

AT RISK

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*A Risk Management Newsletter for the British Columbia Provincial Government,
its Ministries and Organizations*

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Executive Director's Message

I am pleased to present this issue of At Risk. Inside you will find some great articles on the risks of waiving insurance requirements, and details about risk-related contract clauses. We are also bringing you up-to-date on risk management learning and networking opportunities.

I would also like to formally introduce the newest members of the Core Government and Crowns (CGC) team. We are pleased to welcome aboard Chris MacLean and Todd Orchard as Managers, Enterprise Risk Management while we offer our best wishes to Edward Robertson who has left government. Lori Watson and Dragana Petzing are now supporting the CGC clients in their new roles as Risk Management Consultants. Helen Oomen, Margo Steffens, Milaine Moen and Melissa McCabe round out our team of expert Risk Management Consultants.

Through 2008 the CGC team hosted a series of Risk Management Forums. Topics included Risk Management in the Public Sector, Security for Risk Managers, and Insurance in Contracts. Attendance has in some cases been overwhelming, and the feedback has been very positive.

Please see our intranet site for forum materials: <http://gww.fin.gov.bc.ca/PT/rmb/forum/index.stm>

To complement our Forum, we have also offered workshops on "How to Conduct a Risk Assessment" and "Understanding Insurance in Contracts" to smaller groups. Participants have come away with more in-depth knowledge on these subjects and we plan to continue this series, adding new topics, in the coming year.

We are also busy planning our next Risk Management Conference for the BC Public Service, to be held next April 16-17 in Victoria. Watch our internet site for more information, and in the meantime check out the material from our 2007 Conference on our intranet site: <http://gww.fin.gov.bc.ca/PT/rmb/forum/index.stm>

For more information on the Forums, the Workshops, the Conference, or to be added to the CGC distribution list, please send a note to RMB@gov.bc.ca with your request.

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Phil Grewar, Executive Director

The Risks of Waiving Contract Insurance Why Some Organizations Waive it, and Why You Shouldn't

by Katherine Caughran & Melissa McCabe

Smart contract managers understand the legal risks of competitive bidding. As case after case has shown, you need to be clear and concise when drafting your solicitation and contract documents, and then proactively manage your contracts and contractors.

But before you get there, you need to assess and plan for risks. That means asking some basic questions. For instance, what might the repercussions be for your organization if the actions of the contractor cause an injury or a lawsuit, or if there are damages?

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The Risks of Waiving Contract Insurance (cont.)

Why Some Organizations Waive it, and Why You Shouldn't

Many risks directly under the control of the contractor (i.e., associated with the actions of the contractor) are transferred to the contractor by way of an indemnity clause in your organization's standard contract. In contract language, this is the term that generally states: "The contractor will indemnify and hold harmless ..."

Essentially, this means that the contractor will reimburse you ("make you whole") for any losses it causes as a result of its performance, actions or decisions in providing a service and/or good under the contract, or it will pay those costs up front. This is a contractual promise, but it is only as good as the contractor's financial ability to back that promise.

Insurance is a means of managing the financial impact of the indemnity promise and other risk, but some contractors ask to have the insurance requirements waived entirely. There are number of reasons why.

The contractor says it's too expensive or not necessary: Not fully understanding insurance and indemnity, you may waive insurance on the advice of a contractor who convinces you that it's too costly, not available, not worth the paperwork, or simply not needed.

Better logic: Independent contractors should be the first to encourage adequate insurance coverage, both for the organizations with which they contract, and to protect their own personal assets and finances. Ensuring that potential financial risks are covered is just sound business practice.

Best practice: Without insurance, the contractor could go bankrupt attempting to finance legal costs by itself. These provisions are intended to protect the contractor against financial hardship, in the event the contractor causes a loss or makes a mistake: the contractor's insurance will finance many of the possible losses, or pay to remedy its errors.

In addition, the contractor's insurance protects you! Without sufficient contractor's coverage, you may be drawn into

underfunded third-party claims, and you may need to pay, from your own budget, for losses that the contractor causes directly to your organization.

