



Indemnification, Proof of Insurance and Additional Insured Endorsements

Liability

Strategic Risk Management Guideline

Issue SRM201801-8

What are they really and why should you worry about using them?

For many years, Road Commissions were told that they should obtain coverage as an Additional Insured whenever they issue a permit or enter into a contract with a third party contractor. Obtaining that security used to be easy. The insurance agent would type the Road Commission's information on the insured's Certificate of Insurance, send it over, and you were all set. That worked, until the insurance underwriters realized that they were providing insurance to entities that they did not know, for risks that they had not anticipated, and for free.

Road Commissions have seen changes to the law that have significantly narrowed their exposure for liability in the right of way.

Now, insurance agents generally are not allowed to type anything additional on the Certificate of Insurance. The only recognized Additional Insured Coverage comes in the form of an Endorsement to the named insured's policy. And, this coverage is no longer free. The

named insured has to pay to add the Road Commission to its policy.

Simultaneously, Road Commissions have seen changes to the law that have significantly narrowed their exposure for liability in the right of way. Being responsible for maintaining local roads previously included liability for any right of way issue –like trees, signs, and bad excavating. Today, our Members have job responsibility for a wide variety of things related to the right of way, but legal liability exposure only for maintenance and repair of the traveled portion of the highway.

In light of these developments, we took a hard look at what Road Commissions really need to do to limit their exposure to liability when issuing a permit or entering into a contract with a third party. We also considered what is being provided in response to your request for Additional Insured status and how that succeeded or failed in protecting the Road Commission. Our recommendations follow.

Quick Summary

For Permits – you need (at least):

1. Proof of Insurance
2. Indemnification

For Contracts – you need (at least):

1. Proof of Insurance
 2. Indemnification
 3. To be Named Additional Insured
 4. You should have a copy of the Policy Endorsement
 5. Make sure it is Primary Coverage
 6. Watch the Dates
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Permits

For **all** permits, the Road Commission should require **indemnification**.

When you are the indemnified party, the indemnification clause is a promise by the other party to cover your losses if they do something that causes you harm, costs you money, or causes a third party to sue you. The key words in an indemnification clause are “indemnify,” “hold harmless” and “defend”.

What risks does the Road Commission have when it issues a permit to a contractor or other entity to perform work in the right of way?

The biggest risk here is for damage to the traveled portion of the road itself, damage to right of way generally, or failure to complete a project that the Road Commission then has to fix.

What do you need?

First, proof that the contractor or entity has Commercial General Liability and/or Professional Liability insurance in amounts sufficient to pay for any and all potential damages. Alternatively, you could obtain a Cash Bond to hold until they are complete and you have had time to inspect the operation.

What risks does the Road Commission have when it issues a permit to a landowner (i.e., a private individual) to perform work in the right of way?

The landowner may cause damage to the right of way, perform sub-standard work that requires the Road Commission to provide corrections, or fail to adhere to the terms of the permit (i.e., encroach upon the right of way).

What do you need?

Private individuals generally do not have Commercial General Liability Insurance, and most homeowner policies do not cover this type of exposure. If an individual performs work in violation of the permit, the Road Commission should first look for remedies within the terms of the permit itself—including, but not limited to, revocation and/or indemnification. Additionally, the Road Commission may be able to utilize the encroachment statute, Michigan PA 283 (Section 230.7), to recoup costs. Under certain circumstances, and at the Road Commission’s discretion, obtaining a cash bond could be appropriate.

What risks does a Road Commission have when it issues weight, size or load exemption permits—to contractors, agricultural operations, corporate entities or individuals?

While there are associated risks, permits for transportation on our roads generally do not create a situation that increases the Road Commissions’ liability exposure.

What do you need?

