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Guidelines To Managing Contractual Risk

State Of North Dakota
Office of Management & Budget

Risk Management Division &
Procurement Office

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ESTABLISHING CONTRACTUAL RISK MANAGEMENT GUIDELINES

The State and its entities enter into numerous contracts for goods and services that expose it to third-party claims for bodily injury (including death), personal injury, or property damage. Included are contracts for construction, professional services, nonprofessional services, delivered supplies, and leases. If work performed on the State's behalf by a contractor results in damage to a third party, the State could be held liable. This, coupled with the erosion of the State's immunity and the growing litigiousness of society, has made it necessary to ensure that the State's contracting risk is dealt with effectively.

The guidelines in this section are intended to assist State employees who procure goods, services, and leases on behalf of the state of North Dakota. These guidelines have been drafted in coordination with the State Procurement Office and Office of Attorney General to comply with the written directives of the Office of Management and Budget (OMB) related to procurement, N.D.C.C. ch. 54-44.4, and N.D.A.C. Article 4-12 as well as N.D.C.C. § 32-12.2-17. This section is a tool to assist with drafting indemnification and insurance clauses in State contracts. The guidelines represent the best practices to protect the State's interests without unduly burdening contractors. Agencies must consult with the Risk Management Division and/or the agency's assigned Assistant Attorney General before making changes to the recommended contract language.

Every contract has risks that must be reviewed from the perspective of protecting the State's assets and interests. Remember, the dollar amount of the contract is not necessarily a good index of the level of risk associated with the contract. The following will help you manage those risks when you contract on behalf of the State. An inherent part of contract management is to:

1. Evaluate the risks involved;
2. Decide whether to avoid, transfer, or accept the risks; and
3. Implement appropriate risk transfer and/or risk financing mechanisms deemed necessary.

Read the contract thoroughly and anticipate events or situations that could happen within the scope of work outlined. Ask yourself:

1. Who are all the parties involved?
2. What kind of work is being done?
3. What type of accidents or losses could occur?
4. What is the worst-case scenario in terms of financial loss and/or injury to persons or property?
5. Are the responsibilities for the risks appropriately placed with those in the best position to control them?
6. What is each party's ability to manage the risks and absorb the losses?
7. Is the contract legal and enforceable?

Within the contract, risk transfer is accomplished through a combination of indemnification, hold harmless, and waivers of subrogation clauses. Insurance is commonly required as a means of providing the financial support to back the indemnitor's obligation to hold the indemnitee harmless.

The State's goal is to establish contract guidelines for insurance coverage that can be consistently applied with few exceptions. To insure the continued success of the State's contract review program, once insurance requirements have been set, they must be communicated in all solicitations for bids or proposals <u>prior</u> to awarding the contract. The program will not be successful if the insurance is negotiated after the contractor has been selected. Also, a change in bidding requirements, such as changing the insurance requirements, could result in a protest of the award by the unsuccessful bidders.

This section provides several methods of dealing with contractual risk. The Risk Management Fund recommends these procedures be followed by any person involved in procurement and drafting contracts for the State. The discussion will include 1) screening contractors; 2) safety requirements for bid specifications and contracts; 3) contractual risk transfer through indemnification/ hold harmless clauses; and 4) insurance requirements.

PLEASE NOTE: Use of the following recommended clauses and forms does not ensure that all contracts and agreements will be adequately drafted to protect the State's interests. Each entity's counsel should review all contracts and agreements before they are executed.

Screening Contractors

There simply is no substitute for dealing with a safety-conscious contractor who prevents or minimizes damages and injuries through safe work practices. Keep in mind that for every dollar of loss prevented, there is perhaps an additional dollar of frictional and "soft" costs saved (legal fees, claims handling costs, lost employee productivity, and so on).

Screen your contractors carefully before entering into any contract. Screening is probably the simplest and yet most effective method of controlling contractual risk. Suggested steps include:

- Deal only with reputable firms.

  There are several ways to check the reputation of contractors. For example, a clause could be inserted into the bid solicitation mandating contractors explain their safety program and safety problems or violations over the past five years. The agency could also talk with agency employees or review records from other projects performed by that contractor for the agency.

- Check references.

  The bid solicitation should require the contractor to disclose the name, address and telephone number of at least three people who have hired the contractor to do a similar job in the past five years. The bid solicitation should also provide that the State may contact each reference for additional information.

- Check records of safety violations through OSHA and the Secretary of State's records.

  The OSHA office in each state maintains records regarding safety violations by various contractors including construction contractors. For example, under 40 U.S.C. Section 333, the Secretary of Labor, who oversees OSHA, is required to investigate and hold hearings regarding safety violations by construction contractors. The Secretary of Labor ultimately may send a list of contractors who have engaged in safety violations to the Comptroller General and that list is circulated among federal agencies.

  State agencies can obtain information on safety violations by a contractor who has done business in North Dakota by contacting OSHA in North Dakota, 1640 East Capitol Avenue, Bismarck ND 58501; telephone (701) 250-4521.

In addition, pursuant to N.D.C.C. ch. 43-07, the North Dakota Secretary of State regulates contractors and maintains public records regarding their activities. The records include information on the contractor's experience and qualifications, liability insurance, workers' compensation coverage, unemployment coverage, and other information regarding the applicant's fitness to act in the capacity of a contractor. The records may also show the level of activity the contractor is authorized to engage in, the type of work the contractor engaged in over the past year, whether the contractor abandoned a contract without legal excuse, diverted funds, engaged in fraudulent acts, or made a false statement. Information concerning construction related contractors can be obtained from the Secretary of State's office at (701) 328-3665.

Safety records for contractors are also maintained by the North Dakota Workforce Safety and Insurance office. Those records are generally not available for disclosure to the public, including state agencies.

- Monitor compliance with contract terms.

  Care should be exercised by the State to determine if contractor's activities are consistent with each part of the contract. The State should not monitor contracts by retaining control over the means, method and manner of producing the result because that blurs the line between whether the contractor is actually an independent contractor, for which the State may have very limited liability, or an employee, for which the State may have much greater liability.

Safety Requirements for Bid Specifications and Contracts

A key step in a major construction project is preparing the bid specifications outlining the scope and requirements of the project. Safety requirements should be a vital part of the bid specifications. For example, we recommend the following language be incorporated into all construction contracts:

> **Safety Requirements:** The Contractor shall keep informed of and comply with all federal, state, and local laws, regulations, and other legal requirements governing the safety, health, sanitation, and performance of the contract in general. In addition, the Contractor shall provide, inspect and maintain all safeguards, safety devices, protective equipment, safety programs and other needed actions the Contractor determines necessary to reasonably protect the life, health and property of the Contractor, subcontractors, the State, the public and each of the employees, officers, assigns and agents of the Contractor, subcontractors and the State, in connection with the performance of work resulting from or arising out of the contract.
>
> The Contractor shall submit to the State a copy of the written safety program to be used as guidelines and direction for the Contractor's and subcontractors' activities. This program must meet all federal, state and local laws, regulations and other legal requirements and include the following minimum provisions: (1) a worksite safety policy and mission statement; (2) assigned responsibilities among management, supervisors and employees; (3) a system for periodic self-inspections, including inspections of job sites, materials, work performance and equipment; (4) a thorough accident and injury reporting and investigation process; (5) a safety orientation program including first aid, medical attention, emergency facilities, fire protection and prevention, housekeeping, illumination, sanitation, personal protective equipment, and occupational noise exposure; and (6) a safety training program including safety "tool box" meetings and other systems for ongoing training and also including training for employees on the recognition, avoidance and prevention of unsafe conditions.

