



# Risk Transfer Manual

## **CCAP Insurance Programs**

PO Box 60769

Harrisburg, PA 17106-0769

(800) 895-9039

[insurance@pacounties.org](mailto:insurance@pacounties.org)

**Owned By Members**  
**Governed By Members**  
**Service To Members**

**November 17, 2016**

**TABLE OF CONTENTS**

INTRODUCTION ..... 3

RISK MANAGEMENT OVERVIEW ..... 5

INSURANCE GUIDELINES ..... 9

INDEMNIFICATION AND HOLD HARMLESS ..... 17

WAIVER OF SUBROGATION GUIDELINES ..... 23

CONCLUSION ..... 25

SAMPLE CONTRACT DOCUMENTS ..... 26

AIA DOCUMENT COMMENTS ..... 37

SAMPLE INDEMNIFICATION AND HOLD HARMLESS ..... 38

SAMPLE CLAUSE FOR COUNTY PREMISES LEASE ..... 40

INMATE HOUSING CONTRACT PROVISIONS ..... 42

## INTRODUCTION

The purpose of this Risk Transfer Manual is to provide members of CCAP's insurance pools and programs with a guide to use when considering risks and evaluating administrative, management and other options related to county operations. Information on establishing and drafting insurance, indemnification and hold harmless provisions for contracts with third parties are included. These provisions are commonly referred to as the "risk transfer clauses" of a contract or agreement. Contracting parties may be the Commonwealth of Pennsylvania, other political subdivisions, service providers, construction contractors, project managers, vendors, facility users or other contracting parties with whom a county does business.

CCAP's insurance pools and programs provide these model guidelines based on their experience and other resources and factors. It is intended as a reference point for our members. It is not meant to create or suggest absolute requirements. These are, in fact, guidelines. Flexibility and understanding must be tempered with good judgment in establishing provisions that are agreeable and attainable for those involved in the process, the county and the entity with which it is contracting.

Most of the risk issues mentioned in this manual are related to property and liability risks. For that reason, CCAP's Pennsylvania Counties Risk Pool (PCoRP) is cited, often to provide an example. PCoRP is a public entity risk pool, organized

by counties as an intergovernmental cooperative. It is not a commercial insurance company.

Each risk and contract comes with its own unique set of conditions and circumstances. No guideline, no matter how complete, is appropriate for all situations. Members using these guidelines are urged to solicit assistance from risk management and legal professionals as the situation dictates.

**THANKS**

CCAP's insurance pools and programs would like to thank NIRMA, the Nebraska Interlocal Risk Management Association, for allowing us to use portions of their Insurance and Risk Transfer Manual for this publication.

**The suggested guidelines and information provided in this manual are not legal advice. This manual was reviewed and edited by CCAP staff. Counties and county related entities are encouraged to review the information in this manual with their solicitors and other appropriate legal counsel before finalizing any contract or agreement.**

Project coordinator and editor:	John Sallade, CRM Managing Director, Insurance Programs CCAP
Reviewers:	Barb Zemlock, Insurance Boards Legal Counsel CCAP  Crystal Clark, CCAP Solicitor  Karen Cohen, Insurance and Reinsurance Manager, CCAP

## RISK MANAGEMENT OVERVIEW

Two of the main purposes for the formation of CCAP's insurance pools and programs were to provide coverage and risk management services to CCAP members. CCAP continually works to provide its membership with coverage options and programs that are second to none in breadth of coverage and pricing fairness. Risk management services offered include those provided by risk control, legal, claims and other administrative staff.

However, a sound risk management process can and should go beyond the services provided by CCAP's insurance pools and programs. Risk management is something every one of us practices to various degrees on a daily basis in our personal and professional lives. It is a process of making and implementing decisions that will minimize the adverse effects of accidental losses.

Often times we may not even know or understand we are practicing risk management, as risk management equates to common sense. The decisions we make impact our lives and the lives of others and usually the budgets and financial strength of the affected parties. The essential ingredients of the risk management process are:

1. Identify and analyze the exposure to loss;
2. Analyze the feasible techniques available to address the loss exposure;
3. Decide which is the best technique to use;
4. Implement the chosen technique; and
5. Monitor the results and revise the technique as needed.

The techniques available to address an exposure to loss are many. Risk control, risk retention, risk financing and risk transfer are the most common techniques used to manage defined loss exposures.

Risk control is frequently referred to as loss control or loss prevention. CCAP's dedicated risk control team provides various services to its members free of charge on an as needed basis.

Risk retention is a technique practiced by each member. Deductibles are a form of risk retention, as is a conscious decision to not insure certain types of property and retain the risk of loss. Risk retention is practiced in various degrees by the terms of the contracts we enter into.

Risk financing is a technique in which we decide how we intend to pay for losses that are retained and is generally accomplished with the purchase of insurance.

Finally, risk transfer is a technique accomplished through the terms of the contracts we enter into and is the primary focus of this manual.

A contract is generally defined as an agreement between two or more competent parties which creates an obligation to do or not to do certain things directly or indirectly related to the subject of that agreement. Contracts can consequently create risk for your entity. You normally have little if any control over the operations of the party you contract with or how that party conducts its business/activity so your entity should not be held liable for the improper acts of contractors or their employees. What you can control to various degrees are the terms of the contract you enter into for a product or service. In order to avoid the legal expense of proving that you were not involved, or

your involvement was delegated to another to perform a task and you were not otherwise responsible for the injury or damage, indemnification and hold harmless provisions should be in place. If the duty to perform a certain specific task is non-delegable, you may still be sued but the effective allocation and transfer of risk of loss to the appropriate party should be a goal of your contract negotiations.

