Contracts with a political subdivision generally do not require minimum insurance requirements where the political subdivision will not be using a subcontractor.

Contracts for routine off-the-shelf products that do not give rise to any reasonable threat of harm and that are delivered by common carrier do not require indemnification or minimum insurance.
April 2013 ISO additional insured endorsement changes

- Only to the extent permitted by law
- Not broader than the coverage required by contract
- For the limits required by contract or the policy limit, whichever is less
C. With respect to the insurance afforded to these additional insureds, the following is added to Section III – Limits Of Insurance:

If coverage provided to the additional insured is required by a contract or agreement, the cost we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations, whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

**Contractual Risk Guidelines**

- **Statutory Directives**—NDCC 32-12.2-17
  - Contractual indemnity in service contracts ordinarily limited to vicarious liability
    - Obligation of contractor regardless of insurance coverage
    - Vicarious liability—contractor is already 100% responsible and right of indemnity exists independently
  - Additional insured endorsement required
  - Obligation of insurance carrier
  - Standard AI endorsement when statutory requirement enacted—“caused in whole or in part” by negligence of named insured, excluding only the additional insured’s sole negligence
Contractual Risk Guidelines
Template Language

- Additional Insured Endorsement
  - 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 that shall not be limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of the Contractor.

Contractual Risk Guidelines
Template Language

- Purpose of being made an additional insured is to make the contractor’s insurance primary for claims that are caused by the contractor.

- “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,”

- Template language is already met and satisfied by standard additional insured endorsements.
Contractual Risk Guidelines
Template Language

- Attorney General Representation Requirement

  - **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 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.
Contractual Risk Guidelines
Template Language

5) The insurance required in this agreement, through a policy or endorsement, shall include:

   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;

30 Day Notice of Cancellation

5) The insurance required in this agreement, through a policy or endorsement, shall include:

   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;

   8) Contractor shall provide at least 30 day notice of any cancellation or material change to the policies or endorsements.

Contractual Risk Guidelines
Template Language

Employer Liability-Stop Gap Coverage

   Eliminated recommendation to include only with out of state contractors
Attorney General
Contract Drafting Manual

- Updates to the Manual coming soon
- Everyone involved in procurement or who may execute agreements on behalf of the State should familiarize themselves with the AG Contract Drafting Manual

Attorney General
Contract Drafting Manual

- Contract provisions impacting Risk Management:
  - Indemnity Provisions
  - Limitation of Liability
  - Venue
  - Choice of law
  - Attorneys Fees
Indemnity Provisions:

- Risk Management Guidelines established pursuant to NDCC 32-12.2-17
- Lack of Authority to agree to indemnify vendors/contractors

Limitation of Liability Provisions:

- Direct loss, including property damage and personal injury cannot be limited
- Only certain types of contracts/purchases
- Legal Counsel (AAG/SAAG) and Risk Management must be consulted
- Written documentation must be maintained
Venue and Choice of Law Provisions:
- Want venue to be in North Dakota state court and want North Dakota law to apply
- Lack of authority to agree to litigate in another jurisdiction
- Lack of authority to agree to be governed by the laws of another jurisdiction
- Compromise is to be silent on these provisions

Attorneys Fees Provisions:
- AG Guidelines suggest fee shifting in favor of the State
- Lack of Authority to agree to pay attorneys fees
- Compromise is to be silent on fee shifting
Resources

- Guidelines to Managing Contractual Risk
  www.nd.gov/risk/publications/manuals-guides
- Attorney General Contract Drafting Manual
  www.ag.nd.gov/Manuals/Manuals.htm
- N.D.C.C. 32-12.2
  www.legis.nd.gov/cencode/T32C12-2.pdf

Questions?