> It will be a condition of the contract, and shall be made a condition of each subcontract entered into pursuant to that contract, that the State is assuming no liability relating to its receipt and review of the Contractor's safety plan or activities. Safety remains the responsibility of the Contractor. Furthermore, the right of the State to receive and review the safety plan or activities shall not give rise to a duty on the part of the State to exercise this right for the benefit of the Contractor or any other person or entity.

Spoliation (Notice of Potential Claims) Clause

The Risk Management Division recommends a clause entitled Spoliation (Notice of Potential Claims) be added to State lease agreements and service contracts. Spoliation is defined as **the destruction or severe modification of evidence**.

Court decisions have held that the action of merely cleaning the scene of an accident before the accident can be adequately investigated and the loss and cause of loss documented can be determined to be a breach of a legal duty – a tort. A tort can create liability. Such an action can also bar a subrogation claim, which means the State may not have the opportunity to recover losses caused by a negligent third party.

While the State has a concern to preserve evidence, consideration must also be given to the need to appropriately secure or clear the site to mitigate any immediate safety threat.

To ensure the State is afforded an opportunity to adequately investigate and document losses that pertain to contracts to which the State is as party, it is recommended the following clause be included in an agreement. This clause has been incorporated in the Attorney General office's contract template.

> Contractor (or Landlord) agrees to promptly notify State of all potential Claims which arise from or result from this agreement. Contractor (or Landlord) further agrees to take all reasonable steps to preserve all physical evidence and information which may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and to grant to the State the opportunity to review and inspect such evidence, including the scene of the accident.

Contractual Risk Transfer Through Indemnification/Hold Harmless Clauses

Contractual risk is generally transferred with an indemnification/hold harmless clause. The purpose of the clause is to define who pays when a third party makes a claim for damages arising out of the work performed under the contract. The party that exercises the most control over the activities governed by the contract is in the best position to enforce safety and loss control practices and should, therefore, generally be responsible for injuries or damages arising from those activities.

Future agency contributions to the Risk Management Fund are based on actual losses incurred as well as costs incurred to defend any losses. This, of course, includes losses and costs related to claims arising from services provided by contractual agreements. By not implementing an in-depth analysis of the cost and benefit ratio of all agency agreements and incorporating the appropriate indemnification language into the agreement, the agency may adversely impact its required contributions.

Any person contracting on behalf of the State must know that the Risk Management Fund cannot, by law, defend or pay settlements or judgments on behalf of any parties other than the State, a State entity, or a State employee. Therefore, when determining the appropriate indemnification language, ***agencies must remember that if the agency were to sign a contract agreeing to indemnify a private third party, or a political subdivision, the Risk Management Fund would not be able to defend or pay any settlement or judgment on behalf of that third party***. Any such cost would be the sole expense of the contracting agency raising issues of whether or not the agency has appropriation authority to pay such costs and if by signing such an agreement the employee would be determined to not be acting within the scope of his or her employment. Also see the discussion concerning limiting the liability of vendors in these Guidelines.

Indemnification/hold harmless clauses assist agencies in addressing potential exposures and should be used in conjunction with insurance clauses. There are three basic forms of indemnification/hold harmless provisions that can be used in State contracts:

1. **No Indemnification of Liability** provision: Each party agrees to assume the liability and expenses (e.g., defense and investigation costs) for their own acts. This is essentially the same as the liability that would exist under common law, but it is specified in the agreement.

2. **Limited Vicarious Liability** provision*:* ***Pursuant to N.D.C.C. § 32-12.2-17, this indemnification provision is to be the default form for State contracts requiring indemnification.*** While this provision requires each party to assume its own liability, it provides additional protection for the State in that the Contractor agrees to be responsible for any liability alleged against the State resulting from the Contractor's sole actions, and provides defense for the State to resolve those allegations.

   This provision is also to be used in agreements between the State and a political subdivision where:

   a) the benefit to the contracting political subdivision is much greater than that to the State;
   b) it would be an inappropriate use of State taxpayers' funds to pay costs associated with claims arising from the agreement; or
   c) the State has no control over the activities of the political subdivision or its agents related to the agreement.

   Remember, in an agreement between the State and a Political Subdivision the Limited Vicarious Liability and corresponding insurance provision must be in a separate writing signed by both parties specifying the consideration. (See, N.D.C.C. § 32-12.2-13 and N.D.C.C. § 32-12.2-17)

3. **Intermediate** provision*:* Requires Contractor to be responsible for its own liability and the joint liability of the Contractor and the State. This provision will be allowed only after the OMB Director's designee has determined the contract presents a high risk scenario that requires an indemnification provision more stringent than the *Limited Vicarious Liability* form. (See N.D.C.C. § 32-12.2-17)

Insurance Requirements for Contractors

While the indemnification/hold harmless provision is very important, it should not be the only protection required in contracts. Some courts have declared indemnification provisions invalid for a variety of reasons. Even when the provision is valid, the State still faces the risk of the contractor being insolvent, underinsured, uninsured, or otherwise unable to pay claims. Therefore, all contractors, with certain limited exceptions, should be required to maintain reasonable insurance coverage and provide written proof of this protection.

The Risk Management Division strongly recommends that the State make sure the Contractor has provided all the appropriate written proof of insurance coverage and additional insured documentation. "Written proof" consists of certificates of insurance and endorsements to policies. These items will be discussed in further detail later in this Section. Obtaining and reviewing such paperwork is a very important step in ensuring that all the required coverages are in place. Contact the Risk Management Division at (701) 328-7584 if you have questions regarding the written proof of coverage.

The insurance clauses found in many contracts may use outdated language with no defined meaning in the insurance industry. The terms “public liability insurance” and “comprehensive liability insurance” are two common examples. In addition, policy limits generally are no longer split separately for the number of persons involved in an occurrence, for bodily injury versus property damage liability, and so on. Most policies now have a combined single limit per occurrence and, in the case of general liability, an annual aggregate limit – the total that will be paid for the period of the coverage. To prevent disputes, insurance requirements in contracts should be as specific as reasonably possible or should be defined. Common definitions of many insurance terms are found at the end of this document.

The specific coverages and limits required will vary depending on the nature of the contract. When possible, the State should require limits of coverage of its contractors that are higher than the State’s own $250,000 per person and $1,000,000 per occurrence exposure. A higher requirement provides additional protection for both the State and the contractor in the event of a loss, since the coverage is shared by both parties when the State is an additional insured. Also, aggregate limits can be impaired by *other* operations of the contractor, so the higher the limits, the better.

The term "insurance" as used throughout this section is a short hand reference that includes coverage provided through government self-insurance pools and government self-retention funds. Similarly, “certificates of insurance” requirements can be provided by memorandum of coverage documentation.

The insurance required in the contract varies, depending on the nature of the work being performed. For example, agreements for work involving the use of vehicles by contractors should require the contractor to carry automobile liability insurance in addition to general liability and workers’ compensation. When the contractor’s primary duties under the contract requires the use of a commercial vehicle, the State should be named as an additional insured under the contractor’s automobile liability coverage.

Commercial General Liability provides coverage for businesses to respond to claims for bodily injury and property damage, personal and advertising injury, contractual, products and completed operations.