There are several advantages to contractual transfer of risk:

- Some risks may not be insurable or coverage may be difficult to obtain or expensive to purchase. Transfer those risks if possible.
- A potential loss may be shifted to another party that is in a better position to exercise loss control.
- It may be more economical to transfer the risk than to purchase the needed insurance coverage.

A disadvantage to risk transfer is that if the party you have transferred the risk to is unable to pay for a loss, you may be held responsible for payment. And if the language is found to be against public policy or ambiguous, the transfer may not be upheld in a court of law. Always remember, contractual risk transfer transfers the obligation to pay for a loss; it does not transfer the underlying loss exposure to the other party (i.e. a non-delegable duty to perform certain obligations required by law of county government).

In order for the insurance, indemnification and hold harmless provisions of your contracts to properly serve their function, there are some basic steps to follow. It is important to develop these risk transfer clauses in your contracts and let the bidders or contractors know of the requirements early in the bidding or contracting process, including the requirement of providing certificates of insurance. If the contractor/bidder has a problem with meeting these provisions of the contract, it is best to know that as

soon as possible in the process. And it is important that you review the Certificates of Insurance to verify they reflect the terms of the contract and follow up with the contractor if they do not to obtain compliance.

Often the county will seek to be added as an additional insured on the contractor's or service firm's insurance. If this is done, the county should also stipulate that the insurance coverage from the contractor or service firm is primary, and the county's insurance will be excess. This means the contractor's or service firm's coverage will respond first to the cost, and only after that coverage limit is exhausted will the county's insurance respond.

Properly written insurance and risk transfer clauses should be essential elements of any contract. The contract provisions offered in this manual will aid you in your efforts to properly place the risk of loss on the appropriate party. They do not fit all situations. Again, you are encouraged to involve legal counsel to secure proper legal and risk management advice when contemplating entering into a written contract.

## INSURANCE GUIDELINES

Contracts typically address insurance requirements. You may be required to provide evidence of your insurance coverage and may be asked to provide a Certificate of Insurance listing the other party as an additional insured (which is not always a good idea – see more on this later in the manual). On the other hand, you may be in a contract where the other party is providing your county with products or services and you should require that party to show evidence of their insurance with a Certificate of Insurance and add the county to their coverage as an additional insured.

When determining what insurance requirements you should include in a contract you should generally take a practical approach. You need to understand the type of hazard present in the type of work or service being addressed in the contract. You need to be flexible in your requirements so as to not unintentionally exclude or eliminate qualified contractors from bidding on projects because of insurance requirements that may be overly stringent or unavailable in the insurance marketplace.

For instance, you would generally have more stringent insurance requirements for contractors who are going to provide major building construction, such as building a jail or courthouse or administrative offices, than those who might come on site to repair plumbing, do interior carpet cleaning, painting, mowing, or make small repairs to your structures. This latter group might be commonly thought of as service vendors and not generally pose the degree of risk of loss as a contractor doing major construction.

Three criteria to consider when establishing insurance requirements:

1. the dollar size of the contract;
2. the length or time frame of the contract; and

3. the type and hazard level of the work to be performed

Be realistic when determining your insurance requirements. Well-qualified contractors could be eliminated from the bidding process on projects because of insurance requirements that are thought to be excessive or overly stringent. Of the three criteria mentioned, the hazard level of the work to be performed should be given the most consideration.

There are four basic hazard level categories to consider:

**Low Hazard** - carpenters, plumbers (no digging or trenching), painters, small repair or service type work and most consultants.

**Medium Hazard** - roofers, plumbing with minor digging (six inches or less), cement work, grading of landscape, landscapers and building maintenance/cleaning work.

**High Hazard** - excavation and underground work, road projects, erection and welding work, all building and infrastructure construction and renovation work, and lease of premises agreements.

**Special Hazard** - major building and infrastructure projects, contracts involving environmental and asbestos exposures and similar extra-high hazardous operations.

Always require proof that the contractually required insurance is in place throughout the full term of the contract. This proof of insurance is typically provided by a Certificate of Insurance. Requiring such proof at the start of the contract would be sufficient if the contract expires prior to the noted expiration date of the insurance coverage as shown

on the Certificate of Insurance. If the contract period exceeds the depicted insurance coverage policy period, ask for a renewal Certificate of Insurance from the contractor. Coverage limits can be provided with primary or excess/umbrella forms. Either is acceptable. Always verify the contractor's insurance coverage and compliance with the terms of the contract. If using a project manager, make sure they verify the contractor's risk factors and its job completion history. A contractor's historical experience of successfully completing projects should be a factor for your consideration. Don't make the insurance requirements any more complicated than needed. It takes time and effort to monitor insurance contractual compliance which comes at a cost to both contracting parties.

Counties should consider including a requirement in all service contracts which places the responsibility upon the service firm to inform the county should any or all of its required insurance be cancelled or nonrenewed, or if changes are made in the carriers providing coverage, or if the limits of the policies are changed. If the service provider does not provide this notification, there should be penalties in the contract, for example the immediate right of the county to cancel the contract or declare it void.

Examples of insurance provisions to include in most contracts can be found on pages 26 – 35 and 38 -39. These are suggested minimum insurance guidelines recommended to be required of contractors.

