

OCTOBER  
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*Indemnification and  
Insurance Provisions*  
of the Guidelines  
to Managing  
Contractual Risk

STATE OF NORTH DAKOTA  
OFFICE OF MANAGEMENT & BUDGET

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RISK MANAGEMENT DIVISION  
701-328-7584

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### ***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 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, **agencies must remember that if the agency were to sign a contract agreeing to indemnify a private third party, 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. Ordinarily, there is no need to have this type of clause in most contracts. A modified comparative fault indemnification clause, however, may be considered if the contract will be performed in a jurisdiction that retains joint and several liability.
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 service contracts requiring indemnification.*** While this provision results in having each party assume its own direct 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.

Remember, an agreement between the State and a Political Subdivision may not contain a provision that requires one party to assume the liability of the other or the liability of a third party or to bear the costs of defense of actions against the other or against a third party. However, contractors for political subdivisions can be required to indemnify the State. (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). Except in rare circumstances, agencies should not focus on seeking to have a contractor indemnify an agency for its own active acts of negligence. Rather, the focus should remain on potential derivative claims where the contractor is the primary/actively negligent party. The indemnification clause reinforces the executive decisions made on what activities and responsibilities are delegated to the contractor.

### ***Insurance Requirements for Contractors***

Insurance requirements are designed to ensure that contractors can meet their financial obligations in the event their activities cause property damage, personal injury, or other non-contractual losses. While insurance can be complicated, the guide for recommended insurance requirements is simply to ask what could go wrong under the contract and then making sure that the contractor can financially meet its obligations to address those losses. In most circumstances, a contractor should be required to maintain reasonable insurance coverage and provide written proof of this protection.

- **Commercial General Liability Insurance**

Virtually all businesses maintain some form of Commercial General Liability insurance. This insurance is designed to cover claims involving bodily injury and property damage arising out of the insured contractor's premises, operations, products and completed operations, as well as certain personal and advertising injury claims. Standard Commercial General Liability policies also have contractual liability provisions which are designed to cover a contractor's indemnity obligations as well as mechanisms to make those that engage the services of the contractor an additional insured for claims that arise out of the contractor's work under the contract.

When the activities contemplated under a contract pose some realistic risk of personal injury or property damage, the contractor should generally be required to maintain Commercial General Liability insurance at levels sufficient to meet the identified potential losses. When the risk of loss to the State involves being held responsible for the actions of the contractor, the contractor should be required to maintain levels of insurance that meet or exceed the State's statutory limits of liability. For projects with considerable loss exposure, higher aggregate limits or project specific limits should be considered to mitigate the potential of policy limits being eroded from claims arising from other activities of the contractor.

- **Automobile Liability Insurance**

As with an individual's personal automobile insurance, a Commercial Automobile Liability Insurance policy is designed to cover claims arising from the operation of motor vehicles.

Generally, the need to specify minimum levels of auto liability insurance only arises when the contractual relationship contemplates driving on behalf of the State in furtherance of the contractor's obligations and responsibilities under the contract.

Incidental driving that is not directly in furtherance of contractual obligations and responsibilities, such as an ordinary commute from a business location to an agency location to begin work, ordinarily does not require minimum levels of automobile insurance to be included in the contract.

Contracts that involve the movement of people, goods, materials or driving between multiple work sites generally should require minimum automobile limits consistent with the State's limits of liability.

In situations when a contractor is relying upon a personal automobile policy, an agency should take additional steps to ensure that the contemplated driving activities are not excluded as a business use.

- **Professional Liability Insurance**

This insurance provides coverage for errors and omissions in the provision of professional services.

Contracts that involve specialized intellectual services should consider the need for Professional Liability Insurance. Contracts for attorneys, health care providers, design professionals, accountants and some technology services may require some type of Professional Liability Insurance.

A primary focus should be on agency's ability to detect and correct errors before damages can occur. In those cases when the professional negligence may remain undetected even after the contractual relationship has ended, agencies should include an Extended Reporting Endorsement requirement in the contract.

- **Workers Compensation and Employers Liability/Stop Gap Coverage**

Workers Compensation laws and corresponding coverage requirements vary by state. In most jurisdictions, coverage is secured through commercial insurance policies.

Most standard commercial workers compensation policies include a separate Employers Liability coverage part for liability an employer has to employees for work-related injury that is not imposed by the workers compensation laws. In states that have monopolistic state administered funds such as North Dakota, Employers Liability is not provided through the state administered fund. This Gap in coverage is addressed through a "Stop Gap Endorsement" to the Commercial General Liability policy or the Workers Compensation policy if the employer has operations in states that do not operate a monopolistic fund.