The question often arises whether or not **professional liability coverage** (errors and omissions) should be required when drafting a service agreement. **The general rule is if special intellectual ability is required to perform the contracted services (rather than physical activity) professional errors and omissions coverage is required.** If it is determined that professional errors and omissions is not required for the contract you are drafting, omit the paragraph referencing professional errors and omissions coverage in the sample forms.

In the case of professional liability insurance, it is usually not possible or desirable for the State to be an additional insured on the policy, nor will the policy cover liability assumed in a contract. However, commercial general liability and automobile liability coverage should be required in most contracts involving professional services and, when appropriate, the terms should include a requirement for the State to be named an additional insured under the commercial general liability coverage.

Additional Insureds

Some of the recommended insurance provisions found in this document require the state of North Dakota and its agencies, officers, and employees be included as "additional insureds" under the policies of others. There is probably more confusion and misunderstanding about this contractual risk transfer method than any other. Entire books have been written about this topic, but here are the key points to keep in mind when drafting insurance clauses in contracts:

- "Additional insured" status means the State is considered an "insured" party on the insurance policy (usually the general liability or umbrella/excess liability policy) of another person or entity (i.e., contractor) who is the "named insured."

- It generally is not possible — or desirable — to be an "additional *named* insured" because named insureds have duties to pay premiums, report claims, and so on.

- The purpose of the additional insured status is to obtain rights to defense and, when it is determined the contract presents a high risk scenario that requires an indemnification provision more stringent than the Limited Vicarious Liability, indemnity coverage from the insurance company of the other party to the contract without having to look to the State's own funding sources. When combined with a specific insurance requirement clause, it serves to strengthen the financial responsibility of the other party.

- The other party's insurance policy must be specifically endorsed to add the State as an "additional insured." Merely obtaining a certificate of insurance to this effect does not guarantee that the endorsement has been issued, so it is best to obtain a copy of the actual policy endorsement whenever possible. Discussion concerning managing the process of and examples of the certificate of insurance form and the endorsement forms are found later in this document.

- The Intermediate "additional insured" endorsement *should* (but often, in insurance industry practice, does not) specify:

    1. The full legal name of the additional insured; i.e., the state of North Dakota, its agencies, officers and employees;
    2. The specific location or operations for which the coverage applies;
    3. The time frame of when the coverage begins and ends — in some cases, coverage should continue beyond the life of the contract;
    4. That a 30-day (or whatever number of days is agreed to) notice of modification or cancellation will be provided to the additional insured at a specified name and address;
    5. That the insurance company waives any right of recovery it may have against the State. This is necessary since an additional insured is a third party to the policy contract; the additional insured provides no consideration to the insurer and, therefore, may be subject to subrogation;
    6. That the coverage required under this agreement shall be primary for the State and shall not be affected by any other insurance or coverage obtained by the State on its own behalf;
    7. That cross liability/severability of interest coverage is provided;
    8. The legal defense provided to the State under the policy must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary; and
    9. The insolvency or bankruptcy of the insured will not release the insurer from payment under the policy, even when such insolvency or bankruptcy presents the insured contractor from meeting the retention limit under the policy.

These items should be included in the insurance requirements of State contracts. Policy limits and scope of coverage applicable to the additional insured can be modified in the policy endorsement, as long as it is consistent with the terms of the contract. Many of the problems that arise in this area would be prevented if insurance companies would include these elements on all of the additional insured endorsements they issue and if contracting parties require them in their contracts.

- Some insurers issue a "blanket additional insured" endorsement intended to include any person or organization that the named insured contractually agrees to add. The State will have to evaluate such endorsements on a case-by-case basis to ensure compliance with the contract.

Determining Appropriate Indemnification and Insurance Provisions

Your first step when drafting a contract or a solicitation is to consider the potential risk associated with the contract being contemplated, and select the appropriate clauses. For example:

1. **No Indemnification of Liability provision with Certificate of Insurance** should be used:
   a) When contracting with a North Dakota state agency or political subdivision (e.g., cities and counties) if no sub-contractor is involved;
   b) When contracting for intellectual services when the contractor will not be providing on-site services. (Examples of professionals providing intellectual services would include physicians, dentists, attorneys, architects, engineers, accountants, insurance agents and brokers, appraisers, loss claims adjusters, tax consultants, risk investment brokers, and investment and divestiture consultants.)
   c) When the services to be provided present a minimal threat to the safety, health and well being of participants or third parties, has little potential to cause disruption of business schedule, financial loss/increased cost, or degradation of performance.
   d) If the terms of the Lease do not require the landlord to provide snow and ice removal and maintenance on walkways and parking lots or to maintain common areas, or if it is probable that the public will not visit the leased property.

   Obtain a certificate of insurance documenting required coverages are in place prior to executing the contract.

2. **Limited Vicarious Indemnification with Additional Insured Endorsement** – **This is the default indemnification provision for State service contracts and leases.** This provision requires contractor to indemnify the State for the State's vicarious liability arising from the contractor's activities and operations. That means the contractor's carrier would defend the State for a claim brought against the State merely because of the business relationship between the contractor and the State, i.e. the damage occurred on a State project or property.

   Obtain a certificate of insurance documenting required coverages are in place prior to executing the contract. When an additional insured endorsement is required it may take up to 90 days until the insurance carrier provides it. Make sure to verify receipt of the endorsement within 90 days.

3. **Intermediate Indemnification with Additional Insured Endorsement** – Requires the contractor to be responsible for its own liability and the joint liability of the contractor and the State. Use the intermediate indemnification clause if there is the potential that the contractor's activities present a high degree of risk over which the State has no supervision or control that will create liability for

the State. Prior to requiring this level of indemnification in a contract, the State agency must obtain the approval of the OMB Director's designee.

The process a State agency or facility should use to obtain that approval is to complete SFN 58571 form, the *Application to Require a More Stringent Indemnification Provision.* The form, along with a copy of the proposed contract should be filed with the Risk Management Division of OMB for processing unless the OMB director has determined an alternate designee to review the proposed contract. OMB, through Risk Management, will work with the agency to analyze the exposure presented by a proposed agreement and determine what level of indemnification would be appropriate.

The OMB Director has determined that it is appropriate that State software contracts contain indemnification requirements indemnifying and holding the State harmless from and against all third party claims alleging the software infringes a United States patent or copyright, or any similar intellectual property right in the United States. This provision is normally a default in software vendor's license agreements. State agencies do not have to go through the SFN 58571 Application for approval to use indemnification process to use this indemnification provision in an agreement.

Remember, when an additional insured endorsement is required it may take up to 90 days until the insurance carrier provides it. Make sure to verify receipt of the endorsement within 90 days.

4. **Combination of No Indemnification and Limited Vicarious Indemnification with Certificate of Insurance and Endorsement –** should be used in those instances when contracting with a political subdivision and the political subdivision subcontracts with a private entity.

   Certificate of insurance should be obtained from political subdivision and the private entity subcontractor and an endorsement evidencing additional insured coverage from the private entity subcontractor.

