

# **REVVING UP**

## **RISK MANAGEMENT**

PRIMA'S 2018 ANNUAL CONFERENCE // JUNE 3-6, 2018 // INDIANAPOLIS, IN

# Real-World Risk Transfer *Contracts CAN Be Your Friends!*



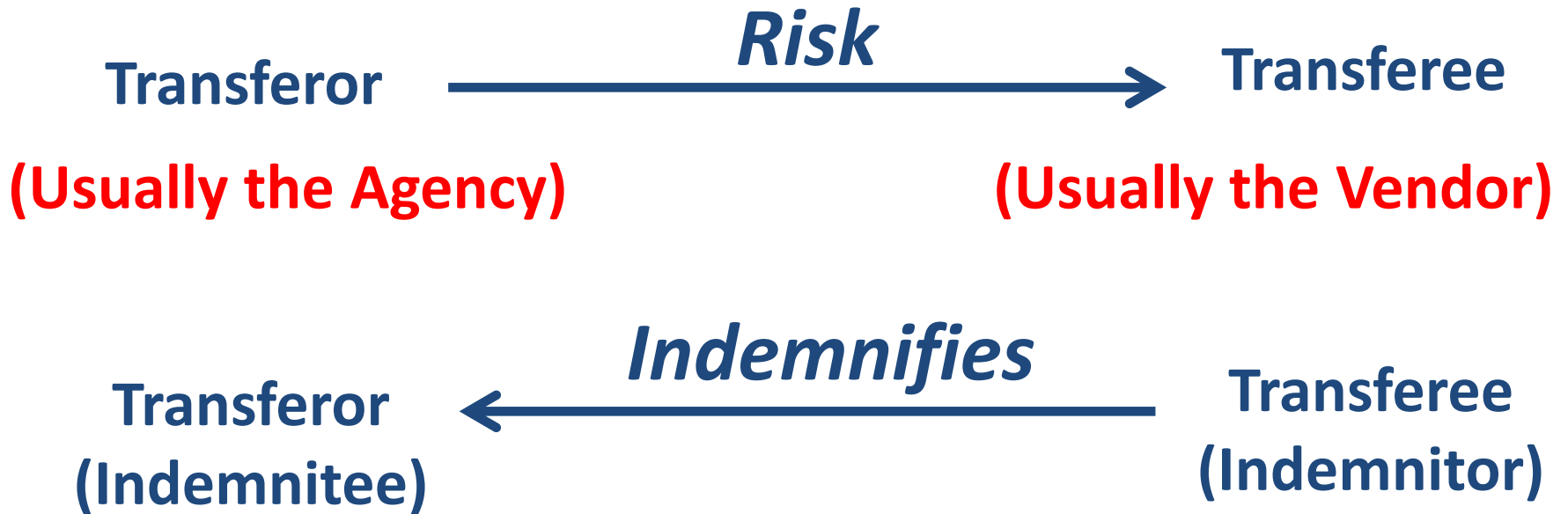
**PRIMA18**  
CONFERENCE  
INDIANAPOLIS

# Your Presenters

- Joe Costamagna, ARM  
Senior Consultant, Lit. Management  
Bickmore  
Sacramento, California
- Ric Burwell, MBA, CPCU, ARM  
Manager, Program Administration  
Bickmore  
Sacramento, California

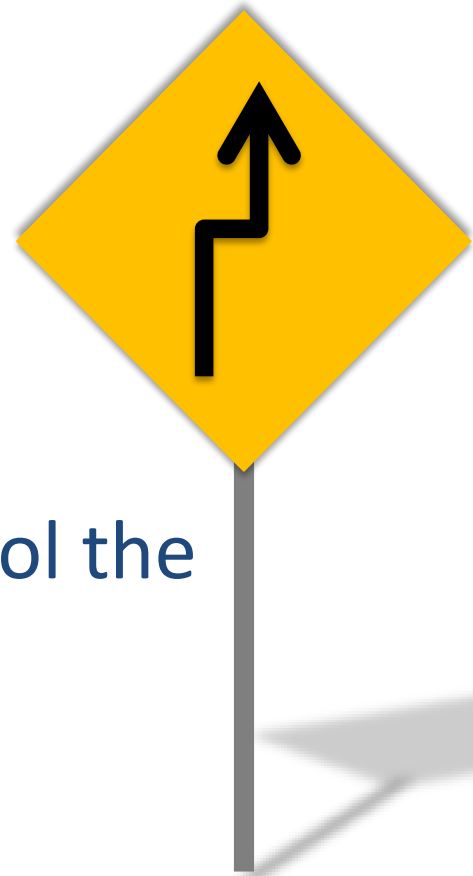


# Who's Who in Risk Transfer



# Why Transfer Risk Via Contract?

- Protect the transferor (the Agency) from liability.
- Avoid confusion and disagreement.
- Transferee (vendor or contractor) is typically in a better position to control the risk.