A manager has a \$50,000 signing authority: This is often a source of confusion. You may waive insurance coverage because you believe that your signing-authority level is 'enough' to cover any potential risks.

Better logic: If your standard agreement contains an indemnity clause that transfers the contractor's risk to the contractor, ask yourself why you would want to take back the financial risk, in the event that the contractor causes a loss. Insurance will cost far less than a loss might – or will it? Have you done a risk assessment?

Best practice: Do a risk assessment! Is this work that should be performed by an employee? Is there another qualified supplier who does have insurance? Is there exceptional benefit in waiving insurance provisions (leaving both contractor and your organization exposed to loss)? If there is, then consider whether or not the contractor should instead be hired as an employee, and forego the procurement process or contract. (This decision can only be considered in a direct-award situation.)

The contractor is a former employee, and so doesn't need insurance: Most organizations indemnify their employees against personal liability for actions taken in the normal course of their employment duties. And some organizations waive insurance coverage for contractors who are former employees, under the misconception that, somehow, former employees are not a risk.

Better logic: The actions and duties of an organization's employees are considered to be under the organization's control, and employees are usually covered by the organization's corporate insurance. Such control, and certainly such insurance, do not



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The Risks of Waiving Contract Insurance (cont.) Why Some Organizations Waive it, and Why You Shouldn't

extend to an organization's contractors. If a former employee working under contract is not appropriately insured, he or she would be subject to losing personal assets – house, investments, car – to pay for such a loss, just like any other uninsured contractor.

Best practice: Think of your former employees who may be involved in contract work as you would think of any other contractor, and assess the risk of their services that way for the purposes of insurance. Price, length of contract, or status as a former employee have no bearing on risk. This procurement practice does not reflect your lack of trust in the contractor; it's not personal, it's following best procurement practices.

You put insurance requirements in your solicitation document, but the contractor wants to change them at the award stage: Without knowing exactly why you required the insurance you asked for, you might not worry about making changes. The contractor's rationale seems reasonable, and you're in a hurry, so what's the big deal?

Better logic: Other bidders may have priced their bids differently, and some vendors who did not submit a bid at all may have done so if the new insurance "deal" you were making with the successful proponent had been in the solicitation. Depending on how your solicitation was written, you may have no room to negotiate those terms.

Best practice: As part of solicitation planning, do a risk assessment of the goods/services to inform the types and amounts of insurance that will be required of the successful proponent. Include a sample agreement, including the contract-specific insurance requirements, as part of your solicitation document, with advice to your bidders that the contractor will have this insurance. Ask your risk manager for advice along the way.

Here's the bottom line: Ensuring that adequate insurance is in place is in the best interests of both the purchasing organization and the contractor. What is adequate insurance? You need to determine that in the planning stages of your solicitation, by doing a thorough risk assessment.

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Melissa McCabe, CRM, is a Senior Risk Management Consultant for the Province of B.C. and a subject-matter expert for the PCMP. She specializes in complex procurement and risk management issues. ◀

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Waivers, Limitations of Liability and Indemnification Clauses in Contracts



In contractual relationships, either party may attempt to transfer risk through contract terms such as waivers of liability, limitations of liability, and indemnification and hold harmless clauses. It's important to understand the effect of these clauses and how to ensure that the risks are being fairly apportioned.

Waivers of Liability

A waiver of liability occurs when one party agrees to give up (or "waive") a claim, right or privilege which it would otherwise have had. A commonly requested waiver is the right to sue for indirect damages (e.g. costs associated with restoration of data such as re-compilation of information and overtime for data entry). In another example a

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Waivers, Limitations of Liability and Indemnification Clauses in Contracts (cont.)

contractor may want you to waive your rights to sue them for failure to properly perform the contracted services (e.g. an elevator maintenance contractor fails to properly maintain the elevator and someone suffers an injury or damages as a result).