The **RISK MANAGEMENT ANALYSIS MATRIX** on the following page provides an overview of the analysis process:

RISK MANAGEMENT ANALYSIS MATRIX			
		Indemnification and Insurance Provisions	Indemnification and Insurance Provisions
Rating	**Definition**	**Commodities**	**Services**
LOW Service Agreements: ▪ Inter-Agency; ▪ Routine Political Subdivision; ▪ Professional Services **Not** Requiring On-Site Services; and ▪ Some Leases	Presents a minimal threat to safety, health and well being of participants and third parties, has little potential to cause disruption of business schedule, financial loss/increased cost, or degradation of performance.	None or No Indemnification of Liability with Certificate of Insurance	None or No Indemnification of Liability with Certificate of Insurance
MODERATE ▪ **Professional** Services Agreements Requiring On-Site Services	Special intellectual ability required to perform the contracted services some of which will be performed on-site.	N/A	Limited Vicarious Liability with Certificate of Insurance and Additional Insured Endorsement and Errors and Omissions Coverage
MODERATE ▪ DEFAULT for Routine **Non-Professional** Services; ▪ Political Subdivisions Hiring Subcontractor; and ▪ Routine Leases	Potential to cause injury/illness, property damage, some disruption of business schedule, financial loss/ increased cost, or degradation of performance.	Limited Vicarious Liability with Certificate of Insurance and Additional Insured Endorsement	Limited Vicarious Liability with Certificate of Insurance and Additional Insured Endorsement
HIGH RISK ▪ **Requires More Stringent Provisions** – Requires Authorization From OMB Director's Designee **SFN 58571**	State has little or no supervision or control over contractor's actions which may cause severe injury/ death, major property damage, significant disruption of business schedule, financial loss/increased cost, or degradation of performance.	Intermediate with Additional Insured Endorsement	Intermediate with Additional Insured Endorsement

The following are examples of appropriate and approved indemnification and insurance clauses with instructions for use that comply with N.D.C.C. § 32-12.2-13 and N.D.C.C. § 32-12.2-17, the recommendations of the office of the Attorney General and the Risk Management Division, and the rules and directives of the Procurement Office. The clauses are intended to either be incorporated into the body of a contract or be used as an appendix to a solicitation (i.e. Informal Request for Bids, Informal Request for Proposal, Invitation for Bid, or Request for Proposal), and then be incorporated into the purchase order or contract.

Remember to consult with Risk Management or legal counsel before making revisions to the recommended clauses.

SAMPLE SERVICE AGREEMENTS

LOW RATED RISK ANALYSIS

Agreements Between State Agencies (Inter-Agency)

Indemnification
The State and Contractor each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

Insurance
The State and Contractor each shall secure and keep in force during the term of this agreement, from an insurance company, government self-insurance pool or government self-retention fund authorized to do business in North Dakota, commercial general liability with minimum limits of liability of $250,000 per person and $1,000,000 per occurrence.

Routine Agreements With Political Subdivisions

Indemnification
The State and Political Subdivision (Contractor) each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

Insurance
Contractor shall secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

i. Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of $250,000 per person and $500,000 per occurrence.
ii. Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of $250,000 per person and $500,000 per occurrence.
iii. Workers compensation coverage meeting all statutory requirements.

The insurance coverages listed above must meet the following additional requirements:

1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. The amount of any deductible or self retention is subject to approval by the State.
2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
3) The insurance required in this agreement, through a policy or endorsement, shall include a provision that the policy and endorsements may not be canceled or modified without thirty (30) days' prior written notice to the undersigned State representative.
4) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement.
5) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.

Professional Services Agreements Not Requiring On-site Services

Indemnification

The State and Contractor each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.
2) Professional errors and omissions, including a three year "tail coverage endorsement," with minimum liability limits of $1,000,000 per occurrence and in the aggregate.
3) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of $250,000 per person and $500,000 per occurrence.
4) Workers compensation coverage meeting all statutory requirements.

The insurance coverages listed above must meet the following additional requirements:

1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. The amount of any deductible or self retention is subject to approval by the State.
2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.

3) The insurance required in this agreement, through a policy or endorsement, shall include a provision that the policy and endorsements may not be canceled or modified without thirty (30) days' prior written notice to the undersigned State representative.
4) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement.
5) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.

MODERATE RATED RISK ANALYSIS

Professional Services Agreements Requiring On-site Services

Indemnification

Contractor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from and against claims based on the vicarious liability of the State or its agents, but not against claims based on the State's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. This obligation to defend, indemnify, and hold harmless does not extend to professional liability claims arising from professional errors and omissions. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Contractor also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred if the State prevails in an action against Contractor in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.
2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.
3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.

NOTE: OPTIONAL CLAUSE (4) EMPLOYER'S LIABILITY.

THIS COVERAGE IS RECOMMENDED FOR CONTRACTORS DOMICILED OUTSIDE THE STATE OF NORTH DAKOTA.
DELETE (4) IF CONTRACTING WITH A RESIDENT (NORTH DAKOTA) VENDOR.

OPTION: DELETE IF NOT REQUIRED

4) Employer's liability or "stop gap" insurance of not less than $1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

5) Professional errors and omissions, including a three year "tail coverage endorsement," with minimum liability limits of $1,000,000 per occurrence and in the aggregate.

The insurance coverages listed above must meet the following additional requirements:

NOTE: OPTIONAL SENTENCE IN (1)

"THE AMOUNT OF ANY DEDUCTIBLE OR SELF-RETENTION IS SUBJECT TO APPROVAL BY THE STATE."

THIS SENTENCE IS NEEDED WHEN THERE IS A QUESTION ABOUT THE FINANCIAL WHEREWITHAL OF THE VENDOR TO SELF RETAIN THE EXPOSURE. THIS REQUIREMENT DOES NOT PERTAIN TO LARGE, FINANCIALLY VIABLE POTENTIAL VENDORS.

1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor.

   OPTIONAL SENTENCE: DELETE IF NOT USED
   The amount of any deductible or self-retention is subject to approval by the State.

2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
3) The duty to defend, indemnify, and hold harmless the State under this agreement shall not be limited by the insurance required in this agreement.
4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies.
5) The insurance required in this agreement, through a policy or endorsement, shall include:
   a) "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;
   b) a provision that the policy and endorsements may not be canceled or modified without thirty days' prior written notice to the undersigned State representative;
   c) a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;
   d) a provision that Contractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be in excess of the Contractor's insurance and shall not contribute with it;
   e) cross liability/severability of interest for all policies and endorsements;
   f) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;
   g) The insolvency or bankruptcy of the insured Contractor shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Contractor from meeting the retention limit under the policy.

NOTE: SENTENCE (6)

WHEN AN ADDITIONAL INSURED ENDORSEMENT IS REQUIRED IT MAY TAKE UP TO 90 DAYS UNTIL THE INSURANCE CARRIER PROVIDES IT. MAKE SURE THAT YOU VERIFY RECEIPT OF THE ENDORSEMENT WITHIN 90 DAYS.

6) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

Default For Routine Non-Professional Service Contracts

Indemnification

Contractor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from and against claims based on the vicarious liability of the State or its agents, but not against claims based on the State's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Contractor also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred if the State prevails in an action against Contractor in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.
2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.
3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.

NOTE: OPTIONAL CLAUSE (4) EMPLOYER'S LIABILITY.

THIS COVERAGE IS RECOMMENDED FOR CONTRACTORS DOMICILED OUTSIDE THE STATE OF NORTH DAKOTA.
DELETE (4) IF CONTRACTING WITH A RESIDENT (NORTH DAKOTA) VENDOR.

