.

For example, if the city gets brought into a lawsuit simply because it is the owner of the project, the city should still be able to tender the defense of the lawsuit to the general contractor's insurance company.

If the lawsuit pleadings also allege the city was negligent, the matter becomes more difficult. The anti-indemnity statute prohibits the city from requiring the contractor to take on the city's negligence. Thus, the city may need to tender the defense of the lawsuit to its insurance carrier, e.g., LMCIT. On the other hand, a mere allegation of negligence does not in fact mean the city was negligent.

One approach might be for the city to replace the broad indemnification language with language imposing on the general contractor an obligation to defend the city in any litigation related to the construction project, regardless of who is claimed to be at fault. However, such an approach could prejudice the city, if the city is in fact negligent. In that case, the city would likely be better off with its own attorney representing just the city's interests.

c. Certificate of insurance

When a city hires a contractor to perform work for the city, LMCIT recommends that the contractor have insurance and name the city as an "additional insured." So how does the city know if the contractor has met the insurance requirements? To show proof of the type and amount of insurance, the contractor should be required to provide the city with a "certificate of insurance" prior to performing any work.

A certificate of insurance is a document issued by or on behalf of an insurance company to a third party, e.g., the city. Certificates are usually issued in conjunction with a contractual relationship between a third party (the city) and the named insured (the contractor) requiring that the contractor have a particular type and amount of coverage. A certificate of insurance is simply a snapshot of the contractor's basic policy coverage and limits at the time the certificate is issued. A certificate of insurance does not override the policy terms.

A certificate of insurance provides written verification of insurance coverage. It includes the name of the insurance company, policy numbers, effective date of coverage, and the type and limits of coverage. By obtaining a certificate of insurance, the city can avoid discovering after the fact that the contractor does not have the type and limits of coverage required or that the contractor has no insurance at all.

See Appendix D, Certificate of Insurance Quick Reference Guide.

Most insurance companies issue certificates of insurance using Association for Cooperative Operations Research and Development (ACORD) forms. The two most common ACORD forms are the ACORD 24 (Certificate of Property Insurance) and ACORD 25 (Certificate of Liability Insurance).

RELEVANT LINKS:

It is important to remember there is a distinction between being listed as "certificate holder" and being listed as an "additional insured." A certificate holder does not automatically have "additional insured" status, so in addition to describing the insurance available to the contractor, a certificate of insurance should also convey information that the city is listed as an additional insured under the policy issued to the contractor, thus giving the city some interest in the policy itself.

2. Workers' compensation insurance

a. Statutory coverage

Minn. Stat. § 176.182.

State law requires that any contractor doing business with the city must provide evidence of compliance with the statutes that require employers to have workers' compensation insurance. Note that this does not mean all contractors must have workers' compensation insurance. A contractor could show compliance with the law in three ways:

Minn. Stat. § 176.011, subd. 9. and Minn. Stat. § 176.041.

- By showing the contractor has insurance.
- By showing the contractor does not have any employees and is, therefore, not required to have workers' compensation insurance since he is not an employer.
- By showing the contractor has been approved by the commissioner of insurance as a self-insurer for workers' compensation.

Minn. Stat. § 176.182.

State law specifies that the statute does not create any liability on the city's part for workers' compensation benefits. Nor does there appear to be any other penalty should the city fail to enforce the insurance requirement. However, this should not be taken to mean that there could be no consequences to the city if the requirements of Minn. Stat. § l76.l82, are not complied with. If the city employs a contractor who did not have workers' compensation insurance, there are a couple of ways the city could be required to pay for workers' compensation benefits:

See, for example, *Moorhead v. Crole*, 254 Minn. l03, 93 N.W.2d 678 (Minn. 1958), involving a similar situation.

- A court might, under some circumstances, hold the city to be a general contractor employing a subcontractor, within the meaning of Minn. Stat. § 176.2l5, and, therefore, liable for workers' compensation to the subcontractor's employees.
- A more common problem is when the city deals with an independent contractor who is a sole proprietor, with no employees, and not required by law to have workers' compensation insurance. These independent contractors are sometimes deemed to be "employees" when they are injured, which could make the city liable for workers' compensation benefits.

RELEVANT LINKS:

The courts have indicated there are five factors to consider in deciding whether a person is an "employee" or an "independent contractor." Unfortunately, the factors themselves are a bit vague, and the courts do not seem to have been particularly consistent in applying them to particular cases. Those factors include the following:

- The right to control the means and manner of performance: Generally with an independent contractor, the hiring party only specifies what the final result is to be. The contractor would be free to determine what equipment to use, in what order to perform the various tasks, the exact times the work will be done, etc. The court has stated that this is the most important of the five factors.
- Mode of payment: If payment is made on a per-job basis, regardless of the exact time involved, it will tend to support the conclusion of an independent contractor relationship. If payment is made on an hourly basis, the inference is that of employer-employee relationship.
- Furnishing of material or tools: An independent contractor typically furnishes his or her own tools, equipment, and supplies.
- Control of the premises where the work is performed: This factor looks at where the work is performed. If persons perform work on their own premises (e.g., repairing a vehicle brought to their garage), they are more likely acting as an independent contractor.
- Right to discharge: The hiring party, without breaching the contract, can generally not terminate the relationship with an independent contractor. Theoretically, many employees can be terminated at-will. The problem with this rule is that there are many employees (e.g., union personnel, veterans, etc.) whom a city may not terminate at-will; and an agreement with an independent contractor might explicitly provide for termination at-will by either party.

Minn. R. Ch. 5224.

Minn. R. 5224.0330, subpt. 1.

The Department of Labor and Industry has also adopted rules on the subject. The rules essentially codify and elaborate on the factors the courts have developed. In particular, Rule 5224.0330 clarifies that "[t]he most important factor in determining whether a person is an independent contractor is the degree of control that the purported employer exerts over the manner and method of performing the work contracted. The more control there is the more likely the person is an employee and not an independent contractor." Despite the rules and court decisions, it is still sometimes difficult in particular cases to make a clear determination as to who is an "employee" and who is an "independent contractor."