Normally, and appropriately, each party to a contract is responsible for its own actions and retains liability for damages arising directly from its own negligence. Use caution before agreeing to waive your rights to hold another party liable for their actions. You should undertake a risk assessment considering the benefits of the contract and the cost of assuming the risks prior to agreeing to waive any rights. Do not agree to waive your organization's rights without a careful understanding of the implications of that waiver.

Limitations of Liability

A limitation of liability, unlike a waiver, does not fully release the other party from liability but instead limits the degree to which they can be held responsible by apportioning liability between the parties or fixing a maximum dollar amount a party will pay. Often another party will seek to cap its liability at the value of the contract, the amount paid, or the amount payable in a certain timeframe. None of these amounts is usually acceptable, depending on the risk of the services and the overall value of the agreement. Always ensure limitations of liability are reasonable and take into account the full potential for loss or damage to your organization. It's almost never appropriate for another party to limit financial losses arising from bodily injury or death caused by them.

Some vendor groups have specific pre-agreed limitations of liability which must be used in every instance. Architects, engineers, information technology professionals, management consultants, and financial assurance professionals are examples of these vendor groups.

Indemnity and Hold Harmless

Another form of risk transfer is the indemnity and hold harmless clauses which obliges

one party to indemnify (or reimburse) the other for specified types of losses or costs. A typical indemnity or hold harmless clause usually also includes a duty to defend the other party in the event of litigation ("hold harmless").

Independent contractors should always indemnify and hold harmless a public sector organization for any losses arising out of the contractor's acts or omissions. This is a standard provision in all government boilerplate contract forms. Always be cautious with requests to alter the existing clause, and with any request for you to indemnify the contractor. The type and scope of services being performed often determines the appropriateness of these requests.

For example, in the case of the elevator maintenance contract, you may be asked to indemnify and hold the contractor harmless for all losses that the elevator company may incur arising from the operation of the elevator. This might be reasonable if the elevator company played no role whatsoever in the operation of the elevator, and had been contracted only for elevator installation. However, you should not agree to indemnify the elevator company for losses resulting from improper maintenance of the elevator – rather, expect the elevator company to indemnify you for those losses.

The *Financial Administration Act* requires that all indemnities intended to be granted by a ministry or government corporation first be approved by either the Minister of Finance or the Executive Director of the Risk Management Branch. Forward a complete, final contract to Risk Management Branch before it is executed and we will facilitate this approval process.

Need More?

This has been a very brief overview of waivers, limitations of liability and indemnity clauses. Contact your organization's risk manager, procurement specialist, or Risk Management Branch if you need assistance or need more detailed information. <

See you at the Forum

Building on the success of our *2007 Risk Management Conference for the BC Public Sector*, the Core Government and Crowns team at Risk Management Branch and Government Security Office (RMB) has implemented a series of Risk Management Forums for our ministry, Crown corporation, agency, board and commission clients.

The Forums are interactive and informal - an opportunity for clients to network with their peers, ask their risk consultant questions, and get the latest on topical issues from RMB. It is also a good venue for us to interact with clients outside our Risk Management Conference and to meet that voice on the phone in person.

Our Spring 2008 offering, Risk Management in Contract Management, "*Insurance for Government Contracts*", received such an overwhelming response that we extended the attendance to almost 200 people over four sessions in Victoria and Vancouver.

Participants received an overview presentation highlighting some key insurance basics, we reviewed three "Tools of the Day" including the Insurance Schedule, Certificate of Insurance, and the minimum insurance requirements matrix on the RMB intranet site.

Then our large group split into four discussion groups - the topics chosen to address just some of the key issues we encounter with our clients daily:

- ❖ Errors and Omissions (Professional) Liability insurance - how do I know when to ask for it?
- ❖ Certificates of Insurance - the ins and outs
- ❖ Waiving Insurance - the risks of this practice, why not to do it
- ❖ Management Consultants and IT Services - Schedules D and F: your questions answered

At each discussion table, participants shared examples from their own ministry or Crown corporation, heard the views and expert

advice of RMB risk management consultants, posed and answered questions, and received handouts to reinforce the learning.