OPTION: DELETE IF NOT REQUIRED

4) Employer's liability or "stop gap" insurance of not less than $1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

NOTE: OPTIONAL SENTENCE IN (1)

"THE AMOUNT OF ANY DEDUCTIBLE OR SELF-RETENTION IS SUBJECT TO APPROVAL BY THE STATE."

THIS SENTENCE IS NEEDED WHEN THERE IS A QUESTION ABOUT THE FINANCIAL WHEREWITHAL OF THE VENDOR TO SELF RETAIN THE EXPOSURE. THIS REQUIREMENT DOES NOT PERTAIN TO LARGE, FINANCIALLY VIABLE POTENTIAL VENDORS.

1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor.

   OPTIONAL SENTENCE: DELETE IF NOT USED
   The amount of any deductible or self-retention is subject to approval by the State.

2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
3) The duty to defend, indemnify, and hold harmless the State under this agreement shall not be limited by the insurance required in this agreement.
4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies.
5) The insurance required in this agreement, through a policy or endorsement, shall include:
   a) a "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;
   b) a provision that the policy and endorsements may not be canceled or modified without thirty days' prior written notice to the undersigned State representative;
   c) a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;
   d) a provision that Contractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be in excess of the Contractor's insurance and shall not contribute with it;
   e) cross liability/severability of interest for all policies and endorsements;
   f) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;
   g) The insolvency or bankruptcy of the insured Contractor shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Contractor from meeting the retention limit under the policy.

NOTE: SENTENCE (6)

WHEN AN ADDITIONAL INSURED ENDORSEMENT IS REQUIRED IT MAY TAKE UP TO 90 DAYS UNTIL THE INSURANCE CARRIER PROVIDES IT. MAKE SURE THAT YOU VERIFY RECEIPT OF THE ENDORSEMENT WITHIN 90 DAYS.

6) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

Agreements With Political Subdivisions When Subcontractor Will Be Hired By Political Subdivision

The following language should be added to the appropriate indemnification and insurance requirements for the subcontractor after a completed analysis if the risks of the subcontract as explained earlier in this section.

Indemnification

State and Political Subdivision each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement. In addition, Political Subdivision shall require all subcontractors, other than state employed subcontractors, prior to commencement of an agreement between Political Subdivision and the subcontractor, to:

Insert Default Vicarious Liability Indemnification Language

Insurance

The State and Political Subdivision each shall secure and keep in force during the term of this agreement, from an insurance company, government self-insurance pool or government self-retention fund authorized to do business in North Dakota, commercial general liability with minimum limits of liability of $250,000 per person and $1,000,000 per occurrence.

In addition, Political Subdivision shall require all subcontractors, other than state employed subcontractors, prior to commencement of an agreement between Political Subdivision and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

Insert Default Vicarious Liability Insurance Language

HIGH RATED RISK ANALYSIS

Agreements Requiring More Stringent Indemnification

For example, contracts for construction, alteration, renovation, or maintenance of a building, structure, highway, road, bridge, water line, railroad right of entry, sewer line, oil line, gas line, appurtenance, appliance or other improvement to real property, including any moving, demolition or excavation, carnival rides.

NOTE: Use of the following provisions requires authorization from OMB Director's Designee. Use SFN 58571 to obtain authorization.

Indemnification

Contractor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from claims resulting from the performance of the contractor or its agent, including all costs, expenses and attorneys' fees, which may in any manner result from or arise out of this agreement. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Contractor also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.
2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.
3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.

NOTE: OPTIONAL CLAUSE (4) EMPLOYER'S LIABILITY.

THIS COVERAGE IS RECOMMENDED FOR CONTRACTORS DOMICILED OUTSIDE THE STATE OF NORTH DAKOTA.
DELETE (4) IF CONTRACTING WITH A RESIDENT (NORTH DAKOTA) VENDOR.

OPTION: DELETE IF NOT REQUIRED

4) Employer's liability or "stop gap" insurance of not less than $1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

NOTE: OPTIONAL SENTENCE IN (1)

"THE AMOUNT OF ANY DEDUCTIBLE OR SELF-RETENTION IS SUBJECT TO APPROVAL BY THE STATE."

THIS SENTENCE IS NEEDED WHEN THERE IS A QUESTION ABOUT THE FINANCIAL WHEREWITHAL OF THE VENDOR TO SELF RETAIN THE EXPOSURE. THIS REQUIREMENT DOES NOT PERTAIN TO LARGE, FINANCIALLY VIABLE POTENTIAL VENDORS.

1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor.

   OPTIONAL SENTENCE: DELETE IF NOT USED
   The amount of any deductible or self-retention is subject to approval by the State.

2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
3) The State will be defended, indemnified, and held harmless to the full extent of any coverage actually secured by the Contractor in excess of the minimum requirements set forth above. The duty to indemnify the State under this agreement shall not be limited by the insurance required in this agreement.
4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies.
5) The insurance required in this agreement, through a policy or endorsement, shall include:
   a) a "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;
   b) a provision that the policy and endorsements may not be canceled or modified without thirty days' prior written notice to the undersigned State representative;
   c) a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;
   d) a provision that Contractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be in excess of the Contractor's insurance and shall not contribute with it;
   e) cross liability/severability of interest for all policies and endorsements;
   f) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;
   g) The insolvency or bankruptcy of the insured Contractor shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Contractor from meeting the retention limit under the policy.

NOTE: SENTENCE (6)

WHEN AN ADDITIONAL INSURED ENDORSEMENT IS REQUIRED IT MAY TAKE UP TO 90 DAYS UNTIL THE INSURANCE CARRIER PROVIDES IT. MAKE SURE THAT YOU VERIFY RECEIPT OF THE ENDORSEMENT WITHIN 90 DAYS.

6) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

If Contractor's insurance carrier cannot provide the insurance requirements listed above, Contractor will be required to purchase a project-specific insurance policy on behalf of State including but not limited to an Owner's Protective Liability insurance policy or a Project Management Protective Liability insurance policy with an occurrence limit of not less than $1,000,000 and an aggregate of $2,000,000. Said insurance shall be kept in force until the project is accepted by State.

For some large construction projects it may be determined that the most effective insurance would be the purchase of All Risk Builder's Risk coverage. Requirements for such coverage should include:

All Risk Builder's Risk insuring the interest of the State, contractor(s) and subcontractors of all tiers including coverage on an All Risk basis, including but not limited to, coverage against fire, lightning, wind damage, hail, explosion, riot or civil commotions, aircraft and other vehicles, collapse, flood, earth movement, and coverage available under the so-called Installation Floater. The policy(ies) for such coverage shall be secured and maintained by contractor in an amount equal to the Full Completed Value of the project. Any deductible amount under the policy(ies) shall be the sole responsibility of the Contractor.

For operations involving a risk of environmental pollution such as a ruptured pipeline, contractors should be required to provide proof of pollution liability coverage. Requirements should include:

Pollution Liability. Contractor shall provide Contractor's Pollution Liability coverage for Personal Injury, Property Damage and Cleanup Cost arising from pollution conditions caused by the operations of the Contractor for limits of $5,000,000. Occurrence coverage is preferred but coverage may be provided on a claims-made form that includes a three year tail coverage endorsement. Coverage shall include contractual liability coverage for claims arising out of liability of subcontractors, loading and unloading, unlimited complete operations, and non-owned disposal site coverage (if applicable).