First, Road Commissions should make sure that vehicles operating under the transportation permit have insurance coverage needed to legally operate on Michigan roads. Michigan No Fault Law requires automobile insurers to pay for accidental damage to tangible property—such as road surfaces or facilities on a highway—caused by a motor vehicle. Obtaining proof of insurance from anyone receiving a permit for special use of the road will provide the information needed to collect for damages to the road or other Road Commission property under the provisions of our No-Fault laws.

If the transportation permit is issued to an entity, corporation, business, etc., Road Commissions should also obtain proof of Commercial General Liability and/or Professional Liability insurance in amounts sufficient to pay for any and all potential damages. Always retain this for your file.

Contracts

It is not a matter of choosing between indemnification and additional insured status – properly done, you should seek both.

Indemnification and additional insured status are two complementary risk-transfer provisions. They perform similarly in most respects but are two totally independent coverage provisions. They act as two separate contracts for coverage. Additional insured coverage should coordinate with the indemnity provision.

When entering into a contract with any outside contractor, Road Commissions should, generally, always obtain proof of Commercial General Liability and/or Professional Liability insurance in amounts sufficient to pay for any and all potential damages. Moreover, Road Commissions need to be indemnified, held harmless, and named as an Additional Insured on the contractor's Commercial General Liability and/or Professional Liability policy when they enter into a contract with a third-party in any of the following situations:

- a. If the contractor is performing work on behalf of the Road Commission, or that the Road Commission would otherwise do itself;
 - b. If the contractor will have the ability to direct or control the work of any of your employees or agents;
 - c. If the contractor will be occupying or utilizing Road Commission facilities or property for any reason; or
 - d. If the contractor is performing an activity that could give rise to liability exposure for the Road Commission under one of the exceptions to governmental immunity
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Summary

For businesses seeking right-of-way permits, Road Commissions should always obtain proof of insurance. Road Commissions must then review the types of coverage and limits to be sure that the insurance is sufficient to cover any potential damage to the roads or road commission property.

For permits to landowners or other private individuals, there is not likely to be any applicable general liability insurance, so Road Commissions will have to rely on remedies included in the Permit terms, in the encroachment or highway damage statutes, or with a cash bond (if required). If the permit involves transportation, Road Commissions should obtain proof of No-Fault Insurance. Road Commissions do not always need to ask for Additional Insured status before issuing right-of-way permits to third parties, but should reserve the right to do so if needed.

Road Commissions should insist on being indemnified and named as an Additional Insured when entering the contract listed above. The Additional Insured Endorsement must specify that the coverage is Primary, and that it is effective for the appropriate period of time.

Strategic evaluation of each set of circumstances, careful evaluation of the verbiage in your permits and contracts and specific requirements for insurance and additional insured clauses will ensure maximum benefit to the Road Commissions and the public we serve.

What to Look for in an Additional Insured Endorsement

Who?

The Road Commission, including its commissioners, officers, agents, volunteers and employees.

What?

Exposure under the activity being contracted.

When?

Watch the dates! If the timing of the work performed under a contract spans more than one coverage year, the renewal of coverage is not automatic. Specify in your contract that the contractor has the obligation to secure continuous coverage.

Where?

The location of the work under contract.

Exclusions?

There should not be any exclusions for Bodily Injury or Property Damage. Or any other exposures that the Road Commission encounters if the contractor is negligent. We would expect that the endorsement would exclude completed operations.

Limitations?

Watch out for these – the limits need to coincide with your needs. We would expect that the endorsement would mention that coverage applies only to the extent permitted by law, and is limited to coverage by the contract. You need to make sure that your contracts describe the coverage required.

Coverage?

Liability caused in whole or in part by (alternatively, arising out of...) the acts or omissions of the named insured, or others on their behalf in the performance of operations for the additional insured at the designated locations.

As we print this, the most common Form used to provide an Additional Insured Endorsement for the construction industry is the ISO CG 20 10 04 13. A copy of this Form is attached to this guideline.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR
CONTRACTORS – SCHEDULED PERSON OR
ORGANIZATION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

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 location 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. 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 most 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.