The types of insurance to include in the provisions of your contract are:

- a. Commercial General Liability. This insurance normally covers bodily injury, personal injury and property damage, as well as contractual liability occurrences. This

should be a staple in all contracts with contractors and should include coverage for products and completed operations.

b. Automobile Liability. If the contractor will be driving as part of performing the service in the contract or operating an automobile on your property, the contractor should be required to carry this insurance coverage. This is particularly important when the contractor is providing transportation to others on your behalf.

c. Workers' Compensation. For all practical purposes, state law requires every contractor employing one or more workers to provide workers' compensation insurance coverage for its workers. ***It is very important that you obtain proof of this coverage or the contractor's exemption from the law prior to allowing work to begin under the contract.*** Failure to confirm coverage could mean that your entity would be held responsible for the contractor's workers' compensation claims and you would have to pay for the cost of these claims.

d. Professional Liability. If the contractor is providing services of a professional nature in which special training, education or certification is needed, a malpractice or errors and omissions loss exposure exists and you should require the contractor to have professional liability insurance coverage. Examples of such professions are physicians, nurses, accountants, architects, engineers, computer program designers and insurance producers or brokers.

e. Builders Risk – Course of Construction Coverage. This coverage addresses the loss of or damage to buildings under construction or those being remodeled or renovated, along with the construction supplies and materials during the construction project. CCAP's PCoRP program provides automatic Builders Risk coverage for new

locations in the course of construction subject to a \$250,000 limit. If higher limits are needed for a new construction project, a separate Builders Risk policy will be needed, which PCoRP staff can secure. We strongly recommend that the county seek to have the builders risk loss exposure assumed by the contractor who is generally in a better position to effect and maintain loss prevention and risk control standards during the construction process. For projects where renovation or remodeling is being done on an existing location, PCoRP provides full policy limits (\$5,000,000) for these type of projects.

### **UMBRELLA OR EXCESS COVERAGE**

One important point about any insurance coverage is to have correct limits. This is fairly easy to do for property insurance because you should be able to obtain accurate values of property that would need to be replaced. For liability coverage, it is a little harder. Often counties and the vendors you contract with will buy higher limits by purchasing excess coverage or an umbrella policy. Excess coverage means the limits are being increased for one specific line of coverage (for example, auto liability) and may be purchased from the same insurer providing the underlying coverage, or from a totally different insurer. Umbrella coverage is bought for multiple lines of coverage (for example all types of liability) and may be purchased from the same insurer that provides the underlying liability coverage, or from a different insurer. For both excess and umbrella insurance, the coverage may be included in the same basic policy being purchased, or could be written in a separate policy.

### **AIA DOCUMENTS**

At times you may be involved in a contract for construction wherein the general conditions of the contract are those of the American Institute of Architects (AIA). We suggest county solicitors carefully review this contract, as it is often presented in a very one-sided manner, overly protective of the architect. Our experience has been that the

document often needs to be amended, and most architectural firms are willing to negotiate those changes.

Generally it is in the owner's best interest to require the contractors, etc., to secure property/builders risk/installation floater property coverage for the risk of loss for a new construction project. If the construction project involves the alteration or repair of an existing building or an addition to an existing building, the risk of loss generally stays with the owner. If your county decides to retain the risk of loss during a construction project, you should check with PCoRP or your insurer to make sure the risk of loss is acceptable and adequately covered.

Make sure the prospective bidders are aware of your revisions to the AIA contract prior to submitting a proposal or bid instead of after the proposals or bids are received. As always, it is suggested that the member consult with legal counsel when entering into any contract.

### **CERTIFICATES OF INSURANCE (COI)**

A certificate of insurance is commonly used to represent the existence of insurance coverage. It is not a binding legal document. It cannot alter, amend or extend the terms of the coverage documents it represents. And it does not guarantee the coverage remains in existence throughout the noted coverage period. Coverages are cancelled or expire for various reasons. Verifying the existence of coverage and the continuance of the represented contractually-required coverage is an important aspect of any contractual transfer monitoring process.

## **CERTIFICATES OF INSURANCE AND ADDITIONAL INSURED**

Of all the insurance documents, the COI is probably the most misunderstood and misused. We get a lot of requests for certificates of insurance for PCoRP and PComp members. In many cases the person asking for the COI has no idea what they need it for – they’ve just been told to get one from us.

The COI is basically a way to show another party that the county has insurance coverage, specifically what kind and what the limits are. The simplest example would be when the county hires a contractor to fix something, and requires the contractor to have liability insurance in case they make an error on your project, and also workers’ compensation insurance for their employees. The COI is how the contractor shows the county they have coverage. You should be able to tell who their insurer is, and what limits they have. The COI should be prepared by their insurance broker or local producer, or could be prepared by their insurance company. It is rare for it to be prepared by the contractor or company itself.

Some counties ask us to reauthorize their COI’s each year. This is not necessarily needed, unless the relationship with the contractor is ongoing. Sending us all your COI’s from last year makes no sense, especially when some of them were for single day activities.

Those single day activities probably are the main reason for COI requests. The county is using someone’s property, and the property owner wants to be sure the county has coverage. When we prepare your COI, we will note the event, and that the COI pertains only to that event on that date.

It is smart to manage your COI's well. Don't give one to a company or a property owner with no beginning or end date, and when possible be specific about the event or reason for the COI. This makes it clear the county's grant of its coverage is ONLY for that event or time period.

When you request a COI from someone doing work for the county, and it does not look right to you, have your local insurance producer review it to make sure it is what you need. CCAP insurance staff can also provide advice.

If you need a COI to prove you have coverages offered by PCoRP, PComp or PELICAN, you can now send us the request using our website – see the Insurance section of the CCAP website and click on the "Request a COI" link under the Essential Links listing. That will give you a form to complete and email to Tona Faust who can then prepare your COI.