Default (Moderate Risk) Lease Indemnification And Insurance Provisions
If the terms of the Lease **DO** require the landlord to provide snow and ice removal and maintenance on walkways and parking lots or to maintain common areas, or if it is likely members of the public will visit the facility.

Indemnification
Lessor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from and against claims based on the vicarious liability of the State or its agents, but not against claims based on the State's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. The legal defense provided by Lessor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Lessor also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred if the State prevails in an action against Lessor in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance
Lessor shall secure and keep in force during the term of this agreement and Lessor shall require all subcontractors, prior to commencement of an agreement between Lessor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.
2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.
3) Property insurance insuring the full and true value of all Landlord's (or Tenant's) real and personal property located on or in the building in which the leased premises are located for all losses.
4) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.

NOTE: OPTIONAL CLAUSE (5) EMPLOYER'S LIABILITY.

THIS COVERAGE IS RECOMMENDED FOR CONTRACTORS DOMICILED OUTSIDE THE STATE OF NORTH DAKOTA.
DELETE (5) IF CONTRACTING WITH A RESIDENT (NORTH DAKOTA) VENDOR.

OPTION: DELETE IF NOT REQUIRED

5) Employer's liability or "stop gap" insurance of not less than $1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

NOTE: OPTIONAL SENTENCE IN (1)

"THE AMOUNT OF ANY DEDUCTIBLE OR SELF-RETENTION IS SUBJECT TO APPROVAL BY THE STATE."

THIS SENTENCE IS NEEDED WHEN THERE IS A QUESTION ABOUT THE FINANCIAL WHEREWITHAL OF THE VENDOR TO SELF RETAIN THE EXPOSURE. THIS REQUIREMENT DOES NOT PERTAIN TO LARGE, FINANCIALLY VIABLE POTENTIAL VENDORS.

1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor.

   OPTIONAL SENTENCE: DELETE IF NOT USED
   The amount of any deductible or self-retention is subject to approval by the State.

2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
3) The duty to defend, indemnify, and hold harmless the State under this agreement shall not be limited by the insurance required in this agreement.
4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies.
5) The insurance required in this agreement, through a policy or endorsement, shall include:
   a) a "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;
   b) a provision that the policy and endorsements may not be canceled or modified without thirty days' prior written notice to the undersigned State representative;
   c) a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;
   d) a provision that Contractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be in excess of the Contractor's insurance and shall not contribute with it;
   e) cross liability/severability of interest for all policies and endorsements;
   f) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;
   g) The insolvency or bankruptcy of the insured Contractor shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Contractor from meeting the retention limit under the policy.

NOTE: SENTENCE (6)

WHEN AN ADDITIONAL INSURED ENDORSEMENT IS REQUIRED IT MAY TAKE UP TO 90 DAYS UNTIL THE INSURANCE CARRIER PROVIDES IT. MAKE SURE THAT YOU VERIFY RECEIPT OF THE ENDORSEMENT WITHIN 90 DAYS.

6) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

Low Risk Lease

If the terms of the Lease do not require the landlord to provide snow and ice removal and maintenance on walkways and parking lots or to maintain common areas, or if it is unlikely members of the public will visit the facility, and for routine political subdivision lease agreements, the following indemnification and insurance language is acceptable.

<u>Indemnification</u>

Lessor and Lessee each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

<u>Insurance</u>

Landlord (or Tenant) shall secure and keep in force during the term of this agreement, from insurance companies or a government self-insurance pool authorized to do business in the state of North Dakota, the following insurance coverages:

1) Commercial general liability, including contractual coverage, with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.
2) Workers' compensation coverage meeting all statutory requirements.
3) Property insurance insuring the full and true value of all Landlord's (or Tenant's) real and personal property located on or in the building in which the leased premises are located for all losses.

The insurance coverages listed above must meet the following additional requirements:

1) Any deductible or self retention amount of other similar obligations under the policies shall be the sole responsibility of the Landlord (or Tenant). The amount of any deductible or self retention is subject to approval by the State.
2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State. "Follows form" means the excess policy must be written with the same terms and conditions as the policy to which it is excess.
3) Landlord (or Tenant) shall furnish a certificate of insurance evidencing the required coverages are in effect and providing that the coverages may not be canceled or modified without thirty (30) days prior written notice to State.

4) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.

Limiting the Liability of Certain Vendors

The need for State agencies and facilities to purchase software, communication, and electronic equipment has presented a new challenge for state procurement - that of a vendor's request to limit its liability.

This issue is not unique to North Dakota. In fact, state and corporate members of the National Association of Chief Information Officers of the States (NASCIO) formed a subcommittee to address the issue because it is of nationwide concern. That subcommittee published the *NASCIO Procurement Subcommittee's Recommendations on Liability Limitations for State IT Contracting*. That document contains specific recommendations for contractually addressing liability for direct and indirect damages in IT contracts. It recommends that states *should hold* vendors responsible for direct damages arising out of a contract; and that states *should not hold* vendors responsible for indirect damages liability unless responsibility is specifically allocated to the vendor in the contract.

By way of defining the difference between direct and indirect damages - *direct damages* are compensation for losses associated with the value of the performance contracted for as contrasted to *indirect damages* which are compensation for the loss of a benefit expected from the use of the equipment. For example, if a computer program is purchased for $1,000 and, if merchantable, would yield profits or cost savings to the business of $10,000, if that program is defective, the "direct" damages would be $1,000.00. The $10,000 lost profits or expected cost savings are consequential or "indirect" damages.

The 2005 Legislature enacted N.D.C.C. § 32-12.2-15 which provides a method for state agencies or facilities to negotiate with vendors to limit a vendor's indirect damages liability for software, communication, or electronic equipment contracts if it is determined by the Attorney General and the Director of OMB that it is in the State's best interest to do so.

The process a State agency or facility should use to obtain that authorization is to complete SFN 54345 form, the *Application for Approval to Limit the Liability of a Vendor*. The form, along with a copy of the proposed contract and Statement of Work can be filed with OMB or the office of the Attorney General for processing. OMB, through Risk Management, works with ITD to analyze the exposure presented by a proposed agreement and recommends what level of limit of a vendor's liability would be acceptable, if any.

Remember, without obtaining authorization from the Director of OMB and the Attorney General, a state employee would not have the authority to limit a vendor's liability and the act of signing a contract without proper authorization would probably be outside the scope of the employee's employment.

CERTIFICATES OF INSURANCE AND ENDORSEMENTS

Contractors are required to provide the State with a Certificate of Insurance and/or Endorsement documenting the required coverages are in place, prior to commencement of the contract. When an additional insured endorsement is required it may take up to 90 days until the insurance carrier will provide it. Make sure that you verify receipt of the endorsement within 90 days. Visit the OMB State Procurement Office website at www.nd.gov/spo/ under Solicitation Templates for a sample letter of instruction for the successful vendor.

Certificate of Insurance: A completed Certificate of Insurance should contain the following information:

- Name and address of agent, phone number and fax number;
- Name of insurance company(ies) and policy number(s);
- Policy period;
- Name and street address of insured;
- Description of coverage(s);
- Name/Number of Project;
- Policy limits as provided in the contract;
- Special instructions or terms of coverage (for example: identification of project or operations with respect to certificate being issued);
- State and/or agency listed as the certificate holder; and
- Signature of the insurer's agent or representative and date.