# 3 Key Elements of Risk Transfer


1. Indemnity language in contract

*supported by an*

2. Insurance certificate

*supported by an*

3. Additional Insured endorsement



**All 3  
Elements  
Must Be  
Present!**



# “To Indemnify”

“To make compensation to an entity, person, or insured for incurred injury, loss, or damage.”

~ International Risk Management Institute (IRMI)

- Protect
- Hold harmless
- **Defend**

## “A Promise”

**This is a BIG DEAL. →**



**PRIMA18**  
CONFERENCE  
INDIANAPOLIS

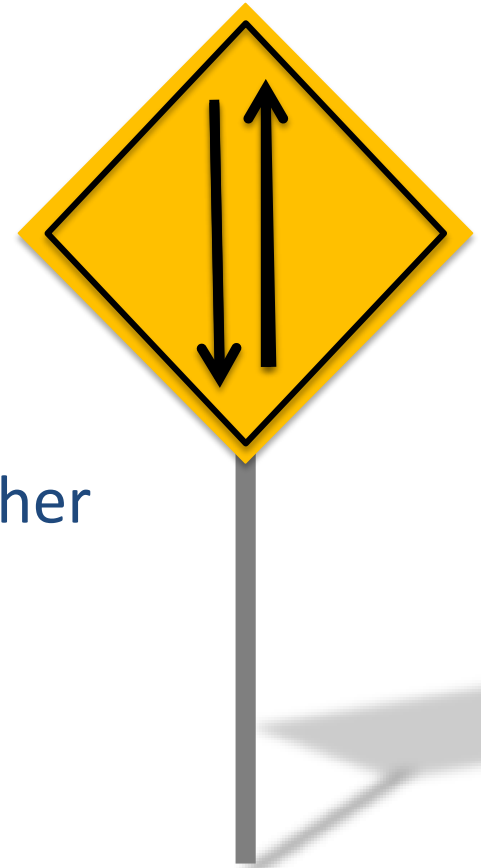
# Why Use Indemnity Clauses?

- Clarifies responsibility.
- Provides an avenue of recovery.



# Why Use Insurance Clauses?

- Specifies types and limits of insurance.
- Ensures availability of funds assumed.
- Provides transferor a direct path to the other party's insurance carrier.





# Consequences of Insurance Going Wrong

- Cancellation of insurance policy (*by vendor or carrier*)
  - Insurance carrier has no responsibility to respond to claims occurring after cancellation date. If vendor will not pay claim costs, the Agency will be expected to do so.
- Inadequate or depleted limits
  - Unless your limits are “Project Specific,” you are sharing the contractor’s limits with their other projects. Policy limits will erode with each claim, and your agency may be left with nil.



# Consequences of Insurance Going Wrong

- Policy exclusions
  - Always be clear on what activities are excluded. Excluded activity = zero coverage.
- Insurance company failure
  - State guaranty funds may provide some relief, but only to insurance carriers licensed with the State. Otherwise, you'll need to pursue the contractor.





# Certificates & Endorsements



## CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

**IMPORTANT:** If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER

CONTACT NAME:



**PRIMA18**  
CONFERENCE  
INDIANAPOLIS

# Certificates & Endorsements

- Endorsements show policy modification to add Agency as an Additional Insured.
- “Additional Insured” means **the Agency is covered by the vendor/contractor’s policy.**
- Endorsements can be standard-issue from the Insurance Services Office (ISO), or customized by the insurance carrier.



# Certificates & Endorsements

- Endorsement language can vary, is ever-changing, and can include hooks and traps.
- Have your Risk Manager or Agency Attorney review, but in general be aware of:
  - “Who Is An Insured,” Operations Covered, Exclusions, Conditions of Coverage, ...
  - ...and EVERY OTHER SECTION OF THE ENDORSEMENT! It defines coverage.

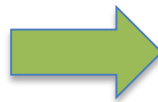


# Case Study – Bigg Construction:

- City hires Bigg Contractor



- Project duration runs long...City gets sued.



\$400,000

- Bigg carries \$7,000,000 in Liability limits...
- ...with a \$500,000 **Self-Insured Retention.**



# Case Study – Bigg Construction

- In addition to standard requirements, the City’s contract with Bigg sought indemnification for “Inverse Condemnation”
- City tenders claim to Bigg and its carrier based on the terms of the contract.
- Claim is denied by carrier based on:
  - \$500,000 Self-Insured Retention (\$400,000 claim)
  - Inverse Condemnation does not constitute tort damages and, thus, “Not our problem.”