### **Additional Insureds**

This is a complicated topic, and most of the requests we get where the person or entity is seeking to be made an additional insured, they usually do not know why they are asking for it. But they've always done it. Tied to COI's, this is really adding someone else to your county's insurance by listing them as an additional insured on your COI. Be very careful about giving your coverage away (usually for free). PCoRP only adds additional insureds for general liability and property coverage and only if there is an insurable interest. If someone asks you to add it for all lines of coverage, that's a red flag. And PCoRP will only add the additional insured if the request comes from the county or the county's local producer – not from a lender or another entity seeking this. PCoRP will only do this if the member knows about it.

## INDEMNIFICATION AND HOLD HARMLESS

In terms of financial loss, what is the “worst case scenario” for your county? This thinking should permeate your decisions on risk transfer.

In order to avoid the legal expense of proving that you were not involved and were not a part of the injury or damage, indemnification clauses (hold harmless) and insurance requirements are put into place.

Every organization enters into contracts. There are basically three types of contracts into which counties enter:

1. Service contracts;
2. Lease of property agreements; and,
3. Purchase/sale of property contracts.

Most if not all contracts have one or more provisions dealing with the allocation of risk. These provisions might be referred to as Indemnification, Indemnity/Hold Harmless, Insurance, Risk of Loss, Limitation of Liability and Waiver of Subrogation. The purpose of these provisions is to clarify or supersede common law principals that may apply. Common law provides that when an innocent party is compelled to pay damages caused by another’s negligence, the innocent party is entitled to be indemnified or compensated by the malfeator. Another purpose of such provisions is to clarify the degree to which one party indemnifies another for damage, loss or injury under a contract or agreement.

The terms of a contract/agreement are negotiable. The terms of the contract become the governing law for the business transactions so do not take the contract negotiation process lightly, especially when it comes to risk allocation.

Each contracting party will have certain goals from a risk management perspective and should accept no more risk than it can reasonably insure or otherwise finance. Risk allocation is negotiable like any other contract term. You must look at the overall contract when deciding how to allocate risk and may have to assume more or less risk depending on your contract position. You will need to be flexible with regard to your risk allocation goals. Transfer the balance of the risk to the other party. When done effectively, risk transfer allocates risk equitably between the contracting parties. In theory, the risk of loss should be allocated to the party that is in the best position to manage or control it.

### **RISK TRANSFER BASICS**

When you contract with others to provide products or services, your county should not be held liable for the improper acts of contractors or their employees. Normally, you have little control over the contractor and therefore, many times you cannot control their actions or results.

There are two basic means to effectively accomplish a transfer of risk. One is the transfer to an insurer, whether a public entity risk pool or a commercial insurance company, by securing insurance coverage. The other, and our focus here, is transfer by means of an indemnification provision, also known as an agreement to hold a party harmless. You will seldom find the obligation to indemnify specified in a contract without the term "hold harmless".

The purpose of hold harmless and indemnification provisions may be defined as the obligation of one party to reimburse the other party for the losses it incurs for damages for which it might be held liable. Saying it yet another way, one party shifts its potential liability to the other party and clarifies that one party must pay on behalf of or otherwise indemnify the other party for any damages incurred. The parties should understand that the hold harmless and indemnification clause does not release a party from liability. It simply allows one party an economic avenue or recovery from the other party who does the contracted work.

There are three basic types of hold harmless and indemnification provisions:

- **Broad Form** – Where Party A agrees to assume any and all liability regardless of which party was actually at fault, even if the liability is caused by the sole negligence of Party B. When enforced, this type of clause serves to transfer the entire risk of loss away from Party B and onto Party A regardless of liability. It should be noted it is difficult to enforce this sort of clause.
- **Intermediate Form** – Where Party A agrees to assume any and all liability arising out of the agreement, unless the injury or damage is caused by Party B's sole negligence. If Party B's negligence was partial in nature and not sole (both parties having some degree of fault), Party A will accept all liability for injuries and damages. Of the three forms this is the most commonly used provision.
- **Limited Form** - This is sometimes referred to as a comparative fault form in that it is basically the same as having no provision at all. Each party assumes the liability for their sole negligence. This limited form clause is basically a restatement of the common law

principal that one should be held responsible for only those circumstances over which it exercises control.

Occasionally you may run across a hold harmless and indemnification form where each party agrees to assume the responsibility for claims related to their respective negligence. This type of provision is referred to as a "mutual" form. It generally leaves the parties in a position similar to one which would exist if risk allocation was not addressed at all. This is pretty similar to the limited form, see above.

**Counties should avoid clauses in which they agree to indemnify a party for that party's negligence. By doing this the county could be creating an argument that it has waived its right of governmental immunity.**

Examples of the three various forms are:

**(Broad Form - Transfer the entire risk of loss regardless of degree of negligence)**

*Contractor agrees to indemnify and hold harmless, protect and defend County and its elected and appointed officials, employees, agents, and representatives from any and all claims, losses, demands, suits, actions, payments and judgments, including any and all costs and expenses connected therewith, legal cost or otherwise, for any damages which may be asserted, claimed, or recovered against or from County or its insurers because of personal injury, including bodily injury or death, or on account of property damage, including loss of use thereof, sustained by any person or persons which arises out of, is in anyway connected with, or results from any and all work or activity arising out of Contractor's work, including claims, losses, damages and expenses arising out of the negligence of the County.*