Endorsement: When the contract terms provide that the State must be named as an "additional insured," an endorsement is required. The only way that an entity other than the named insured (contractor) is protected under the terms of the contractor's insurance policy is by adding, by endorsement, an additional insured. Under these circumstances, the certificate of insurance should note the additional insured ("Special instruction or terms of coverage" should show the addition of the State and/or agency as additional insured and/or waivers of subrogation). In addition, an endorsement needs to be provided prior to commencement of the contract.

Isn't The Certificate Of Insurance Enough If It Names The State As An Additional Insured?

An agent issues a certificate of insurance and, unless the agent is authorized to bind an insurance company, is not documentation by the contractor's insurer that the coverage is in place. A certificate of insurance does not confer rights upon a certificate holder or alter, extend, or amend policy coverage. The only proof that an insurance company has knowledge of and agrees to accept the contractual indemnification obligation of the contractor is an endorsement. Without an endorsement documenting the required coverage is in place, a contractor may not have the financial resources to comply with the contract terms. The endorsement should conform to the insurance requirement portion of the contract detailing the endorsement's terms.

SAMPLE LETTER WHEN CERTIFICATE IS INADEQUATE

Date:

To:

To Whom It May Concern:

Thank you for forwarding the Certificate of Insurance. After review, the certificate does not reflect required limits and/or coverages as outlined in the contract dated _____. Please amend the certificate form to reflect the following:

[INSERT THE INSURANCE PROVISIONS FROM CONTRACT]

Please forward the amended Certificate by ____(10 days)___. If you have any questions, please call me at _____.

Sincerely,

SAMPLE LETTER FOR EXPIRATION OF CERTIFICATE OF INSURANCE

Date:

To:

To Whom It May Concern:

Our records indicate that your Certificate of Insurance currently on file with us has either expired or will be expiring. Please have your insurance agent send us a new Certificate of Insurance evidencing the following:

[INSERT THE INSURANCE PROVISIONS FROM CONTRACT]

[Delete if not using Intermediate and Additional Insured Endorsement]
Further, ensure that the state of North Dakota, ***Agency Name*** is named as an additional insured and provide an Endorsement to the policy within 30-60 days documenting that the required coverage is in place.

If you have any questions, please call me at _____.

Sincerely,

UNDERSTANDING THE CERTIFICATE OF INSURANCE

PRODUCER: Insurance agent/broker who issues certificate

NAME OF INSURED: Must be legal name and address of contracting party for whom confirmation of coverage is desired[1]

TYPES OF INSURANCE: Must include the types of insurance required by contract

POLICY FORM: Indicates whether "claims made" or "occurrence" - a claims made policy covers claims first made (*reported or filed*) against the insured during the policy period; an occurrence policy covers incidents that occur *during* the policy period, regardless of when the claim is filed

DESCRIPTION OF OPERATIONS/ LOCATIONS/ SPECIAL ITEMS: Includes additional insured references and/or job specific information – copy of endorsement required[2]

CERTIFICATE HOLDER: Name and address of the entity for whom the certificate is being prepared

CERTIFICATE OF INSURANCE

ISSUE DATE (MM/DD/YY)

PRODUCER

AGENT NAME
ADDRESS
CITY STATE ZIP
PHONE NUMBER

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURED

CONTRACTOR NAME
ADDRESS
CITY STATE ZIP

COMPANIES AFFORDING COVERAGE

Company A CNA Insurance Company
Company B
Company C
Company D
Company E

COVERAGES

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIODS 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

CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
A	GENERAL LIABILITY					
	X Commercial General Liability	XXX			General Aggregate	$1,000,000
	Claims Made [X] Occur				Products-Comp/OP Agg	$1,000,000
	Owner's & Contractor's Prot				Personal & Adv Injury	$1,000,000
	X Contractual Liability				Each Occurrence	$1,000,000
	X Stop Gap Employers Liability	(If part of this policy)			Fire Damage (Any one fire)	XXXX
					Med Exp (Any one person)	XXXX
B	AUTOMOBILE LIABILITY					
	X Any Auto	XXX			Combined Single Limit	$1,000,000
	All Owned Autos				OR	
	Scheduled Autos				Bodily Injury and Property Damage	
	Hired Autos				Per Person	$1,000,000
	Non-Owned Autos				Per Accident	$1,000,000
	EXCESS LIABILITY				Each Occurrence	
	Umbrella Form				Aggregate	
	Other than Umbrella Form					
C	WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY	(If part of this policy)			X Statutory Limits	
					Each Accident	$1,000,000
					Disease - Policy Limit	$1,000,000
					Disease - Each Employee	$1,000,000
D	PROFESSIONAL ERRORS AND OMISSIONS				Each Claim	$1,000,000
	3 Year Tail X				Annual Aggregate	$1,000,000

DESCRIPTION OF OPERATIONS/LOCATIONS/SPECIAL ITEMS

1. Description of Project/Location
2. The following provisions shall be endorsed onto the Contractor's General Liability Policy. (Attach a copy of each endorsement)
   - State of North Dakota and its agencies, officers and employees (State) are named as Additional Insured
   - The Insurer waives all rights of subrogation against the State
   - Any attorney who represents the State must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. 54-12-08.
   - This insurance policy shall be primary as respects any insurance, self-insurance or self-retention maintained by the State and any insurance, self-insurance or self-retention maintained by the State shall be in excess of this policy and shall not contribute with it.
   - Cross Liability / Severability of Interest.

CERTIFICATE HOLDER

STATE OF NORTH DAKOTA
AGENCY NAME
ADDRESS
CITY STATE ZIP

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL MAIL **30 DAYS** WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT.

AUTHORIZED REPRESENTATIVE

COMPANIES AFFORDING COVERAGE: Name of insurance companies providing coverage

POLICY NUMBER(S)

POLICY PERIOD: Effective date must commence prior to or coincidental with effective date of contract; if occurrence form, expiration date must be on or after termination of contract

LIMITS OF INSURANCE: Must be the same or greater than required by contract

NOTICE OF CANCELLATION: Sets out the number of days in which the insurance company will try to mail a written notice to the certificate holder stating its intent to cancel the policy of insurance prior to its expiration date = 30 days

AUTHORIZED REPRESENTATIVE: Must be signed, *not* stamped

1. Ensure that the name of insured is the same as the party entering into the contract
2. Ensure that coverages are consistent with contract requirements

SAMPLE VICARIOUS LIABILITY ENDORSEMENT

COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION – VICARIOUS LIABILITY – PRIMARY AND NONCONTRIBUTORY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:
Project:
Location of Project:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

A. SECTION II – WHO IS AN INSURED is amended to include as an additional insured the person or organization shown in the Schedule, subject to the following provisions:

1. This insurance applies only to the extent that you are held liable for your ongoing operations performed for the additional insured shown in the Schedule.

2. This insurance does not apply to any "bodily injury" or "property damage" resulting from any act or omission by, or willful misconduct of the additional insured shown in the Schedule, whether the sole or a contributing cause of the loss. The coverage afforded to the additional insured is limited solely to the additional insured's "vicarious liability" that is a specific and direct result of your conduct.

3. The insurance provided to the person or organization shown in the schedule is Primary Insurance and we will not seek contribution from any other insurance available to that additional insured.