It has been suggested that simply including in the contract a provision that the person will waive any claim to workers' compensation benefits could solve the problem of independent contractors. However, this does not work. It is clear that simply calling people independent contractors does not make them independent contractors;

RELEVANT LINKS:

Minn. Stat. § 176.021, subd. 4.

the courts will look to the substance of the relationship rather than the words used by the parties. And if the relationship is one of employer-employee, any signed waiver will be ineffective since law prohibits employees from waiving their right to workers' compensation benefits.

Thus, in dealing with an independent contractor who has no employees, the city really has two options: (1) allow the contractor to proceed without workers' compensation insurance or (2) require all contractors to have workers' compensation insurance, whether the statutes require it or not.

This approach eliminates the city's exposure, but has the disadvantage of either increasing cost to the contractor or alternately making it impossible for these individuals to qualify for city contracts. The other option is to make sure the contract is carefully drafted with an eye to the five factors cited by the courts.

In auditing the city's payrolls to determine the final workers' compensation premium, the auditors look at these kinds of contracts and whether the city has a certificate of coverage from the contractor. If not, amounts paid under contracts are treated as payroll unless there is good evidence the individuals are not in fact "employees" for purposes of the statutes. What this means is that when hiring a sole proprietor as an independent contractor, the city should make sure to have a written contract that is structured with an eye toward the five factors the court has listed. Without such a contract, the carrier must assume that the work involved represented a workers' compensation risk for which premium is appropriately charged.

b. Employer's liability

Employer's liability is provided by part two of the workers' compensation policy and provides coverage for claims for work-related accidents, injuries, or illnesses that may fall outside of the Minnesota Workers' Compensation Act. Claims may be made by the employee, the employee's family members, relatives, or third parties. Unlike the statutory coverage, a city should impose minimum limits for the employer's liability coverage. Common minimum requirements are $500,000 for Bodily Injury by Disease per employee, $500,000 for Bodily Injury by Disease aggregate and $500,000 for Bodily Injury by Accident.

3. Builder's risk insurance

LMC information memo, *LMCIT Property, Crime, Bond and Petrofund Coverage Guide,* Section II-D-2-d, *Buildings under construction*.

Builder's risk coverage is designed to cover the property loss exposures associated with construction projects. Construction projects often involve unique risks not usually contemplated by standard property coverage forms. For example, buildings under construction are more prone to damage from the elements than are completed structures; the property values do not remain stable through the policy period;

RELEVANT LINKS:

and the property used in the construction process may be owned by different parties during the course of construction.

In addition to the building being constructed, the builders risk policy typically covers fixtures, materials, supplies, machinery, and equipment to be integrated into the completed project. The coverage also typically applies to scaffolding, falsework, fences, and temporary structures incidental to the project. Builders risk policies do not cover losses occurring before construction begins or after completion of construction; construction must be in progress for coverage to exist.

Coverage is usually written on an "all risk" basis and typically applies not only to property at the construction site, but also to property at off-site storage locations and in transit. The estimated completed value of the project is used as the coverage limit. Builders risk coverage may be purchased by either the contractor or the city (the owner).

For cities insured through LMCIT, property coverage provides automatic builders risk coverage only for buildings or properties-in-the-open that are in the course of construction, alteration, repair, or expansion, if the estimated total project cost is less than $2 million.

4. Automobile liability insurance

Minn. Stat. § 65B.48.

Automobile liability insurance provides coverage when an insured is legally liable for bodily injury or property damage caused by an automobile. Minnesota law requires the vehicle owner to maintain automobile liability coverage, personal injury protections (no-fault coverage), and uninsured/underinsured motorist coverage or provide evidence of financial responsibility.

Automobile liability coverage is usually expressed as a "combined single limit." A combined single limit is the most the insurance policy will pay as a result of any one covered accident for bodily injury and property damage combined.

If vehicles are being used to provide services, the city should require the contractor to have automobile liability insurance. If vehicles are merely being driven to a city site but driving is not part of the work, automobile liability insurance is usually not required. For example, a city probably would not require a contract city attorney to have automobile liability coverage where the city attorney's use of a vehicle is just driving to city hall.

In most cases a city should require a minimum of $1,000,000 in automobile liability coverage. However, each case should be individually assessed. In especially large or risky contracts, the city may want to substantially increase the minimum required insurance.

For example, if the city is contracting with a garbage hauler that is using big commercial trucks, higher limits may be appropriate.

The contractor's automobile liability coverage should include coverage for "any auto" which extends coverage to owned autos, non-owned autos, and hired autos (autos temporarily rented to the insured).

5. Professional liability (errors and omissions) insurance

Professional liability insurance covers errors and omissions or unintentional wrongful acts by covered parties in the performance of the contractor's professional duties. Also known as errors and omissions coverage, this coverage may include legal defense costs and resulting judgments up to the policy limits.

Professional liability insurance is almost always written on a "claims made" basis. Under a claims-made policy, coverage is triggered when a claim is made against the insured during the policy period, regardless of when the wrongful act that gave rise to the claim took place.

Professional liability insurance provides coverage for professional service providers for claims that don't cause bodily injury or property damage that would be picked up by the contractor's CGL insurance.

6. Umbrella/excess insurance

Umbrella or excess coverage is issued to provide limits in excess of the underlying liability policy. Policies are typically written to provide excess coverage over primary liability policies such as CGL insurance, automobile liability insurance, and employer's liability insurance. An umbrella/excess policy serves three purposes:

- It provides excess limits when the limits of the underlying policies have been exhausted by payment of claims.
- It provides coverage when the aggregate limits of the underlying policies have been exhausted.
- It may provide protection against some claims not covered by the underlying policies.