**(Intermediate Form - Transfer the entire risk of loss except that caused by sole negligence)**

*Contractor agrees to indemnify and hold harmless, protect and defend County and its elected and appointed officials, employees, agents, and representatives from any and all claims, losses, demands, suits, actions, payments and judgments, including any and all costs and expenses connected therewith, legal cost or otherwise, for any damages which may be asserted, claimed, or recovered against or from County or its insurers because of personal injury, including bodily injury or death, or on account of property damage, including loss of use thereof, sustained by any person or persons which arises out of, is in anyway connected with, or results from any and all work or activity arising out of Contractor's work, unless said claims, losses, damages and liabilities arise out of the sole negligence of the County.*

**(Limited Form - Limits parties to their own negligence)**

*Contractor agrees to indemnify and hold harmless, protect and defend County and its elected and appointed officials, employees, agents, and representatives from any and all claims, losses, demands, suits, actions, payments and judgments, including any and all costs and expenses connected therewith, legal cost or otherwise, for any damages which may be asserted, claimed, or recovered against or from County or its insurers because of personal injury, including bodily injury or death, or on account of property damage, including loss of use thereof, sustained by any person or persons which arises out of, is in anyway connected with, or results from any and all work or activity arising out of Contractor's work, but only to the extent caused by the negligence of the Contractor.*

**DRAFTING HOLD HARMLESS AND INDEMNIFICATION CLAUSES**

All contracts should contain language addressing hold harmless and indemnification of the contracting parties. These clauses can be tailored to the contract in which they

appear. When drafting a hold harmless and indemnification clause, the parties must clearly define the scope of the work being addressed by the contract. It is also important to state the duration of the clause if the duty to hold harmless and indemnify continues after completion of the work. The parties should be very careful that the language chosen reflects their intent. A properly drafted hold harmless or indemnification agreement will be enforced as written. Some examples of contracts and agreements with hold harmless and indemnification clauses can be found in at the back of this manual. They reflect several samples of various contracts or agreements used by counties.

Some include insurance provisions discussed earlier in this manual. They are not intended to be used without the advice of legal counsel. Always include legal counsel in your review of any contract or agreement.

Remember, even though these agreements may be entered into, the mere existence of them will not prevent the county or agency from being subject to suit from an injured third party. It is merely providing an avenue to transfer the ultimate risk of loss to a party with whom you are contracting.

## WAIVER OF SUBROGATION GUIDELINES

In addition to a hold harmless/indemnification provision, a waiver of subrogation clause operates as a risk transfer tool that shifts the risk of loss to one contracting party who in turn shifts it to their insurance company. The waiver of subrogation exists independently in a contract along with a hold harmless/indemnification clause.

For example, normally when CCAP's property and liability program, PCoRP, pays for a loss incurred by one its members as a result of another party's negligence, such as a contractor, it has the right to subrogate against the party responsible for the damage or loss if that can be determined, unless the right has been waived. If a fire occurs during a construction project as a result of the contractor's negligence and the county has waived its right to subrogate against the contractor, the county's insurance will pay for the loss if covered but PCoRP will then be unable to seek a recovery from the contractor. In an effort to limit potential disputes among participants on a construction project, the contracting parties often agree to waive their subrogation rights; PCoRP discourages that practice. To emphasize again, if the county agrees to waive its right to subrogate against a contractor for damage or loss resulting from the negligence of the contractor, it effectively eliminates PCoRP's potential to seek reimbursement for loss caused by the contractor, and increases the amount of the claim paid which impacts the county's coverage costs.

**PCoRP's Coverage Document contains a severe deductible penalty when a PCoRP member waives subrogation: their deductible is raised to the pool deductible for the coverage involved in the claim, which can be as high as \$450,000.**

A typical mutual waiver of subrogation clause reads, in part: "the owner and contractor waive all rights of recovery against each other for damages caused by fire or other causes to the extent such damages are covered by insurance."

The county's loss history will be negatively affected by its decision to waive rights of subrogation if PCoRP is obligated to pay for claims of a negligent contractor and not be able to subrogate and that, in turn, will increase the member's future costs for coverage. The county, in essence, would be paying for a claim that it is not responsible for.

PCoRP recommends that a member resist, to the extent possible, any attempt within a contract to waive its rights of subrogation. Losses are a key factor in determining what the member pays for its coverage. Don't accept a loss exposure you can avoid.

## CONCLUSION

### Remember the following:

- Risk management is practiced by each of us to a degree on a daily basis.
- Contractual risk transfer is one of the most cost-effective risk management tools at your disposal.
- Review all contracts and agreements to assure yourself that it accurately states your position in regard to risk transfer.
- Not all contracts are alike and what may be good in one contract may not be good in another.
- Be careful not get too boilerplate with your contracts. Don't merely cut and paste.
- Use consistent and acceptable language.
- Seek the advice and direction of legal counsel (your County Solicitor) in regard to all contracts and agreements you might enter into.
- You still may be subject to suit if something happens to cause injury or damage to a third party, so always anticipate that risk when seeking to transfer the risk of loss to the contractor doing the work or providing the service.

## SAMPLE DOCUMENTS

### Low Hazard contracts under \$10,000 and 30 days in duration

The Contractor shall not begin work under this contract until it has obtained all insurance coverages required under this section and such insurance has been approved by the County. The following insurance coverages shall be kept in force during the life of the Contract and shall be primary with respect to any insurance or self-insurance programs covering the County, its commissioners/supervisors, officials, agents, representatives and employees.

A. Workers' Compensation and Employers Liability Insurance

The minimum acceptable limits shall be the statutory limits as required by the Commonwealth of Pennsylvania for Coverage A, Workers' Compensation and \$100,000 for Coverage B, Employers Liability.