Workers compensation coverage generally only applies to business entities that have employees. Sole proprietorships and other business entities that do not have employees are generally not required to secure workers compensation coverage, although optional voluntary coverage may be available. Personal service contracts and other contracts for which workers compensation coverage is not required should be evaluated to determine whether optional voluntary coverage should be required or whether a waiver of liability provision should be included in the contract.

- **Other Insurance**

Other types of insurance may be warranted depending on the unique risks that arise from the contractual relationship. For example:

- ♦ Contracts that involve vendor hosting of confidential or sensitive information may call for the vendor to maintain a Cyber Liability policy covering third-party claims as well as first party notification and remediation costs following a data breach.
- ♦ Building construction contracts may call for an Owners and Contractors Protective Liability coverage and Builder Risk Insurance.
- ♦ Construction contracts should always be carefully reviewed by legal counsel.
- ♦ When leasing space, it is critical that the contract specifically require the Landlord to maintain property insurance on the building and contents.

## ***Certificates of Insurance***

The primary means of ensuring that a contractor has the insurance required in a contract is through a Certificate of Insurance that is issued by the contractor's insurance agent or broker. A Certificate of Insurance is not part of and does not amend the underlying insurance policies, but rather is simply an indication of the insurance that is in place at that moment in time.

It is impermissible to ask for language on a Certificate of Insurance that does not reflect the actual insurance coverages that are in place.

When an agency is made an additional insured pursuant to a blanket additional insured endorsement, the Certificate of Insurance should indicate that the State is an additional insured to the extent required by contract or other appropriate description.

Contracts that extend beyond the coverage period specified in a Certificate of Insurance should be evaluated to determine whether the Contractor should be required to provide updated current Certificates of Insurance throughout the term of the contract. In many contracts requiring the Contractor to provide updated Certificates only in the event of any changes in coverage is adequate.

## ***Additional Insureds***

A common requirement in many commercial transactions is for one party to be made an Additional Insured on the other party's insurance, typically the commercial general liability policy and any umbrella or excess policies. The purpose is to provide a direct right of access to defense and indemnity through the other party's insurance.

A party to a contract can be made an Additional Insured through a manual endorsement, whereby the party is specifically included as an Additional Insured by name on an endorsement to the policy or through a blanket Additional Insured endorsement typically whereby anyone the contractor is required by contract to include as an Additional Insured is automatically provided that coverage.

Most transactions that involve the State being made an Additional Insured will be through a blanket Additional Insured endorsement. This is perfectly fine in most transactions, but drafters should be aware that Additional Insured coverage through a blanket Additional Insured endorsement typically is limited to the contractor's ongoing operations and does not extend to completed operations.

## ***Determining Appropriate Indemnification and Insurance Provisions***

The 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 for intellectual services when the contractor will not be providing on-site services, or only limited on-site services presenting a low risk of harm. (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.)
  - b) 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.

- c) 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 members of the public will not visit the leased property.
- d) Most standard product purchases that do not involve ongoing on-site maintenance.

Obtain a certificate of insurance documenting required coverages are in place prior to executing or before beginning work under the contract.

2. **Limited Vicarious Indemnification with Additional Insured Endorsement – This is the default indemnification provision for State service contracts and leases.** When a contractual relationship poses some realistic risk of claims being brought against the State arising from the contractor's activities and operations, the contract should require the Contractor to indemnify the State. In most service contracts and leases, the indemnity obligation should be limited to vicarious claims - those 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. In addition, the State must be made an additional insured on the Contractor's Commercial General Liability insurance, providing coverage for all claims that arise out the Contractor's work.

Obtain a certificate of insurance documenting required coverages are in place **prior** to executing or before beginning work under the contract. When a manual 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 could 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 this indemnification provision in an agreement.

4. **No Indemnification or Insurance Requirements** – should be used in contracts between state agencies and with political subdivisions if no subcontractor will be used. Where a contract with a political subdivision contemplates a subcontractor directly providing services on behalf of the State or on State property, the contract should require the subcontractor to indemnify the State and maintain insurance commensurate with the risk. In addition, purchases of routine "off the shelf" products that do not pose any realistic risk of harm and that are delivered through common carrier generally do not require any indemnification or insurance provisions.

## ***Risk Analysis***

Before making decisions about indemnification and insurance requirements, it is necessary to evaluate the potential risks associated with the contract. The identification of potential risks generally requires a thorough understanding of the scope of the contract and may involve discussions with others more familiar with it.

The Risk Management Analysis Matrix below is a tool to assist with the risk assessment and determination of the indemnification and insurance requirements that appropriately address the specific risks associated with the contract. **The Matrix is not a substitute for proper analysis and identification of the specific risks that arise under a contract and tailoring the contract language to meet the identified risks.**

Following the Matrix are examples of indemnification and insurance clauses that can be incorporated into the body of a contract, **as appropriate**, 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.