The basic distinction between umbrella and excess liability coverage is that umbrella policies not only provide additional limits (as excess liability policies do), but also provide coverage not available in the underlying coverage. In contrast, excess liability policies provide coverage above the limits of the underlying coverage. They offer no broader protection than that provided by the underlying policy. In fact, the excess liability coverage may even be more restrictive than the underlying coverage.

RELEVANT LINKS:

7. Specialty insurance coverages

Some contracted services may expose the city to risks for which other specialized coverage may be necessary. Examples include pollution liability insurance, aircraft liability insurance, and garagekeepers liability insurance. In addition, the city may require a contractor to provide certain types of bonds, e.g., a fidelity bond, performance bond, or payment bond. Cities should consult with their insurance agent and attorney to determine what insurance coverages will be required.

V. Tips for managing contracts

A. Know who is responsible

Know who is really responsible for what actions in the agreement. Know what the contract says and, if in doubt, ask. Make sure your employees and officials know who is responsible for what and that they follow through on the contract. Do not step outside your role as owner or you may be assuming liability for the actions of others.

B. Enforce the contract

Do what the contract says you are required to do. Make the contractor do everything the contract requires them to do. Document what you did and what the contractor did. If there is a problem down the road, documentation may be your best defense.

C. Don't micro-manage

If you hire a contractor, they are responsible for deciding how to do the work. You should deal only with the person designated by the contractor as the person in charge. Let the contractor deal with all subcontractors.

D. Assistance in contract management

Are you going to prepare plans, specifications, and other contract documents for a construction project or hire an outside engineering firm to do appropriate contract management or administrative work for you? You may also hire others to administer the contract for you (i.e., hiring an engineering firm to inspect the work to make sure the city is getting what it is paying for). However, when you hire others and there are mistakes in plans, specifications, or contract administration, the person you hire should be liable for any mistakes they make.

RELEVANT LINKS:

E. Communicating about problems

All problems must be communicated promptly. A written record of communication is always preferred. Problems related to the contract should be communicated to the person in charge (appropriate person).

F. Status as an additional insured

Be sure to enforce your status as an additional insured by requiring appropriate and complete documentation. If you have a contract provision requiring the contractor to indemnify and hold you harmless from all claims related to do the work, failure to indemnify or hold you harmless is a breach of contract. Watch out for "mutual" hold-harmless language in contracts. Do not waive all claims related to the contract (usually upon completion of the work) without consulting an attorney.

G. Understand the contract

Get help with contract language and provisions before you sign. If you don't understand it, don't sign it.

H. Contract modification or termination

If it the contract isn't working out, modify or terminate the contract. Make sure to follow all notice and other contract provisions related to termination or modification of the contract. Always consult with your city attorney before you modify or terminate any contract.

VI. Further assistance

LMCIT Contract Review Service.

Remember that LMCIT can assist the city and the city attorney in reviewing all types of agreements for the city. LMCIT encourages cities to take advantage of this free service.

Appendix A: Contract Drafting Checklist

Although every contract is different, there are certain issues and contract terms that should be addressed in almost all contracts. Not all of these provisions will be included in every contract, and most contracts will include additional provisions that relate specifically to the subject matter of that contract. The following checklist, however, is a general guide as to what provisions cities should consider when entering into contracts. Specific contract language is available in Appendix C, Sample Independent Contractor Agreement.

- ☐ Legality. Is this a contract the city may legally enter into?
  - Authority (explicit or implied) must be found in state or federal law or a city's home rule charter.

- ☐ Parties are properly identified.
  - Is the other party an individual or business entity? If a business entity, what type? (e.g., corporation, LLC, partnership, etc.)
  - List the address of the parties.
  - Verify contractor's information is current.

- ☐ Purpose of the contract. The contract must be for a legal purpose. A general purpose should be stated to establish the parties' intent to enter in to the agreement.

- ☐ Clear description of good or services.
  - Scope of the work is clearly written and defined.
  - Are the services adequately described?
  - Are the good adequately described?
  - Are relevant quantities listed?

- ☐ Competitive bidding or best value contractive laws followed, if applicable. For additional information, see the League of Minnesota Cities Information Memo, *Competitive Bidding Requirements in Cities*.

- ☐ For projects not subject to bidding, the city used appropriate contractor-screening criteria.

- ☐ Term of the contract clearly identified.
  - Date the contract is to begin (may not be the date the contract is signed).
  - Date the contract ends.
  - Does performance extend over a period of time?
  - Procedure for renewal clearly identified, including automatic renewal.
  - Procedure for termination (for cause or without cause) clearly identified.

- ☐ Important dates listed.
  - Dates should be clearly identified, e.g., deadlines, reports due, etc.
  - Clear beginning, ending, and effective dates.

- Default.
  - Method for providing notice of default
  - Is there an opportunity to cure?

- Consideration/Compensation/Payment. All contracts must include consideration. Consideration is the benefit that each party gets from the contract. Typically, money is exchanged for goods or services.
  - Is the contractor's compensation clearly identified?
  - Does the contract clearly establish the time, place, and method of payment?
  - Are relevant price and other terms listed? May include a lump sum, installment, or unit pricing.
  - Penalties for late payment, e.g., interest, late fee, etc.

- Independent contractor relationship. Make clear the contractor is an independent contractor in service agreements.

- Insurance.
  - List the contractor's insurance requirements. Types of insurance and minimum dollar amounts should be listed.
  - City's insurance requirements.
  - Contract may address workers' compensation, general liability, auto liability, umbrella/excess, builder's risk, and specialized insurance coverages.
  - Per-occurrence and aggregate requirements listed?
  - Is contractor required to provide a certificate of insurance?
  - Is the contractor required to endorse the city as an additional insured?
  - See Model Independent Contractor Agreement for suggested types of insurance and minimum dollar amounts.

- Is the contractor required to provide a performance or payment bond?
  - See Minnesota Statutes, section 574.26.

- Indemnification. Contract must include appropriate defense and indemnification provisions.
  - Is the contractor responsible for its liability?
  - Is the contractor required to defend and indemnify the city?
  - Is the city only responsible for its negligence?
  - Is the city being asked to take on liability in excess of the municipal tort caps or the city's insurance?
    - City should only do so in very limited circumstances. Consult city attorney before agreeing to such a provision.