B. With respect to the insurance afforded to this additional insured, the following exclusion is added:

2. Exclusions

This insurance does not apply to "bodily injury" or "property damage" occurring after:

(1) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed; or

(2) That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

C. "Vicarious liability" as used in this endorsement means liability that is imposed on the additional insured solely by virtue of its relationship with you, and not due to any act or omission of the additional insured.

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SAMPLE INTERMEDIATE ADDITIONAL INSURED ENDORSEMENT

ENDORSEMENT TO
GENERAL LIABILITY COVERAGE - **Intermediate**

IT IS HEREBY UNDERSTOOD AND AGREED THAT THE POLICY IS AMENDED AS FOLLOWS:

1. State of North Dakota and its agencies, officers and employees (State) are named as Additional Insured.

2. The Insurer waives all rights of subrogation against the State.

3. Any attorney who represents the State must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. 54-12-08).

4. This insurance policy shall be primary as respects any insurance, self-insurance or self-retention maintained by the State and any insurance, self-insurance or self-retention maintained by the State shall be in excess of this policy and shall not contribute with it.

5. Cross Liability / Severability of Interest.

Insured _____

Policy #_____ issued by _____
Insurance Company

Effective date _____

DEFINITIONS OF COMMON INSURANCE TERMS

(More Definitions Located In the Glossary of the Risk Management Manual)

A

Additional Insured—A person or entity other than the named insured who is protected by the policy, often in regard to a specific interest. This coverage is typically extended through a policy endorsement. Contrast with "Named Insured."

Adjuster—A person who settles claims for insurers.

Aggregate— Cumulative. An aggregate limit of $1 million means that when the total of all claims in a year reaches $1 million, coverage ceases.

All States Endorsement—Automatically extends statutory workers compensation coverage to states where the contractor's new operations are added during the policy term.

B

Bodily Injury—Injury, sickness, or disease sustained by a person, including death resulting therefrom. See also Personal Injury.

Bond—An obligation of the insurance company to protect one against financial loss caused by the acts of another.

Breach—Failure to live up to the warranties or condition of an insurance contract. For example, a fire sprinkler warranty is breached if the sprinklers are not operational, if the failure is from conditions under the insured's control.

C

Cancellation—The termination of an insurance policy or bond before it's expiration by the insured or insurer.

Carrier—An insurance company.

Certificate of Insurance—A form used to convey information (valid only as of the date it is issued) regarding the client's insurance coverages. It does not confer rights upon a certificate holder or alter, extend, or amend policy coverage.

CGL–Commercial General Liability Coverage—Principal form of liability insurance for businesses that provides coverage for bodily injury and property damage, personal and advertising injury, contractual, products and completed operations on an occurrence basis.

Claim--The amount of damage for which a third party seeks reimbursement from the insured and/or insured seeks reimbursement from his or her insurance company. Once the amount has been determined, it becomes a loss. Claim and loss are often used interchangeably. Self-insured losses are often called claims.

Contractual Liability—Coverage for liability assumed under contract.

Coverage—A term used to designate the type of protection provided by an insurance policy.

D

Deductible—An amount of loss to be absorbed by the insured before an insurer becomes liable for payment.

E

Effective Date—The date on which an insurance policy goes into effect starting date.

Employer's Liability--Liability insurance for employers to protect against bodily injury claims resulting from accident or disease of employees not covered by workers compensation. Examples: Employee rejects or is excluded from workers compensation; injuries not covered by workers compensation; suit by spouse; injuries in federal jurisdiction or monopolistic states.

Endorsement—An amendment to an insurance policy that in some way modifies the original contract provisions.

Errors and Omissions-- Commonly referenced as E&O, or professional liability. Applies when requested services require special intellectual ability rather than strict physical activity. Examples: Engineers, accountants, consultants, technology designers/installers, public officials, directors and officers. Medical personnel E&O is often called malpractice coverage.

Exclusions--Specific items identified as not being covered under a particular policy.

F

Follows Form—A requirement that an excess policy to be written with the same terms and conditions as the policy to which it is excess.

H

Hold Harmless Agreement—A clause found in contracts and leases that shifts (or attempts to shift) liability for loss from one party to another.

I

Indemnify/Indemnity—Making "whole" or restoring financially, after a loss.

Indemnity Agreement—Same as a hold harmless agreement.

Insured—The person who has purchased an insurance policy and is protected by it; sometimes also referred to as the "assured."

Insurer—The insurance company.

L

Lessee—A tenant who has signed a lease.

Liability Insurance—Any form of coverage whereby the insured is protected against claims of other parties arising from specified causes.

Limit—The maximum amount the insured can collect under the terms of a policy.

Loss—Any destruction or disappearance of value.

N

Named Insured—Any person, firm or corporation, or any member thereof, specifically designated by name as insured(s) in a policy as distinguished from the others who, though unnamed, are protected under some circumstances. A common application of this latter principle is in auto liability policies wherein by a definition of "insured," coverage is extended to other drivers using the car with the named insured's permission. Other parties can also be afforded protection of an insurance policy through being named an Additional Insured (see definition) through a policy endorsement. Other rights and responsibilities of the Named Insured include: rights to request policy endorsements or additional coverage, terminate policy, receive premium refund; obligations to notify insurer of a claim, pay premiums, and to comply with all other policyholder obligations.

Negligence—Failure to exercise that degree of care that a reasonable person would exercise under the same circumstance.

P

Property Insurance—Insurance that indemnifies an individual or entity with an ownership interest in real or personal property for loss of or damage to property or the loss of business income-producing ability.

R

Reinsurance—A contract to transfer all or a portion of the insurer's (ceding insurance company's) risk, assumed on behalf of its insureds, to another insurer/reinsurer. The reinsurer agrees to reimburse the insurer/ceding insurance company for the claim's reinsured portion. A reinsurer may, in turn, seek reinsurance on some portion of the risk it has reinsured, a process known as "retrocession."

Risk—The chance or probability of financial loss.

S

Self-insurance—Retention of risk. Generally refers to a planned program for financing or otherwise recognizing losses. It is not the same as insurance.

Stop Gap--Specific form developed to provide employer's liability coverage for the employer's activities in monopolistic workers compensation states when the employer is domiciled in a different state.

Subrogation--The right of an insurer to recover from a third party an amount paid on a loss when the third party is at fault.

T

Tail Coverage--Provides for a specific time period after the policy expiration during which the insured can file a claim that occurred but was not reported during the claims-made policy term.

Term--The length of time for which a policy or bond is written.

Third Party--Someone other than the parties directly involved in an action or transaction; someone other than the insured and the insurer.

U

Umbrella or Excess Policy—A broad, high-limit liability policy usually requiring the insured to carry primary or underlying insurance.

V

Vicarious Liability—Requires each party to assume its own liability, but provides additional protection for the State in that the Contractor agrees to be responsible for any liability alleged against the State resulting from the Contractor's sole actions, and provides defense for the State to resolve those allegations.

W

Waiver—The relinquishment of a known right; for example waiver or subrogation under a fire insurance policy.

Waiver of Subrogation—A waiver by the named insured giving up any right of recovery against a third party. For example, in a construction contract, if a contractor provides a waiver of subrogation on a workers' compensation policy, the contractor (or its insurer) would not be able to file a claim against a third party for recovery for injury to an employee occurring on its premises where the construction is taking place. Normally an insurance policy requires that subrogation (recovery) rights be preserved. In commercial property insurance, a written waiver of subrogation rights is permitted if it is executed before the loss occurs.