B. Commercial General Liability Insurance

Coverage shall include liability coverage addressing premises and operations, contractual, independent contractors, and products/completed operations. The coverage must protect against claims for damages resulting from bodily injury, including death, personal injury and property damage.

The minimum acceptable limits of liability shall be \$250,000 each occurrence. If the coverage contains a general aggregate, such limit shall not be less than \$500,000. The products/completed operations limit shall not be less than \$500,000. If written on a claims made form, the products/completed operations coverage is to be maintained for two years after final payment. Ask that the limits apply on a "per project" basis which is not always possible to secure, but is worth asking for.

The county is to be named as an additional insured on the insurance coverage required under this section.

C. Automobile Liability Insurance

Coverage shall include liability coverage addressing claims for damages resulting from bodily injury, including death and property damage, which may arise from the operations of any owned, hired or non-owned automobile. The minimum acceptable limit of liability shall be \$250,000 Combined Single Limit for each accident.

The County is to be included as an additional insured on the insurance coverage required under this section.

D. Certificate of Insurance

The Contractor shall furnish the County with a certificate(s) of insurance evidencing the coverages required in this section and shall give the County at least thirty (30) days written notice in the event of cancellation of, or material change in, any of the coverages. If the certificate(s) is shown to expire prior to completion of all the terms of this contract, the Contractor shall furnish a certificate(s) of insurance evidencing renewal of its coverage to the County.

The Contractor shall require each and every Subcontractor performing work under this Contract to maintain the same coverages required of the Contractor in this section, and upon the request of the County, shall furnish the County with a certificate(s) of insurance evidencing the Subcontractor's insurance coverages required in this section.

E. Insurance Company

All insurance coverages herein required of the Contractor shall be written by an insurance company or companies transacting business as an admitted insurer in the Commonwealth of Pennsylvania or under the Commonwealth of Pennsylvania Surplus Lines Insurance Act. All insurance companies must

possess a minimum A.M. Best Insurance Company rating of A-. Be aware that some companies may not be rated, for example surplus lines companies which are used by many contractors, so you need to be flexible on these requirements.

Upon request of the County, the Contractor shall furnish evidence that the insurance company or companies being used by the Contractor meet the minimum requirements listed in this subsection.

Upon request by the County, the Contractor shall furnish the County with complete and accurate copies of the insurance policies required within this section. If at any time during the life of this Contract, the Contractor's insurance coverages and limits do not meet or exceed the minimum insurance requirements presented in this section, the Contractor is required to notify the County of any deviations from the minimum requirements presented in this section.

**Low and Medium Hazard contracts under \$300,000 and 180 days in duration, except those addressed in Exhibit 1**

The Contractor shall not begin work under this contract until it has obtained all insurance coverages required under this section and such insurance has been approved by the County. The following insurance coverages shall be kept in force during the life of the Contract and shall be primary with respect to any insurance or self-insurance programs covering the County, its commissioners/supervisors, officials, agents, representatives and employees.

A. Workers' Compensation and Employers Liability Insurance  
 The minimum acceptable limits shall be the statutory limits as required by the Commonwealth of Pennsylvania for Coverage A, Workers' Compensation and \$250,000 for Coverage B, Employers Liability.

B. Commercial General Liability Insurance  
 Coverage shall include liability coverage addressing premises and operations, contractual, independent contractors, and products/completed operations. The coverage must protect against claims for damages resulting from bodily injury, including death, personal injury and property damage.

The minimum acceptable limits of liability shall be \$500,000 each occurrence. If the coverage contains a general aggregate, such limit shall not be less than \$1,000,000. The products/completed operations limit shall not be less than \$1,000,000. If written on a claims made form, the products/completed operations coverage is to be maintained for two years after final payment.

The County is to be named as an additional insured on the insurance coverage required under this section.

C. Automobile Liability Insurance  
 Coverage shall include liability coverage addressing claims for damages resulting from bodily injury, including death and

property damage, which may arise from the operations of any owned, hired or non-owned automobile. The minimum acceptable limit of liability shall be \$500,000 Combined Single Limit for each accident.

The County is to be included as an additional insured on the insurance coverage required under this section.

D. Certificate of Insurance

The Contractor shall furnish the County with a certificate(s) of insurance evidencing the coverages required in this section and shall give the County at least thirty (30) days written notice in the event of cancellation of, or material change in, any of the coverages. If the certificate(s) is shown to expire prior to completion of all the terms of this Agreement, the Contractor shall furnish a certificate(s) of insurance evidencing renewal of its coverage to the County.

The Contractor shall require each and every Subcontractor performing work under this Contract to maintain the same coverages required of the Contractor in this section, and upon the request of the County, shall furnish the County with a certificate(s) of insurance evidencing the Subcontractor's insurance coverages required in this section.

E. Insurance Company

All insurance coverages herein required of the Contractor shall be written by an insurance company or companies transacting business as an admitted insurer in the Commonwealth of Pennsylvania or under the Commonwealth of Pennsylvania Surplus Lines Insurance Act. All insurance companies must possess a minimum A.M. Best Insurance Company rating of A-. Be aware that some companies may not be rated, for example surplus lines companies which are used by many contractors, so you need to be flexible on these requirements.

Upon request of the County, the Contractor shall furnish evidence that the insurance company or companies being used by the Contractor meet the minimum requirements listed in this subsection.

Upon request by the County, the Contractor shall furnish the County with complete and accurate copies of the insurance policies required within this section. If at any time during the life of this Contract, the Contractor's insurance coverages and limits do not meet or exceed the minimum insurance requirements presented in this section, the Contractor is required to notify the County of any deviations from the minimum requirements presented in this section.