- Limitations on liability or damages.
  - Is the contractor trying to limit its liability in any way?
  - Is there a waiver of liquidated or confidential damages?
  - Consult with the city attorney.

- Warranties and disclaimers.
  - Is the contractor trying to limit any warranties or disclaim responsibility for its actions?
  - Consult with the city attorney.

- Confidentiality provisions. Is the city or contractor required to keep any information confidential?
  - City may not protect information that is public under the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13.
  - Include required disclosure when city hires a contractor to perform a service for the city. See Model Independent Contractor Agreement.

- Dispute resolution.
  - Does agreement provide for alternative dispute resolution?
    - Mediation is acceptable.
    - City should not agree to binding arbitration.

- General terms.
  - Entire Agreement. The written agreement represents the entire agreement. No oral representations may be considered.
  - Assignment. Contract may not be assigned without the written approval of the city.
  - Amendments. Must be in writing.
  - Nondiscrimination. Contractor will not discriminate.
  - Governing law. Minnesota law should apply.
  - Venue of lawsuits. Litigation should be in county where city is located.
  - Ownership of documents. City owns documents the contractor produced for the city.
  - Government data. Contractor must maintain data received from the city in accordance with the Data Practices Act.
  - Waiver clause. A party's waiver does not imply a continued waiver of contract provisions.
  - Notices. List to whom and where any notice must be provided.
  - Force majeure clause. Provides relief if performance prevented by unexpected events, such as extreme weather and civil disturbances.
  - Severability/Savings clause. Agreement is enforceable even though one provision may be unenforceable.
  - Counterparts. Parties may sign separate copies.

- Spelling, formatting, grammar, punctuation, and appearance of contract are professional and accurate.

- Attachments.
  - All exhibits, attachments, appendices, schedules, etc. are attached.

- LMCIT has reviewed contract.
    - LMCIT will review contracts free of charge. The focus is on insurance and liability provisions.
    - All police service agreements must be reviewed by LMCIT.

- City attorney has reviewed agreement.

- City council approval. City council has made a motion or passed a resolution approving the agreement.
    - Some employees in charter cities and city managers in Plan B statutory cities have the power to approve city contracts.

- Signatures.
    - Usually the clerk and mayor must sign on behalf of the city.
    - Has the contractor signed the agreement?
        - What is the signor's official title?
        - Does the signor have authority to bind the contractor?

Appendix B: Sample Insurance Requirements Policy

Contractor shall not commence work under the contract until it has obtained all the insurance described below and the city has approved such insurance.

Contractor shall maintain such insurance in force and effect throughout the term of the contract.

Contractor is required to maintain and furnish satisfactory evidence of the following insurance policies:

1. Workers' Compensation Insurance
Except as provided below, contractor must provide workers' compensation insurance for all its employees, and in case any work is subcontracted, contractor will require the subcontractor to provide workers' compensation insurance in accordance with the statutory requirements of the State of Minnesota, including Coverage B, employer's liability. Insurance **minimum** limits are as follows:

$500,000 – Bodily Injury by Disease per employee
$500,000 – Bodily Injury by Disease aggregate
$500,000 – Bodily Injury by Accident

If Minnesota Statutes, Section 176.041 exempts contractor from workers' compensation insurance or if the contractor has no employees in the city, contractor must provide a written statement, signed by an authorized representative, indicating the qualifying exemption that excludes contractor from the Minnesota workers' compensation requirements.

If during the course of the contract the contractor becomes eligible for workers' compensation, the contractor must comply with the workers' compensation insurance requirements herein and provide the city with a certificate of insurance.

2. Commercial General Liability Insurance
Contractor is required to maintain insurance protecting it from claims for damages for bodily injury, including sickness or disease, death, and for care and loss of services as well as from claims for property damage, including loss of use which may arise from operations under the contract, whether the operations are by the contractor or by a subcontractor or by anyone directly or indirectly employed by the contractor under the contract. Insurance **minimum** limits are as follows:

$1,000,000 – per occurrence
$2,000,000 – annual aggregate
$2,000,000 – annual aggregate – Products/Completed Operations

The following coverages shall be included:
Premises and Operations Bodily Injury and Property Damage
Personal and Advertising Injury
Blanket Contractual Liability

Products and Completed Operations Liability

City must be named as an additional insured.

3. Commercial Automobile Liability Insurance
Contractor is required to maintain insurance protecting it from claims for damages for bodily injury as well as from claims for property damage resulting from the ownership, operation, maintenance, or use of all autos which may arise from operations under this contract, and in case any work is subcontracted, the contractor will require the subcontractor to maintain commercial automobile liability insurance. Insurance **minimum** limits are as follows:

> $1,000,000 – per occurrence Combined Single Limit for Bodily Injury and Property Damage

In addition, the following coverages should be included:
Owned, Hired, and Non-owned Automobiles.

4. Professional/Technical (Errors and Omissions) Liability Insurance
This policy will provide coverage for all claims the contractor may become legally obligated to pay resulting from any actual or alleged negligent act, error, or omission related to contractor's professional services required under the contract.

Contractor is required to carry the following **minimum** limits:

> $1,000,000 – per claim or event
> $2,000,000 – annual aggregate

Any deductible will be the sole responsibility of the contractor and may not exceed $50,000 without the written approval of the city. If the contractor desires authority from the city to have a deductible in a higher amount, the contractor shall so request in writing, specifying the amount of the desired deductible and providing financial documentation by submitting the most current audited financial statements, so that the city can ascertain the ability of the contractor to cover the deductible from its own resources.

The retroactive or prior acts date of such coverage shall not be after the effective date of this contract, and the contractor shall maintain such insurance for a period of at least three (3) years following completion of the work. If such insurance is discontinued, extended reporting period coverage must be obtained by contractor to fulfill this requirement.