The feedback from this particular event has been extremely positive – participants enjoyed the interaction with each other and found the two-hour session relatively easy to accommodate into their busy schedules. In addition, we've had many requests to bring our Forum to regional offices. Our original plan was to hold the Risk Management Forum a few times a year in Victoria with a new topic each time, but we are now considering our options for regional delivery.

The Forums will be supplemented by Workshops offering specialized learning opportunities. To date we have offered "Insurance 101", an in-depth guide for beginners to the world and language of insurance, and "How to Conduct a Risk Assessment", a practical implementation of the Enterprise Risk Management methodology using real-world examples from the participants' work context.

Handouts from the Risk Management Forums, including our on-line Client Service Questionnaire, are available on the RMB intranet site: <http://gwww.fin.gov.bc.ca/PT/rmb/index.stm>

- ❖ Do you or your staff have responsibility for some aspect of risk management in your organization?
- ❖ Do you have a thirst for knowledge surrounding the complex and diverse subject of risk management?

Risk Management Branch and Government Security Office invites you to be a part of this new venue for learning, sharing, and embracing your inner risk manager! As RMB is not a cost-recovery operation, there is no charge for Risk Management Forum attendance.

To have your name added to our distribution list, or if you have any questions for us, please send an email to RMB@gov.bc.ca or call 250-356-1794. <



Save the Date

Risk Management Branch and Government Security Office successfully hosted its first conference, "Navigating the Labyrinth: Practical Risk Management Solutions for a Complex World" in November 2007. The conference was attended by 275 participants from across all our program groups, and from all over British Columbia. We would like to thank all the guest speakers and the participants that made our inaugural conference a complete success that greatly exceed our expectations!

Conference handouts are available on the Risk Management Branch intranet site for government staff: http://gww.fin.gov.bc.ca/PT/rmb/conference/conf_prog_and_pres.htm

We look forward to seeing you all again for our 2009 Conference scheduled for April 16 – 17, 2009 at Delta Victoria Ocean Point in downtown Victoria. Watch our internet site for upcoming details: <http://www.fin.gov.bc.ca/pt/rmb/conference.shtml>. To be added to the conference mailing list, please send a note to RMB@gov.bc.ca. <

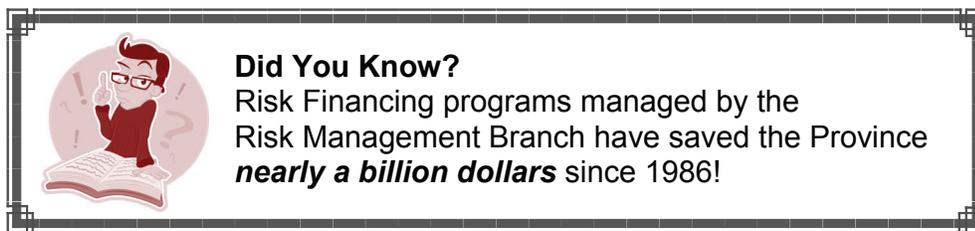
Ongoing Risk Management Education

- ❖ **British Columbia Risk & Insurance Management Association (BCRIMA)**
BCRIMA provides education primarily through monthly luncheon speakers and a spring Professional Development Day session. Educational opportunities are posted on the BCRIMA website as they become available:
<http://britishcolumbia.rims.org/Sites/BritishColumbiaChapter/1/Home/Default.aspx>
- ❖ **Canadian Risk Management (CRM) Program**
The three CRM courses offered by Simon Fraser University start in January. Evening courses are scheduled at the downtown campus, and in Victoria through Risk Management Branch.

For more info: <http://www.sfu.ca/cstudies/mpprog/certificate-risk.htm>

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About Our Organization...



To find out more about the Risk Management Branch and Government Security Office please see the following link: <http://www.fin.gov.bc.ca/PT/rmb/index.shtml>

Government staff may also access our intranet site at:
<http://www.min.fin.gov.bc.ca/PT/rmb/index.stm>

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Comments, questions, further information about the contents of this newsletter, or questions for possible inclusion in our ASK RISK column can be directed to the Editor at
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