***Note: Not every recommended insurance requirement will apply to every contemplated contract.***

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**Remember to consult with legal counsel and/or Risk Management when addressing these recommended terms and clauses.**

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**RISK MANAGEMENT ANALYSIS MATRIX:** provides an overview of the risk analysis process.

<b>RISK MANAGEMENT ANALYSIS MATRIX</b>			
<b>September 2017</b>		<b>Indemnification and Insurance Provisions</b>	<b>Indemnification and Insurance Provisions</b>
<b>Rating</b>	<b>Definition</b>	<b>Commodities</b>	<b>Services</b>
<p style="text-align: center;"><u>LOW</u></p> <ul style="list-style-type: none"> <li>▪ Inter-Agency &amp; Political Subdivision;</li> <li>▪ Professional Services <b>Not</b> Requiring On-Site Services or Low Risk On-Site Activities;</li> <li>▪ Non-Professional Services Posing Little Realistic Risk of Harm or Damage To Property; or</li> <li>▪ Contracted Services That Do <b>Not</b> Involve Handling of Confidential Information</li> </ul>	<p>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.</p>	<p style="text-align: center;">None</p> <p style="text-align: center;">(The purchase of routine off the shelf products.)</p>	<p style="text-align: center;">None</p> <p style="text-align: center;">or</p> <p style="text-align: center;">No Indemnification of Liability with Certificate of Insurance</p>
<p style="text-align: center;"><u>MODERATE</u></p> <ul style="list-style-type: none"> <li>▪ <b>Professional</b> Services Agreements Requiring Significant On-Site Services</li> </ul>	<p>Special intellectual ability required to perform the contracted services some of which will be performed on-site. <b>On-site</b> generally involves a significant presence or activity giving rise to a risk of injury or damage to property, rather than a single visit or low risk activities such as classroom training.</p>	N/A	<p>Limited Vicarious Liability with Certificate of Insurance and Additional Insured Endorsement and Errors and Omissions Coverage</p>
<p style="text-align: center;"><u>MODERATE</u></p> <ul style="list-style-type: none"> <li>▪ Routine <b>Non-Professional</b> Services;</li> <li>▪ Some Unique or Specially Made Products;</li> <li>▪ Routine <u>Leases</u></li> </ul>	<p>Potential to cause injury/illness, property damage, some disruption of business schedule, financial loss/increased cost, or degradation of performance.</p>	<p>Limited Vicarious Liability with Certificate of Insurance and Additional Insured Endorsement</p>	<p>Limited Vicarious Liability with Certificate of Insurance and Additional Insured Endorsement</p>
<p style="text-align: center;"><u>HIGH RISK</u></p> <ul style="list-style-type: none"> <li>▪ Requires More Stringent Provisions – Requires Authorization From OMB Director’s Designee <u>SFN 58571</u></li> </ul>	<p>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.</p>	<p>Intermediate with Certificate of Insurance and Additional Insured Endorsement</p>	<p>Intermediate with Certificate of Insurance and Additional Insured Endorsement</p>

# SAMPLE SERVICE AGREEMENTS

## LOW RATED RISK

### Agreements Between State Agencies (Inter-Agency) and With Political Subdivisions

#### Indemnification

None

#### Insurance

None

### Professional/Non-Professional Services Agreements Involving Low Risk Activities

#### Indemnification

None **OR:** 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 \$1,000,000 per occurrence.
- 2) Professional errors and omissions with minimum limits of \$1,000,000 per claim and in the aggregate, Contractor shall continuously maintain such coverage during the contact period and for three years thereafter. In the event of a change or cancellation of coverage, Contractor shall purchase an extended reporting period to meet the time periods required in this section.
- 3) 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.
- 4) Workers compensation coverage meeting all statutory requirements.

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

- 1) 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.
- 2) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement.
- 3) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.
- 4) Contractor shall provide at least 30 day notice of any cancellation or material change to the policies or endorsements. An updated, current certificate of insurance shall be provided in the event of any change to a policy.

**Professional Services Agreements Requiring Significant  
On-site Presence or Activity**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. Any attorney appointed to represent 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. Contractor also agrees to reimburse the State 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 \$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.
- 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 with minimum limits of \$1,000,000 per claim and in the aggregate, Contractor shall continuously maintain such coverage during the contact period and for three years thereafter. In the event of a change or cancellation of coverage, Contractor shall purchase an extended reporting period to meet the time periods required in this section.

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. **Optional Provision:** 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 on a primary and noncontributory basis, 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 that shall not be limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of the Contractor.