5. Additional Insurance Conditions

- Contractor's policies shall be primary insurance to any other valid and collectible insurance available to the city with respect to any claim arising out of contractor's performance under this contract.
- Contractor's policies and Certificate of Insurance shall contain a provision that coverage afforded under the policies shall not be cancelled without at least thirty (30) days advanced written notice to the city.

- Contractor is responsible for payment of contract-related insurance premiums and deductibles.
- If contractor is self-insured, a Certificate of Self-Insurance must be attached.
- Contractor's policies shall include legal defense fees in addition to its liability policy limits, with the exception of the professional liability insurance.
- Contractor shall obtain insurance policies from insurance companies having an "AM BEST" rating of A- (minus); Financial Size Category (FSC) VII or better, and authorized to do business in the State of Minnesota.
- An umbrella or excess liability insurance policy may be used to supplement the contractor's policy limits on a follow-form basis to satisfy the full policy limits required by the contract.
- The city reserves the right to immediately terminate the contract if the contractor is not in compliance with the insurance requirements and retains all rights to pursue any legal remedies against the contractor.
- All insurance policies must be open to inspection by the city, and copies of policies must be submitted to the city's authorized representative upon written request.
- The contractor is required to submit a Certificates of Insurance acceptable to the city as evidence of the required insurance coverage requirements.

Appendix C: Sample Independent Contractor Agreement

The following contract is a sample agreement a city can use when hiring an independent contractor to perform a service for the city. No single contract is appropriate for all circumstances. This agreement may not be appropriate for your city's circumstances. This agreement is a sample provided for information purposes only and may not be relied upon as legal advice. Please have your city attorney review all final contracts. LMCIT members can also submit their agreements for review to LMCIT's free Contract Review Service.

This contract (the "Agreement") is made and entered into this _____ day of _____, 20___, between:

1. The City of _____, Minnesota (the "City"), located at _____ _____ , in _____, Minnesota; and

2. _____, (the "Contractor"), located at _____ _____, in _____, _____.

The City and the Contractor are referred to herein individually as a Party and collectively as the "Parties."

1. Purpose. The purpose of this agreement is to set forth the terms and conditions under which the Contractor will provide certain services to the City.

2. Scope of Services. The Contractor agrees to perform the following services: [describe the services to be provided in detail], (the "Services.")

[Alternate language: The Contractor shall perform the work (the "Services) as described in Exhibit A to this Agreement which is incorporated herein by reference.]

The Contractor agrees to comply with all federal, state, and local laws and ordinances applicable to the Services to be performed under this Agreement, including all safety standards. The Contractor shall be solely and completely responsible for conditions of the job site, including the safety of all persons and property during the performance of the Services. The Contractor represents and warrants that it has the requisite training, skills, and experience necessary to provide the Services and is appropriately licensed by all applicable agencies and governmental entities and will perform the Services with reasonable care and skill.

The Contractor shall not perform any additional Services without the express written permission of the City.

3. Term. This Agreement shall be effective on the date hereof and shall continue, unless terminated sooner in accordance with the terms of this Agreement, until the Completion Date.

[Describe the term of the agreement. Services may be provided on a particular date or during a defined period of time.]

A. Start date: The Contractor shall commence the provision of Services on: _____.

B. Completion Date: The Contractor shall complete the Services by: _____.

C. Key Dates: The Contractor agrees to provide the following parts of the Services by the specific dates below: _____.

The City may terminate this Agreement for convenience at any time. Termination shall be effective upon ten (10) days written notice to the Contractor.

[Alternate language to provide termination for cause by the City: If the Contractor refuses or fails to complete the Services, or to complete the Services in a manner satisfactory to the City, the City may, by written notice to the Contractor, give notice of its intention to terminate this Agreement. After such notice, the Contractor shall have ten (10) days to cure, to the satisfaction of the City. If the Contractor fails to cure, the City shall send the Contractor a written termination letter which shall be effective upon deposit in the United States mail to the Contractor.]

The Contractor may terminate this Agreement if the City is in breach of any material obligation contained in this Agreement, which is not remedied by the City within ten (10) days of written notice.

The Parties may voluntarily terminate this Agreement at any time by mutual agreement.

In the event of termination, the City shall only be responsible to pay for the Services satisfactorily performed by the Contractor to the effective date of termination, as described in the final invoice to the City.

4. Compensation. As consideration for the provision of the Services, the City agrees to pay the Contractor as follows: [describe the dollar amount of compensation; compensation may be paid on an hourly basis, as a flat fee, or some other basis as agreed to by the parties; consider including “not to exceed” dollar language].

The Contractor shall submit a written invoice to the City upon completion of the Services.

[Alternate language for continuing services: Contractor shall submit monthly payment invoices to the City after such Services have been completed.]

Each invoice shall include in detail the hours worked and a description of the Services performed.

The invoice shall be submitted to the City Council for approval at the first City Council meeting following receipt of the invoice. The City shall pay Contractor within one (1) week after the invoice has been approved for payment by the City Council.

If the City objects to all or any portion of any invoice, the City shall notify the Contractor of the dispute with ten (10) days from the date of receipt and shall pay that portion of the invoice not in dispute. Any dispute shall be settled in accordance with Paragraph 8 of this Agreement.

5. Independent Contractor Relationship. It is expressly understood that the Contractor is an "independent contractor" and not an employee of the City. The Contractor shall have control over the manner in which the Services are performed under this Agreement. The Contractor shall supply, at its own expense, all materials, supplies, equipment, and tools required to accomplish the Services contemplated by this Agreement. The Contractor shall not be entitled to any benefits from the City, including, without limitation, insurance benefits, sick and vacation leave, workers' compensation benefits, unemployment compensation, disability, severance pay, or retirement benefits. Nothing in this Agreement shall be deemed to constitute a partnership, joint venture or agency relationship between the Parties.

6. Insurance Requirements. (Note: Liability insurance requirements may be modified depending on the nature of the contract. Some contracts may require other types of insurance and higher coverage limits. Consult with your city attorney, insurance agent and LMCIT for specific insurance requirements.)

