16. INTELLECTUAL PROPERTY (IP)

A. Overview
Some of the most valuable aspects of Goods and Services are not the actual supply, software, report, etc., but the rights to possess, use, copy, publish, display, transfer, and prepare derivative works related to Goods or Services, including the right to allow others to use Goods or Services in specified manners through licensing.

IP is a complicated and specialized area of law and requires careful scrutiny. OSC, OAG, and OIT (for IT Procurements) assistance are advisable in this area whenever Agencies/IHEs are changing Model Contract provisions or receive unfamiliar terms from Vendors.

B. Intellectual Property Types
IP refers to creations of the mind; it is the physical or tangible result of original thought: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. The types of IP likely to be encountered in State contracting are:

i) Patents
The Patent Act (35 USC 101 et seq.)(Patent Act) protects novel ideas. Patents grant inventors the exclusive right to make, use, sell, license, assign, and/or import their patented invention in the United States for twenty years. Design patents offer more limited protection more akin to copyrights. Remedies for patent infringement are applicable whether or not the infringement was intentional.

ii) Copyrights
The Copyright Act (17 USC 101 et seq.)(Copyright Act) protects “original works of authorship.” The Copyright Act protects the expression of ideas, but not the ideas themselves. The holder of a copyright has the right to copy, distribute, prepare derivative works; i.e., modify, and publicly display the work. Although copyright protection exists under common law, the protection is more limited than that provided under federal statute. Remedies for patent infringement apply whether or not the infringement was intentional.

iii) Trademarks
Protections for trademarks and service marks exist under federal law through the Trademark Act of 1946 or Lanham Act (15 USC 1051 et seq.), State law (CRS §7-70-101 et seq. and CRS §18-5-110.5) and common laws. Trademarks and service marks identify and distinguish Goods or Services in commerce. They can be visual or auditory. Trademarks grant owners exclusive rights to use within a defined geographical area (which can be worldwide) and within defined markets (which can be all) as long as they are in use, protected, and do not become a generic noun (aspirin used to be a trademark). Nike’s swoosh, McDonald’s golden arches, and the Olympics’ five interlocking rings are trademarks while “An Army of One” is registered service mark.

iv) Trade Secrets
Trade secrets are categories of information legal afforded protection. CRS §7-74-102 defines a trade secret as “the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses or telephone numbers, or other information relating to any business or profession which is secret and of value." Examples include manufacturing techniques, software programs, cost ad pricing data, marketing techniques, customer lists, and food recipes. Vendors should be required to clearly identify trade secrets (or confidential and proprietary information) if they propose nondisclosure provisions and should be advised that the Colorado Open Records Act (CRS §24-72-203 and 204) requires disclosure of certain information despite contrary contractual provisions.

C. Intellectual Property Rights in Software
The OSC and OIT may develop provisions defining the duties and rights to the data and documents delivered or produced pursuant to Contracts. Contracts should specify exactly what documentation (e.g. software) must be delivered as a standard clause stating that the State “owns” all rights in documentation delivered under the Contract means little if the Contract never requires delivery of software documentation.

Computer software programs have patents if they meet the requirements of the Patent Act. In addition, federal courts have classified computer software as a literary work under the Copyright
Act and protected source and object code. The original work issue often arises regarding databases as they are a compilation of data, raising questions about original authorship, i.e. what creative effort went into arranging or selecting the contents. Copyright protection has been extended to the selection and arrangement of the data, not the contents or the discrete facts. An issue also arises regarding authority of the State to reproduce additional copies of Vendor-developed materials, e.g. training materials that are furnished in limited numbers, original work and reproduction issues should be addressed in Contracts.

The State must decide whether to develop software in-house, Contract to develop custom software, or buy a License to use existing software. The State usually retains ownership rights to software and documentation developed in-house or by Contract. Vendors should deliver them to the State at Contract Termination, and may be prohibited from otherwise using them without the State’s permission. Vendors retain ownership rights and the State obtains a use License when Purchasing commercial off-the-shelf software. At a minimum, License provisions should clearly identify the following:

i) The term of the License-usually perpetual;
ii) The Cost of the License;
iii) That other entities on behalf of the State may modify and use the Licensed software; and
iv) All of the rights the State wishes to retain, including the right make archival copies and to modify at least the portion of the software customized for the State’s use.