- 5) A "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State.
- 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.
- 8) Contractor shall provide at least 30 day notice of any cancellation or material change to the policies or endorsements. Contractor shall provide on an ongoing basis, current certificates of insurance during the term of the contract. A renewal certificate will be provided 10 days prior to coverage expiration. **Optional Provision:** An updated, current certificate of insurance shall be provided in the event of any change to a policy.

### Routine Non-Professional Service Contracts Requiring On-site Services or Involving Moderate Risk

#### 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. Any attorney appointed to represent 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. Contractor also agrees to reimburse the State 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 \$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.
- 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:

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. **Optional Provision:** 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 on a primary and noncontributory basis, 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 that shall not be limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of the Contractor.
- 5) A "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State.
- 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.
- 8) Contractor shall provide at least 30 day notice of any cancellation or material change to the policies or endorsements. Contractor shall provide on an ongoing basis, current certificates of insurance during the term of the contract. A renewal certificate will be provided 10 days prior to coverage expiration. **Optional Provision:** An updated, current certificate of insurance shall be provided in the event of any change to a policy

## **HIGH RATED RISK**

### **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.

**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, except claims based upon the State's 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. Any attorney appointed to represent 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. Contractor also agrees to reimburse the State 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 \$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.
- 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:

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. **Optional Provision:** 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 on a primary and noncontributory basis, 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 that shall not be limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of the Contractor.
- 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 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;
  - c) cross liability/severability of interest for all policies and endorsements;
  - d) 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;
  - e) 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.
- 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.
- 8) Contractor shall provide at least 30 day notice of any cancellation or material change to the policies or endorsements. Contractor shall provide on an ongoing basis, current certificates of insurance during the term of the contract. A renewal certificate will be provided 10 days prior to coverage expiration.

For high risk contracts, agencies should consult with the Risk Management Division to evaluate whether to require notice from the carrier through an endorsement.

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:

Builder's Risk insuring the interest of the State, contractor(s) and subcontractor(s) 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 completed operations, and non-owned disposal site coverage (if applicable).

## LEASES

### MODERATE Risk Lease

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 reimburse the State 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 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 \$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 Lessor's real property and personal property located on or in the building in which the leased premises are located for all losses. Lessor waives any right to seek compensation from State for any covered losses for which this required insurance is to apply. **Optional Provision:** Lessor shall require all other tenants to have property insurance covering the full and true value of all of tenant's personal property located on or in the building together with a waiver of subrogation.
- 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.
- 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:

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. **Optional Provision:** 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 on a primary and noncontributory basis, 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 that shall not be limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of the Contractor.
- 5) A "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State.
- 6) The Lessor 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.
- 8) Lessor shall provide at least 30 day notice of any cancellation or material change to the policies or endorsements. Lessor shall provide on an ongoing basis, current certificates of insurance during the term of the contract. A renewal certificate will be provided 10 days prior to coverage expiration. **Optional Provision:** An updated, current certificate of insurance shall be provided in the event of any change to a policy.

#### 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, the following indemnification and insurance language is acceptable. ***Omit indemnification language for leases with political subdivisions.***

#### Indemnification

None or 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.

## Insurance

Lessor 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 \$1,000,000 per occurrence.
- 2) Workers' compensation coverage meeting all statutory requirements.
- 3) Property insurance insuring the full and true value of all Lessor's real property and personal property located on or in the building in which the leased premises are located for all losses. Lessor waives any right to seek compensation from State for any covered losses for which this required insurance is to apply.  
**Optional Provision:** Lessor shall require all other tenants to have property insurance covering the full and true value of all of tenant's personal property located on or in the building together with a waiver of subrogation.

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).
- 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) Lessor shall furnish a certificate of insurance evidencing the required coverages are in effect prior to commencement of the agreement.
- 4) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.
- 5) Lessor shall provide at least 30 day notice of any cancellation or material change to the policies or endorsements. Lessor shall provide on an ongoing basis, current certificates of insurance during the term of the contract. A renewal certificate will be provided 10 days prior to coverage expiration. **Optional Provision:** An updated, current certificate of insurance shall be provided in the event of any change to a policy.

## ***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.

N.D.C.C. § 32-12.2-15 is consistent with this recommendation and allows agencies to limit the liability of a vendor for certain products and related services when the agency determines, in consultation with the Attorney General's Office and the Office of Management and Budget, that agreeing to the limitation is in the best interests of the State. Direct losses may not be limited and agencies must be careful of language that attempts to limit direct damages including any right of indemnification or contribution.

Agencies must also maintain documentation of the justification for agreeing to any limitation. The State Procurement Office has developed a [template](#) to assist agencies in this process. A state employee that agrees to a limitation of liability without consulting with the Attorney General's Office and the Office of Management and Budget may be acting outside the scope of their employment.