The Contractor, at its expense, shall procure and maintain in force for the duration of this Agreement the following minimum insurance coverages:

A. General Liability. The Contractor agrees to maintain commercial general liability insurance in a minimum amount of $1,000,000 per occurrence; $2,000,000 annual aggregate. The policy shall cover liability arising from premises, operations, products-completed operations, personal injury, advertising injury, and contractually assumed liability. The City shall be endorsed as additional insured.
B. Automobile Liability. If the Contractor operates a motor vehicle in performing the Services under this Agreement, the Contractor shall maintain commercial automobile liability insurance, including owned, hired, and non-owned automobiles, with a minimum liability limit of $1,000,000 combined single limit.
C. Professional (Errors and Omissions) Liability Insurance. [Only required for professional services provided by accountants, attorneys, engineers, etc.] The Contractor will maintain professional liability insurance for all claims the Contractor may become legally obligated to pay resulting from any actual or alleged negligent act, error, or omission related to Contractor's professional services required under this Agreement. The Contractor is required to carry the following minimum limits: $1,000,000 per occurrence; $2,000,000 annual aggregate. The retroactive or prior acts date of such coverage shall not be after the effective date of this Agreement, and the Contractor shall maintain such insurance for a period of at least three (3) years following completion of the Services. If such insurance is discontinued, extended reporting period coverage must be obtained by the Contractor to fulfill this requirement.
D. Workers' Compensation. The Contractor agrees to provide workers' compensation insurance for all its employees in accordance with the statutory requirements of the State of Minnesota. The Contractor shall also carry employers liability coverage with minimum limits are as follows:

- $500,000 – Bodily Injury by Disease per employee
- $500,000 – Bodily Injury by Disease aggregate
- $500,000 – Bodily Injury by Accident

The Contractor shall, prior to commencing the Services, deliver to the City a Certificate of Insurance as evidence that the above coverages are in full force and effect.

The insurance requirements may be met through any combination of primary and umbrella/excess insurance.

The Contractor's policies shall be the primary insurance to any other valid and collectible insurance available to the City with respect to any claim arising out of Contractor's performance under this Agreement.

The Contractor's policies and Certificate of Insurance shall contain a provision that coverage afforded under the policies shall not be cancelled without at least thirty (30) days advanced written notice to the City.

7. Indemnification. To the fullest extent permitted by law, the Contractor agrees to defend, indemnify, and hold-harmless the City and its employees, officials, and agents from and against all claims, actions, damages, losses, and expenses, including reasonable attorney fees, arising out of the Contractor's negligence or the Contractor's performance or failure to perform its obligations under this Agreement. The Contractor's indemnification obligation shall apply to the Contractor's subcontractor(s), or anyone directly or indirectly employed or hired by the Contractor, or anyone for whose acts the Contractor may be liable. The Contractor agrees this indemnity obligation shall survive the completion or termination of this Agreement.

8. Dispute Resolution. The Parties shall cooperate and use their best efforts to ensure that the various provisions of the Agreement are fulfilled. The Parties agree to act in good faith to undertake resolution of disputes in an equitable and timely manner and in accordance with the provisions of this Agreement. If disputes cannot be resolved informally by the Parties, the following procedures shall be used:

A. Whenever there is a failure between the Parties to resolve a dispute on their own, the Parties shall first attempt to mediate the dispute. The parties shall agree upon a mediator, or if they cannot agree, shall obtain a list of court-approved mediators from the _____ County District Court Administrator and select a mediator by alternately striking names until one remains. The City shall strike the first name, followed by the Contractor, and shall continue in that order until one name remains.
B. If the dispute is not resolved within thirty (30) days after the end of mediation proceedings, the Parties may pursue any legal remedy.

9. General Provisions.

A. Entire Agreement. This Agreement supersedes any prior or contemporaneous representations or agreements, whether written or oral, between the Parties and contains the entire agreement.
B. Assignment. The Contractor may not assign this Agreement to any other person unless written consent is obtained from the City.
C. Amendments. Any modification or amendment to this Agreement shall require a written agreement signed by both Parties.
D. Nondiscrimination. In the hiring of employees to perform work under this Agreement, the Contractor shall not discriminate against any person by reason of any characteristic or classification protected by state or federal law.
E. Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Minnesota. All proceedings related to this Agreement shall be venued in _____ County, Minnesota.
F. Ownership of Documents. All reports, plans, specifications, data, maps, and other documents produced by the Contractor in the performance of Services under this Agreement shall be the property of the City.
G. Government Data/Privacy. The Contractor agrees to abide by the applicable provisions of the Minnesota Government Data Practice Act, Minnesota Statutes, Chapter 13, HIPAA requirements, and all other applicable state or federal rules, regulations, or orders pertaining to privacy or confidentiality. The Contractor understands that all of the data created, collected, received, stored, used, maintained, or disseminated by the Contractor in performing those functions that the City would perform is subject to the requirements of Chapter 13, and the Contractor must comply with those requirements as if it were a government entity. This does not create a duty on the part of the Contractor to provide the public with access to public data if the public data is available from the City, except as required by the terms of this Agreement.
H. Waiver. The waiver by either party of any breach or failure to comply with any provision of this Agreement by the other Party shall not be construed as or constitute a continuing waiver of such provision or a waiver of any other breach of or failure to comply with any other provision of this Agreement.
I. Notices. All notices and other communications pursuant to this Agreement must be in writing and must be given by registered or certified mail, postage prepaid, or delivered by hand at the addresses set forth below:

Notice to City: _____
_____
_____

Notice to Contractor: _____
_____
_____

J. Force Majeure. Except for payment of sums due, neither Party shall be liable to the other or deemed in default under this Agreement if and to the extent that Party's performance is prevented by reason of *force majeure*. *"Force majeure"* includes war, an act of terrorism, fire, earthquake, flood, and other circumstances, which are beyond the control and without the fault or negligence of the Party affected and which by the exercise of reasonable diligence the Party affected was unable to prevent.