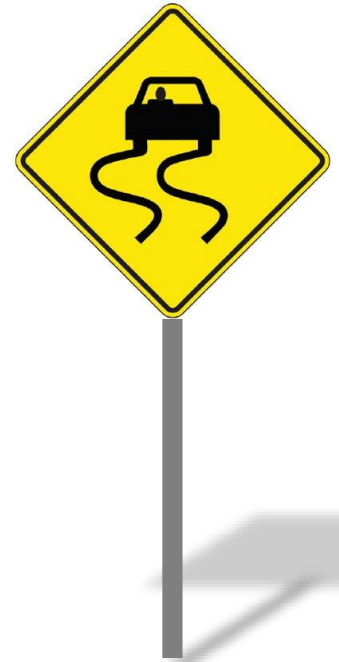




# Case Study – Bigg Construction

## Lessons Learned

- Be aware of high SIRs
- Know the difference between an SIR and a deductible – and how insurers respond to each
- Do not overreach with your indemnity requirements



# Contract Review Fundamentals

- Use your own contracts whenever possible.
- Establish Risk Transfer terms **AS EARLY AS POSSIBLE.**
  - Indemnity language and insurance requirements should be included in RFPs/bid packets.
  - If a technology purchase, establish your terms early in the sales process.



# Contract Review Fundamentals

When first viewing or developing a contract,

## **IDENTIFY:**

- What lines of insurance are required?
- What limits are required?
- Who is the Indemnitor?
- Who is the Indemnitee?
- Identify all exceptions in the Indemnity language.



# Contract Review Fundamentals

As an Indemnatee (Agency is indemnified by Vendor),  
be cautious of:

- Mutual Indemnity
- Softening of Agency's Indemnity Language
- "Limitation of Liability" Clause
  - **Be Very Careful of These!**
- Reduced Insurance Limits

**Limits! Let's Talk About LIMITS...**



# Case Study – Pedestrian Crossing

- City has a pedestrian crossing at a high-traffic road, familiar to locals, but with limited visibility due to a slow-rounding curve.
- Enough close calls of “car vs. pedestrian” prompt City to bid out the installation of traffic/pedestrian signal equipment.



# Case Study – Pedestrian Crossing (cont'd)

- Winning bid: >\$70k.
- Contractor named the City as Additional Insured with \$2,000,000 per occurrence in General Liability limits.

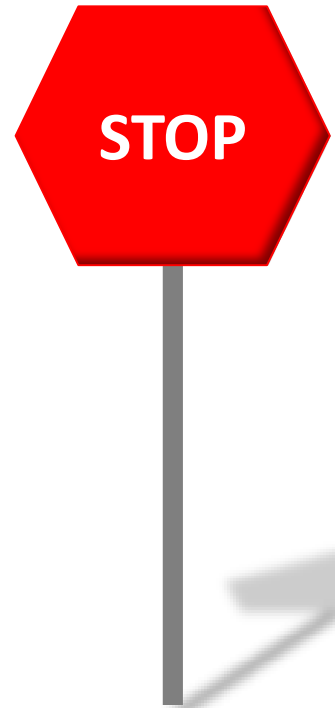
**\$2,000,000 limits for a \$70,000 job.**

**All good...right?**



# Case Study – Pedestrian Crossing (cont'd)

- Equipment fails. One of the footlights blew out and an overhead signal light is blinking out of sync.
- Contractor called for repair, will be there in two days.
- Signal is turned off by City due to its faulty operation.
- Before the Contractor can repair the equipment, two pedestrians are struck by a vehicle.
- One pedestrian is killed, a second is badly injured.



# Case Study – Pedestrian Crossing (cont'd)

- Plaintiff sues City for **\$20,000,000**.
- Case goes to mediation and is settled for **\$6,750,000**.
- Once Contractor's limits and the Driver's limits are exhausted...

**CITY IS RESPONSIBLE FOR \$4,000,000+  
TOWARD SETTLEMENT**





# Case Study – Pedestrian Crossing Lesson Learned

When Hiring a Contractor:  
Smaller Projects ≠  
Lower Insurance Limits!



# Public Works Projects

## Transfer of Risk

*When Determining Liability Limits for Construction Projects, Consider These Factors:*

- Public accessibility to project
- Type of equipment and vehicles being used
- Access to underground pipes, gas or water



# Public Works Projects

## Transfer of Risk

- Completed Work: What risks will be present following completion of the project?
- Consider the potential for high severity claims
  - Ask **“What’s the worst that could happen?”**
  - ... build your limits requirements off of that.



# Public Works Projects Transfer of Risk

- Be aware of your contractor's limits capacity
- Communicate "Changed Conditions" to public
- Encourage potential claimants to contact Agency directly, and quickly

# Waivers

- **Require a Waiver whenever physical activity is part of the event.**
- Waivers do not replace insurance!
- Waivers should:
  - List potential risks as specifically as (reasonably) possible
  - Provide clear release of Agency for liability in BI/PD claims
  - Waive liability for Agency's active negligence



# Additional Questions?



# Contact Information

- Joe Costamagna  
(415) 407-4157  
[jcostamagna@bickmore.net](mailto:jcostamagna@bickmore.net)  
<https://www.linkedin.com/in/joecostamagna>



- Ric Burwell  
(916) 244-1172  
[rburwell@bickmore.net](mailto:rburwell@bickmore.net)  
<https://www.linkedin.com/in/gobuckeyes>