17. INSURANCE
As a matter of Policy, the State requires that its Vendors (with some exception for Contracts with non-State public entities) maintain certain types and minimum levels of insurance. This ensures that Vendors have the financial capability to defend the State from lawsuits and to pay claims where liability exists while continuing to perform Services. The State requests additional insured status on all polices (excepting auto) as it offers protection under Vendor insurance policies if the State is sued in conjunction with Vendors based on Vendors’ fault. The State has its own liability coverage for claims alleging the State is at fault.

The standard types of insurance a State Vendor should have are commercial general liability (CGL), commercial automobile liability, and workers’ compensation. Additionally, depending on the nature of Contract performance, the Vendor may be required to have: umbrella liability, professional liability, environmental impairment liability, and employee dishonesty/crime (if Vendors have control of State funds). Additional or special liability insurance is usually required for unique operations such as those involving the use of aircraft or watercraft.

The types of insurance coverage and certificate of insurance normally requested in State Contracts are discussed below. The liability limits required in the Model Contracts were provided by DPA’s Office of Risk Management and are derived from the State’s maximum liability exposure under the Colorado Governmental Immunity Act, CRS §24-10-101 et. seq. If Contracts have exposures outside of the standard insurance provisions in the Model Contracts, please contact the State Office of Risk Management for assistance in determining appropriate insurance coverage or for any insurance related issues.

A. Commercial General Liability
CGL is the standard insurance policy issued to business organizations to protect them against liability claims for bodily injury and property damage arising out of the operation of their business such as premises operations liability, products and completed operations, advertising, and personal injury. Personal Injury includes: false arrest; detention or imprisonment; malicious prosecution; wrongful eviction; slander; libel; and invasion of privacy.

B. Commercial Automobile Liability
Commercial automobile liability coverage protects against loss arising from automobile-related injuries to others or property damages. Do not omit this coverage unless Vendors will not use an automobile as part of Contract performance. Even limited use of a Vendor’s automobile to “run errands” during performance of Services may involve the State in a lawsuit if an accident occurs.
C. Umbrella Policies
Umbrella policies provide protection against catastrophic losses excess of primary policies such as CGL, auto liability, and the employer’s liability section of a workers’ compensation policy. They provide increased limits of liability when the limits of underlying policies are exhausted.

D. Professional Liability
Professional liability policies protect traditional professionals (e.g. physicians, attorneys, architects, engineers, accountants, etc.) and quasi-professionals (computer programmers, real estate brokers, insurance Agents, etc.) against liability incurred as a result of errors and omissions in performing Professional Services. Most professional liability policies cover economic losses suffered by others. Policies also cover bodily injury and property Damage risks for certain professions such as physicians, architects, and engineers; however, most other professionals, bodily injury and property damage losses are covered under CGLs.

E. Environmental Impairment Liability
Liability for the contamination of the environment by pollutants is normally excluded to some degree by other liability policies and requires special environmental liability insurance covering liability and sometimes cleanup costs. The Procurement team should consult with the OAG and/or the State Office of Risk Management if Contracts involve environmental issues.

F. Occurrence vs. Claims-Made Policies
Liability insurance may be written on an “occurrence” or “claims made” basis. There is a significant difference between the two and the former is preferable from the State’s perspective.

i) Occurrence
Occurrence based policies cover losses occurring during the policy period, regardless of when claims are reported to the insurance company. Most CGLs are written on occurrence forms.

ii) Claims-Made
Claims made insurance pays when the claim is both made against the insured and reported to the carrier during the policy term. Claims made policies are commonly used for professional and environmental liability risks. A key provision is that coverage ends when the policy expires. To ensure coverage for claims arising out of the Services performed that manifest after the Expiration of the policy, the Procurement team should require an “extended reporting provision” (also know as a “tail”), which keeps the policy in force after Contract Termination or Expiration for a period equal to the applicable statute of limitations on lawsuits, normally two years. As an alternative, the Procurement team can also request that similar coverage, with a “prior acts” provision, be kept in place for a period also equal to the statute of limitations after the end of the Contract.