K. Savings Clause. If any court finds any portion of this Agreement to be contrary to law, invalid, or unenforceable, the remainder of the Agreement will remain in full force and effect.

L. Counterparts. This Agreement may be signed in counterparts, each of which shall be deemed an original, and which taken together shall be deemed to be one and the same document.

IN WITNESS WHEREOF, the Parties, have caused this Agreement to be approved on the date above.

City of _____, Minnesota

By: _____
Its Mayor

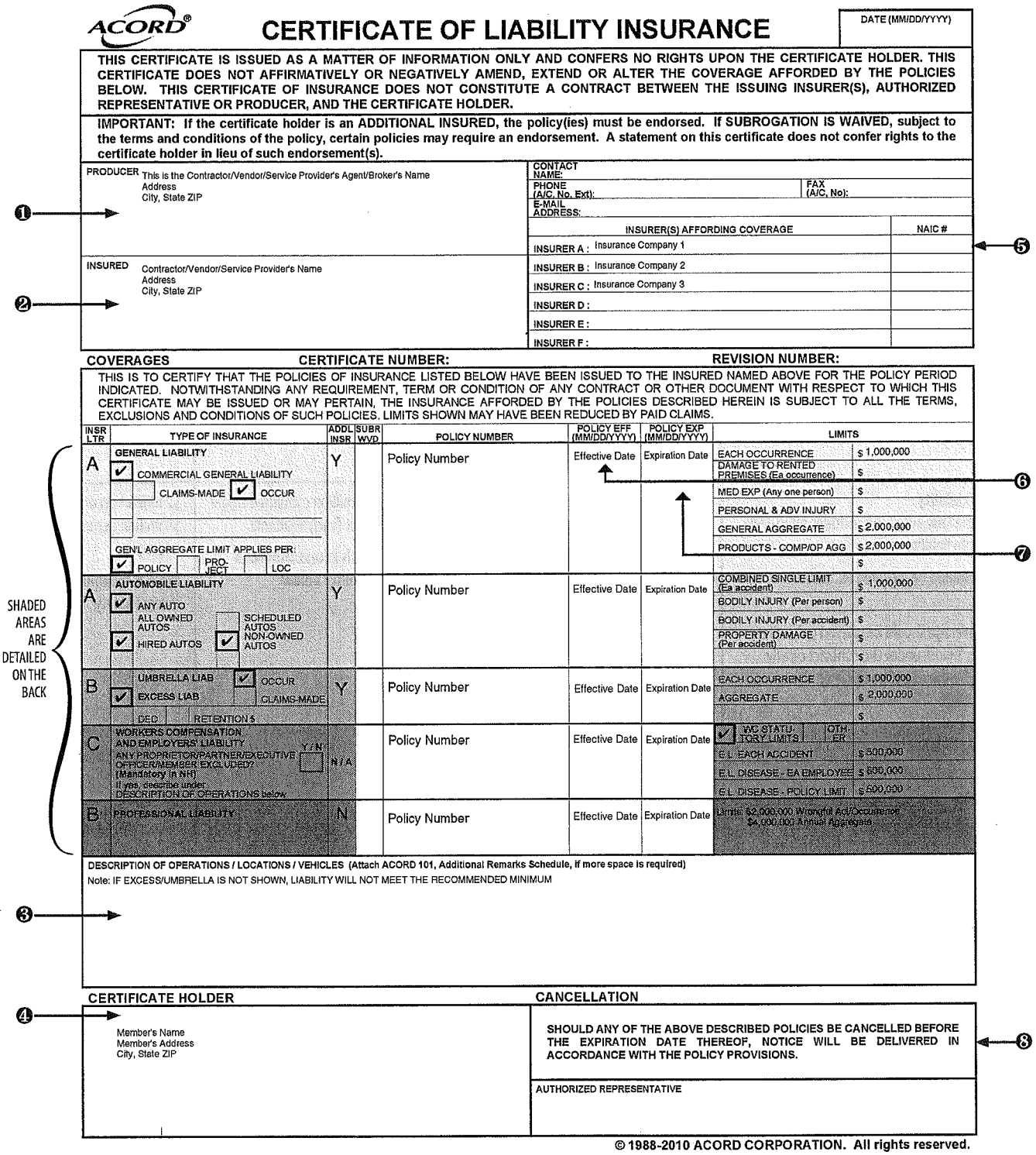
And: _____
Its Clerk

_____
Contractor

By: _____

Its _____

CERTIFICATE OF INSURANCE QUICK REFERENCE GUIDE



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 This is the Contractor/Vendor/Service Provider's Agent/Broker's Name
Address
City, State ZIP

CONTACT NAME:
PHONE (A/C, No, Ext):
FAX (A/C, No):
E-MAIL ADDRESS:

INSURER(S) AFFORDING COVERAGE	NAIC #
INSURER A : Insurance Company 1	
INSURER B : Insurance Company 2	
INSURER C : Insurance Company 3	
INSURER D :	
INSURER E :	
INSURER F :	

INSURED Contractor/Vendor/Service Provider's Name
Address
City, State ZIP

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.