**High Hazard contracts over \$25,000 and all contracts over \$300,000 except those addressed in Exhibits 1 and 2**

The Contractor shall not begin work under this contract until it has obtained all insurance coverages required under this section and such insurance has been approved by the County. The following insurance coverages shall be kept in force during the life of the Contract and shall be primary with respect to any insurance or self-insurance programs covering the County, its commissioners/supervisors, officials, agents, representatives and employees.

- A. Workers' Compensation and Employers Liability Insurance  
The minimum acceptable limits shall be the statutory limits as required by the Commonwealth of Pennsylvania for Coverage A, Workers' Compensation and \$500,000 for Coverage B, Employers Liability.
  
- B. Commercial General Liability Insurance  
Coverage shall include liability coverage addressing premises and operations, contractual, independent contractors, and products/completed operations. The coverage must protect against claims for damages resulting from bodily injury, including death, personal injury and property damage.

The minimum acceptable limits of liability shall be \$1,000,000 each occurrence. If the coverage contains a general aggregate, such limit shall not be less than \$2,000,000. The products/completed operations limit shall not be less than \$2,000,000. If written on a claims made form, the products/completed operations coverage is to be maintained for two years after final payment.

The County is to be named as an additional insured on the insurance coverage required under this section.

C. Automobile Liability Insurance

Coverage shall include liability coverage addressing claims for damages resulting from bodily injury, including death and property damage, which may arise from the operations of any owned, hired or non-owned automobile. The minimum acceptable limit of liability shall be \$1,000,000 Combined Single Limit for each accident.

The County is to be included as an additional insured on the insurance coverage required under this section.

D. Professional Liability Insurance (if applicable)

Coverage shall be for wrongful acts, errors or omissions. The minimum acceptable limits of liability shall be \$1,000,000 each occurrence. If the coverage contains a general aggregate, such limit shall not be less than \$2,000,000. The Contractor shall provide proof of coverage for one (1) year after the completion of the work.

E. Property Insurance (if applicable)

During the term of the Contract all responsibility for maintenance of property insurance on the work remains solely with the Contractor who shall as a minimum obtain a builders risk "all risk" or equivalent policy form with sufficient limits to cover the total value of the Project, including all the cost of the material, equipment and/or machinery involved under this Contract. This property insurance shall cover portions of the work and materials stored off-site, on-site and in transit.

F. Certificate of Insurance

The Contractor shall furnish the County with a certificate(s) of insurance evidencing the coverages required in this section and shall give the County at least thirty (30) days written notice in the event of cancellation of, or material change in, any of the coverages. If the certificate(s) is shown to expire prior to completion of all the terms of this Agreement, the Contractor shall furnish a certificate(s) of insurance evidencing renewal of its coverage to the County.

The Contractor shall require each and every Subcontractor performing work under this Contract to maintain the same coverages required of the Contractor in this section, and upon the request of the County, shall furnish the County with a certificate(s) of insurance evidencing the Subcontractor's insurance coverages required in this section.

G. Insurance Company

All insurance coverages herein required of the Contractor shall be written by an insurance company or companies transacting business as an admitted insurer in the Commonwealth of Pennsylvania or under the Commonwealth of Pennsylvania Surplus Lines Insurance Act. All insurance companies must possess a minimum A.M. Best Insurance Company rating of A-. Be aware that some companies may not be rated, for example surplus lines companies which are used by many contractors, so you need to be flexible on these requirements.

Upon request of the County, the Contractor shall furnish evidence that the insurance company or companies being used by the Contractor meet the minimum requirements listed in this subsection.

Upon request by the County, the Contractor shall furnish the County with complete and accurate copies of the insurance policies required within this section. If at any time during the life of this Contract, the Contractor's insurance coverages and limits do not meet or exceed the minimum insurance requirements presented in this section, the Contractor is required to notify the County of any deviations from the minimum requirements presented in this section.

Note: Professional Liability insurance coverage protects against losses that occur when a "professional's" error in judgment, planning and/or design could result in economic loss to the county. Examples of professionals that might provide services that you would want to require proof of their professional liability insurance coverage are: accountants, appraisers, architects,

attorneys, auditors, computer/software designers, consultants, engineers, financial consultants, medical professionals, project managers, property managers and teachers.

## Special Hazard

Contracts in this category have many unique features. Requests for Proposals involving environmental exposures, asbestos removal, building demolition, extensive use of explosives and similar projects require extensive knowledge of the hazards involved and how to properly treat them.

It is quite likely a contract of this type will include the basic insurance guidelines addressed in the other exhibits presented in this manual, but you will likely be dealing with more claims made forms and other specialty coverages. Consultation with risk management and legal professionals is suggested to achieve proper protection.

## **AIA Document A201 – Contractor Provides Builders Risk**

Counties should consider necessary changes to be made to Article 11, Insurance and Bonds, of AIA Document A201-2007 where the contractor is going to provide the builders risk property coverage for new construction.

## **AIA Document A201 – Owner Provides Builders Risk**

Counties should consider necessary changes to be made to Article 11, Insurance and Bonds, of AIA Document A201-2007 where the owner/county is required to provide the builders risk property coverage for new construction. We encourage members to avoid this practice.

## **AIA Document A107 – Owner Provides Builders Risk**

Counties should consider necessary changes to be made to be made to Article 17, Insurance and Bonds, of AIA Document A107-2007 where the owner/county is required to provide the builders risk property coverage for new construction. We encourage members to avoid this practice.