G. Workers’ Compensation Insurance
Required by State statute, workers’ compensation provides no-fault statutory benefits from employers to Employees due to job-related injuries or death resulting from accident or occupational disease.

H. Crime Insurance
Crime insurance can cover losses arising from Employee dishonesty, theft of money, securities or personal property, safe burglary, forgery, robbery, computer fraud, and funds transfer fraud. It should be requested if Vendors will have control of or access to the State’s funds, other negotiable instruments, or personal property. The State should be added as a “Loss Payee” on the policy to ensure that the State has a right to file a claim directly with the insurance company in the event of a loss. The most common use is for janitorial Contracts.
I. Surety Bonds
Surety bonds (Surety Bonds) are a guarantee, in which the Surety guarantees the principal (Vendor) named in the bond will perform the Obligation stated in the bond on behalf of the obligee (State). If a Vendor fails to perform the Obligation stated in the Surety Bond, both the principal and the Surety are jointly and severally liable; however, the Surety’s liability only extends to the “Penalty or Penal Amount”, which is the upward limit of liability on the bond. Common types of Surety Bonds include:

i) Bid Bond
   The Obligation in the bond is that the principal will honor the Bid.

ii) Performance Bond
   The Obligation in the bond is that the principal will complete the project.

iii) Payment Bond
   The Obligation in the bond is that the principal will properly pay Subcontractors and suppliers.

J. Insurance-State of Colorado Policies
The State self-insures the majority of its liability exposures, meaning that the State provides its own defense and pays the ultimate liability in most cases from the risk management fund administered by the State Office of Risk Management. The State Office of Risk Management will, upon request by a Vendor, issue a certificate showing State CGL coverage. The risk management fund covers only the liability of State Agencies/IHEs and Employees and no one else may be named as an additional insured. Further, the State may not promise to use self-insurance to contractually meet any liability except in property Leases covered under CRS §24-30-1510(3)(e).

The State has a commercial insurance policy covering damage to its property on an “all risk” basis, subject to specific exclusions. The Procurement team should contact the State Office of Risk Management before, not after, delivery of Goods or Execution of a real property Lease to have such property listed on the State’s policy if asked to carry insurance on leased real or personal property or property purchased on an installment plan.

K. Insurance-Governmental Vendors
Model Contracts provide special treatment for “public entity” Vendors within the meaning of the Colorado Governmental Immunity Act, CRS §24-10-101, et seq., which applies only to Agencies and political subdivisions created under the law and/or the State Constitution. It does not apply to agencies or political subdivisions of the federal government or other states, which usually have their own governmental Immunity statutes, self insurance, or other alternatives to insurance. These are often cited by those entities as reasons to not comply with standard State insurance requirements, and deletion of such requirements in federal/other state Contracts may be acceptable as the risk of the State being liable for the actions of federal/other state entities is often minimal.

L. Certificate of Insurance
Model Contracts do not require certificates of insurance until seven business days after the Effective Date of Contracts. This reflects the reality that in some situations, Vendors will only incur the expenses of obtaining insurance after a Contract is Effective; however, if possible, the Procurement team should obtain a certificate of insurance before entering into a Contract as this provides the best protection for the State and obviates the necessity for Agencies/IHEs to engage in post-Execution verification. The Procurement team should ensure that the insurance is Effective during the Contract term and that limits comply with State Office of Risk Management guidelines, that the “Insured” name at the top of the form matches the name of the Vendor. During the review, the team should pay close attention to the way the boxes at the bottom of the form entitled “Description of Operations/Locations/Vehicles/Special Items”, “Certificate Holder”, “Cancellation”, and “Valid As Of” are filled out.