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	GENERAL LIABILITY ☑ COMMERCIAL GENERAL LIABILITY ☐ CLAIMS-MADE ☑ OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: ☑ POLICY ☐ PRO-JECT ☐ LOC	Y		Policy Number	Effective Date	Expiration Date	EACH OCCURRENCE $ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) $ MED EXP (Any one person) $ PERSONAL & ADV INJURY $ GENERAL AGGREGATE $ 2,000,000 PRODUCTS - COMP/OP AGG $ 2,000,000 $
A	AUTOMOBILE LIABILITY ☑ ANY AUTO ALL OWNED AUTOS ☐ SCHEDULED AUTOS ☑ HIRED AUTOS ☑ NON-OWNED AUTOS	Y		Policy Number	Effective Date	Expiration Date	COMBINED SINGLE LIMIT (Ea accident) $ 1,000,000 BODILY INJURY (Per person) $ BODILY INJURY (Per accident) $ PROPERTY DAMAGE (Per accident) $ $
B	☑ UMBRELLA LIAB ☑ OCCUR ☑ EXCESS LIAB CLAIMS-MADE DED RETENTION $	Y		Policy Number	Effective Date	Expiration Date	EACH OCCURRENCE $ 1,000,000 AGGREGATE $ 2,000,000 $
C	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) Y / N N/A If yes, describe under DESCRIPTION OF OPERATIONS below			Policy Number	Effective Date	Expiration Date	☑ WC STATU-TORY LIMITS ☐ OTH-ER E.L. EACH ACCIDENT $ 500,000 E.L. DISEASE - EA EMPLOYEE $ 500,000 E.L. DISEASE - POLICY LIMIT $ 500,000
B	PROFESSIONAL LIABILITY	N		Policy Number	Effective Date	Expiration Date	Limits: $2,000,000 Wrongful Act/Occurrence $4,000,000 Annual Aggregate

SHADED AREAS ARE DETAILED ON THE BACK

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)
Note: IF EXCESS/UMBRELLA IS NOT SHOWN, LIABILITY WILL NOT MEET THE RECOMMENDED MINIMUM

CERTIFICATE HOLDER

Member's Name
Member's Address
City, State ZIP

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

ACORD 25 (2010/05) The ACORD name and logo are registered marks of ACORD

❶ **Producer:** Insurance agent or broker who issues the certificate

❷ **Name of Insured:** Must match the legal name of the contractor

❸ **Description of Operations:** Reference contact number, or project description, locations, vehicles or exclusions added by endorsement or special provisions. May also confirm that the member has been added as an "additional insured."

❹ **Certificate Holder:** Member name (not department) and mailing address

❺ **Insurers Affording Coverage:** Insurance companies must be acceptable to the member. If the contractor is self-insured, review of financial information may be required.

❻ **Policy Effective Date:** Must be prior to or coincide with the contract date.

❼ **Policy Expiration Date:** Coverage must be in force for the complete term of the contract. If insurance expires during the term of the contract, a new Certificate of Insurance must be received by the member at least 10 days prior to the expiration date. This new insurance must meet the terms of the original agreement.

❽ **Notice of Cancellation** LMCIT recommends that the contractor's insurance policies contain a provision that states a minimum of 30 days advance notice will be given to the member of any substantial change to or cancellation of any insurance policy listed on the certificate. The ACORD 25 (2010/05) version of the Certificate of Liability Insurance states notice will be given with the policy provisions.

This is intended for general purposes only and should not be construed as legal or coverage advice on any specific matter. (8/2012)

Coverage Type	Minimum Limits	Option 1:	Option 2:
Commercial General Liability The policy should be written on a per-occurrence basis, not a claims-made basis. The member should be included as "additional insured."	The minimum limits of liability should be: • $1 million per occurrence • $2 million annual aggregate An umbrella or excess liability policy may be used in conjunction with primary coverage limits to meet the minimum limit requirements. If general liability occurrence limit is less than $1 million and/or the general aggregate limit is less than $2 million, look for umbrella/excess liability coverage: • Add the general liability occurrence limit to the umbrella/excess occurrence limit. • Add the general liability general aggregate limit to the umbrella/excess. • If the total is equal to or greater than $1 million per occurrence and $2 million aggregate, the minimum has been met. • If the total is less than $1 million per occurrence and $2 million aggregate, limits do not comply with the recommended minimum.	$1.5 million per occurrence $3 million annual aggregate **With excess/umbrella liability below**	$2 million per occurrence $4 million annual aggregate Exceeds minimum without excess liability
Automobile Liability Should indicate "any auto." This includes hired and non-owned auto liability coverage. Note: Auto coverage should be waived only when the contractor's work under the contract clearly does not involve the use of a vehicle on the member's behalf.	The minimum limits of liability should be $1 million on a combined single limit basis. Note: Auto liability is typically not subject to an aggregate limit. An umbrella or excess liability policy may be used in conjunction with primary coverage limits to meet the minimum limit requirements. If auto combined single limit is less than $1 million, look for umbrella/excess coverage: • Add auto combined single limit to the umbrella/excess occurrence limit. • If total is equal to or greater than $1 million, the minimum has been met. • If total is less than $1 million, limits do not comply with the recommended minimum.	$1.5 million combined single limit (each accident) **With excess/umbrella liability below**	$2 million combined single limit (each accident) Exceeds minimum without excess liability
Umbrella/Excess Liability Coverage An umbrella or excess liability policy may be used in conjunction with primary coverage limits to meet the minimum limit recommendation. The policy should be written on a per-occurrence basis, not a claims-made basis. The member should be included as an "additional insured."	Typically the limits of an umbrella or excess liability policy will be at least: • $1 million per occurrence • $2 million annual aggregate To determine the total coverage limits, add umbrella/excess limits to the primary limits as indicated above.	$1 million per occurrence $2 million annual aggregate	Exceeds minimum without an umbrella or excess liability policy
Workers' Compensation and Employers Liability Any proprietor/partner/ executive officer/member excluded? Should be "no." If yes, an explanation should be shown in the Description of Operations section.	Workers' compensation statutory limits should be indicated with an "X."	**Options 1 and 2** • Bodily injury by accident: $500,000 per accident • Bodily injury by disease: $500,000 per employee • Bodily injury by disease: $500,000 policy limit	
Professional Liability Coverage Professional liability should be required for individuals/ contractors who perform professional or semi-professional services. Examples include (but are not limited to) medical service providers, architects, engineers, attorneys, and consultants.	Minimum limits of liability should be: • $1 million per wrongful act or occurrence • $2 million annual aggregate Note: Umbrella or excess liability coverage typically excludes professional liability.	**Options 1 and 2** $2 million per wrongful act or occurrence $4 million annual aggregate	