## Sample Insurance and Indemnification Requirements

### INSURANCE REQUIREMENTS

The Contractor shall not begin work under this Contract until it has obtained all insurance coverages required under this section and such insurance has been approved by the County. The following insurance coverages shall be kept in force during the life of the Agreement and shall be primary with respect to any insurance or self-insurance programs covering the County, its commissioners, officials, agents, representatives and employees.

A. Workers' Compensation and Employers Liability Insurance

The minimum acceptable limits shall be the statutory limits as required by the Commonwealth of Pennsylvania for Coverage A, Workers Compensation and \$500,000 each accident for Coverage B, Employers Liability.

B. Commercial General Liability Insurance

Coverage shall include liability coverage addressing premises and operations, contractual, independent contractors, and products/completed operations. The coverage must protect against claims for damages resulting from bodily injury, including death, personal injury and property damage.

The minimum acceptable limits of liability shall be \$1,000,000 each occurrence. If the coverage contains a general aggregate, such limit shall not be less than \$2,000,000. The products/completed operations limit shall not be less than \$2,000,000. If written on a claims made form, the products/completed operations coverage is to be maintained for two years after final payment.

The County is to be named as an additional insured on the insurance coverage required under this section.

C. Automobile Liability Insurance

Coverage shall include liability coverage addressing claims for damages resulting from bodily injury, including death and property damage, which may arise from the operations of any owned, hired or non-owned automobile. The minimum acceptable limit of liability shall be \$1,000,000 Combined Single Limit for each accident.

The County is to be named as an additional insured on the insurance coverage required under this section.

D. Certificate of Insurance

The Contractor shall furnish the County with a certificate(s) of insurance evidencing the coverages required in this section. Such certificate(s) shall specifically state that the insurance company or companies underwriting these insurance coverages shall give the County at least thirty (30) days written notice in the event of cancellation of, or material change in, any of the coverages. If the certificate(s) is shown to expire prior to completion of all the terms of this Agreement, the Contractor shall furnish a certificate(s) of insurance evidencing renewal of its coverage to the County.

The Contractor shall require each and every subcontractor performing work under this Contract to maintain the same coverages required of the Contractor in this section, and upon the request by the County, shall furnish the County with a certificate(s) of insurance evidencing the Subcontractors insurance coverages required in this section.

**INDEMNIFICATION AND HOLD HARMLESS**

The Contractor agrees to indemnify and hold harmless, protect and defend the County and its elected and appointed officials, employees, agents, and representatives against any and all claims, demands, suits, actions, payments and judgments, including any and all costs and expenses connected therewith, legal cost or otherwise, for any damages which may be asserted, claimed, or recovered against or from County or its insurers, because of personal injury, including bodily injury or death, or on account of property damage, including loss of use thereof, sustained by any person or persons which arises out of, is in any way connected with, or results from any and all work or activity associated with the services provided under this agreement unless such damages are the direct and sole result of County's negligence.

## **A Sample Indemnification and Insurance Provision for Lease of a County Owned Premises**

(Lessee) agrees to indemnify and hold harmless, protect and defend (Lessor) and its elected and appointed officials, employees, agents, and representatives against any and all claims, demands, suits, actions, payments and judgments, including any and all costs and expenses connected therewith, legal cost or otherwise, for any damages which may be asserted, claimed, or recovered against or from (Lessor), because of personal injury, including bodily injury or death, or on account of property damage, including loss of use thereof, sustained by any person or persons which arises out of, is in anyway connected with, or results from the negligent or other use or operation of (Description of Property) by the (Lessee).

(Lessee) agrees to take proper care of the above referenced property and shall return such property to (Lessor) in the same condition as when received, ordinary wear and tear excepted. (Lessee) agrees to secure a liability insurance policy against claims for damages resulting from bodily injury and property damage which might arise from the use or operation of the referenced property by (Lessee) or its elected and appointed officials, employees, agents, and representatives with limits not less than (\$1,000,000 should be minimum) for each accident or occurrence. (Lessor) should be named as an additional insured on the referenced liability insurance policy. A certificate of insurance evidencing such insurance and additional insured status is to be provided to

(Lessor) for the duration of this agreement and/or as long as the above referenced property is in the care, custody or control of (Lessee).

(Lessee) agrees to waive any and all rights of recovery its insurance company may have for insured losses against (Lessor) and its elected and appointed officials, employees, agents, and representatives for any and all loss or damage that may occur while the above referenced property is in its care, custody or control.

## **CONSIDERATIONS FOR AGREEMENTS BETWEEN COUNTIES FOR THE HOUSING OF INMATES IN THE COUNTY PRISON**

We suggested contracts of this type include the following information:

- Date of agreement
- Governing Law (Commonwealth of Pennsylvania)
- Duration of the agreement
- Provisions for termination of the contract
- Mailing and other contact addresses
- Definitions (for example, how is a prisoner day defined?)
- Compensation – rates, per day, how calculated, any annual rate adjustments, billing and payment process
- Right of inspection of the prison where the county's inmates are being held.
- Furloughs, passes and work release
- Inmate accounts
- Inmate property
- Responsibility for offender's custody, provision of sustenance, necessary medical services and supplies, programs, treatments, etc.
- Medical Services to be provided, record keeping, payments
- Disciplinary Authority

- Records and Reports
- Removal from the prison
- Technology efforts, funding, video conferencing
- Escapes, reporting, costs
- Death of an inmate, notice, investigation, death certificate
- Hold Harmless, Indemnification
- Right of refusal and transportation
- Independent contractor (the county accepting the inmate is an independent contractor and its employees are not employees of the county providing the inmates).
- Severability
- Access to Records