Figure 1 on the next page is an example of a satisfactory certificate of insurance form (often called an “ACORD” form-the example says “MARSH”).
## MARSH

### CERTIFICATE OF INSURANCE

<table>
<thead>
<tr>
<th>COMPANY</th>
<th>CERTIFICATE NUMBER</th>
<th>SEA.000821668.06</th>
</tr>
</thead>
<tbody>
<tr>
<td>COMPANY A: ROYAL INDEMNITY COMPANY</td>
<td></td>
<td></td>
</tr>
<tr>
<td>COMPANY B: FIREMANS FUND INSURANCE CO.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>COMPANY C: PINNACOL ASSURANCE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>COMPANY D: LEXINGTON INSURANCE COMPANY</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### INSURED

X, Y, Z, INC
105 PLEASANT STREET
ANYWHERE, CO 80000

### COVERAGES

This certificate supersedes and replaces any previously issued certificate for the policy period noted below.

- **General Liability**
  - Commercial Liability
  - Owners & Contractor's Liability

- **Automobile Liability**
  - Any Auto
  - All Owned Autos
  - Hired Autos
  - Non-Owned Autos

- **Garage Liability**
  - Any Auto

- **Excess Liability**
  - Umbrella Form
  - Other Than Umbrella Form

- **Workers' Compensation and Employers' Liability**
  - The Proprietor, Partner, & Executive Officers Are
    - Incl.
    - Excl.

<table>
<thead>
<tr>
<th>CO</th>
<th>LINE</th>
<th>TYPE OF INSURANCE</th>
<th>POLICY NUMBER</th>
<th>POLICY EFFECTIVE DATE (MM/DD)</th>
<th>POLICY EXPIRATION DATE (MM/DD)</th>
<th>LIMITS</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td></td>
<td>GENERAL LIABILITY</td>
<td>1234</td>
<td>07/01/01</td>
<td>07/01/02</td>
<td>General Aggregate: $10,000,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Products-Compo: $10,000,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Personal-Inj.: $10,000,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Each Occurrence: $10,000,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Fire Damages (Any one fire): $50,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Med Ex Sp (Any one person): $5,000</td>
</tr>
<tr>
<td>B</td>
<td></td>
<td>AUTOMOBILE LIABILITY</td>
<td>1234</td>
<td>07/01/01</td>
<td>07/01/02</td>
<td>Combined Single Limit: $1,000,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Bodily Injury (Per Person): $</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Bodily Injury (Per Accident) : $</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Property Damage: $</td>
</tr>
<tr>
<td>C</td>
<td></td>
<td>EXCESS LIABILITY</td>
<td>1234</td>
<td>07/01/01</td>
<td>07/01/02</td>
<td>Each Occurrence: $</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Aggregate: $</td>
</tr>
<tr>
<td>D</td>
<td></td>
<td>PROFESSIONAL LIABILITY</td>
<td>1234</td>
<td>07/01/01</td>
<td>07/01/02</td>
<td>Each Claim: $1,000,000 DEDUCTIBLE</td>
</tr>
</tbody>
</table>

### DESCRIPTION OF OPERATIONS, LOCATIONS, VESSELS, SPECIAL ITEMS

Certificate holder is named as additional insured. Above policies shall be primary and includes a waiver of subrogation in favor of the State of Colorado, its officers, agents, employees, and volunteers.

### CANCELLATION

The insurer will endeavor to mail 45 days written notice to the certificate holder named herein, but failure to mail such notice shall impose no obligation or liability of any kind upon the insurer or any others, including any person or organization listed as additional insured on this certificate.

**COLORADO DEPARTMENT OF**

**DIVISION OF**

**ADDRESS**

<table>
<thead>
<tr>
<th>MM</th>
<th>DD</th>
<th>YYYY</th>
</tr>
</thead>
<tbody>
<tr>
<td>01</td>
<td>01</td>
<td>2004</td>
</tr>
</tbody>
</table>