



RISK NOTE

Subject: Risk Management in Contracts

There are many circumstances in which a Health Care Agency (HCA) will contract with another party including service contracts, sales agreements, leases, affiliation agreements and clinical trial agreements.

A contract is an agreement that is enforceable at law. It is the primary tool through which HCA's govern relationships and understanding with the other party. There are 5 components of a contract, all of which must exist in order for the contract to be legally binding on the parties. These components are:

1. Legal Capacity
The parties to the contract must have the legal capacity to enter into a contract. Legal capacity means that the parties are of legal age and are competent. It also means that the party is a legal entity (example: an HCA is a legal entity, a hospital is not). Individuals signing the contract must have the authority to bind the legal entity to the agreement.
2. Offer & Acceptance
There must be a genuine intent to enter into the agreement from all parties. Allegations of coercion or intimidation can be grounds to render the contract void.
3. Consideration
To be legally enforceable something of value must be given by one party in return for the promise of action, or omission of action by the other party. Most commonly the consideration takes the form of money, but it could be something else of value (example: goods or services).
4. Legal Purpose
The purpose of the contract must be for legal endeavours (example: contracts for a supply of illegal drugs would not be enforceable at law).

5. Conditions

The contract must specify the terms that will govern the agreement.

Policy for Risk Management in Contracts

Contracting has the potential to create many risks. Care in managing these risks can protect the HCA from loss. Therefore, we recommend all HCA's have a written policy in regards to risk management in contracts. This policy should address broad risk issues related to all contracts including:

- Requirement that all contracts must be written
- Designated authority levels to negotiate and sign contracts (generally, the greater the amount and potential exposure, the greater the level of authority required)
- Requirement that all contracts be reviewed for risk management considerations prior to acceptance
- Requirement that any indemnities granted by the HCA are approved pursuant to the requirements of the *Financial Administration Act* (see Indemnification section below)
- Designated central storage areas, including who can access stored contracts and procedures to obtain copies;
- Requirement that current listings of all contracts be maintained;
- Schedule defining how frequently contracts should be reviewed for both performance and risk management issues;
- Archiving procedures for expired contracts, including how long they will be retained.

Anyone dealing with contracts must know if they have the authority to negotiate and sign the contract and, if they do not, who does. HCA employees must understand the obligations under the contract and the risks associated with those obligations. Therefore, employees responsible for contract negotiation should receive instruction or training on how to effectively review a contract.

Contract Review

In order to facilitate consistent and thorough contract review practices we recommend HCA's develop a tool such as a checklist in order to ensure the quality of the review process. We have included a sample checklist at the end of this Risk Note for your consideration.

All contracts must be reviewed periodically to determine if changes are needed, or even if the contract should be continued. Considerations for contract continuation include the changing needs of the HCA, new regulations or legislation and performance evaluation of the contracted party.

At minimum, a contract review should confirm the following:

- Parties to the contract are legal entities and the correct legal names (or defined abbreviated terms) are utilized throughout the contract
- Performance measures and reporting requirements are set
- Any changes to the contract are required to be made in writing and signed by all parties

- British Columbia is specified as the jurisdiction for governing law
- Insurance requirements are specified
- If there are limitations of liability, they are identified and reviewed for reasonableness, given the context of the contract
- Assignment of the contract to another party is not allowed without written approval of the HCA
- Subcontractors must be approved by the HCA and bound by all the same terms and conditions as the primary contractor
- Confidentiality issues are addressed and contractor is obligated to follow FOIPPA
- Contractor required to be trained and licensed to provide the services (where appropriate)
- Termination provisions are specified and reasonable
- Dispute resolution processes are identified

Indemnification

The objective of all contracts should be the acceptance of responsibility by a party for loss arising from its own actions and those for whom it is responsible. Indemnification is an agreement between parties to protect one of them from loss or damage that they may incur as a result of the fulfillment of the agreement. An agreement to indemnify is voluntary and may create obligations beyond those imposed by negligence.

HCA's should consider the necessity of indemnification and hold harmless clauses in any contract, agreement, license or permit to protect the HCA from claims arising out of the actions of the other party. The other party should agree to reimburse losses sustained by the HCA (indemnify the HCA), and to defend and pay for any losses itself with no HCA involvement (hold the HCA harmless) when the loss arises out of the actions of the other party. The intent of indemnification is that the HCA be returned to the financial position it was in before the loss occurred.

HCA's are frequently asked to provide an indemnity in contracts. Before granting this request the HCA must carefully review the contract terms to ensure the indemnity provided is only for liability which arises from the contract and only for acts over which the HCA has control or for which it has agreed to accept responsibility. Ensure the indemnity granted excludes liability which arises from the acts or omissions of other parties. Ideally an indemnification agreement should allocate risk to the party who is best able to manage the risk. Indemnity agreements which do not allocate risk to the party who is best able to manage it should be reviewed with your risk management team.

Indemnities provided by those HCA's which meet the definition of a government corporation under the *Financial Administration Act* must receive prior approval from the Minister of Finance or the Executive Director of the Risk Management Branch of the Ministry of Finance pursuant to the *Financial Administration Act*. Your HCPP risk consultant co-ordinates this process for you.

Insurance

Requiring contractors to prove they carry sufficient insurance to cover the exposures inherent in their services provides assurance the contractor has the financial capacity to indemnify and hold the HCA harmless.

There is no one-size-fits-all insurance requirement. The types and amounts of insurance should be customized relevant to a specific contract. Consider the activities the contractor will perform to deliver the goods or services, and the risks arising from those activities. The following illustrates some common types of insurance and when to request the coverage in contract. Contact your risk management team for specific recommendations.

Type of Insurance	When to request this coverage
Commercial General Liability (CGL)	All contracts that deal with a commercial or business arrangement between the contractor and the HCA.
Professional Liability	Services of “professionals” where their advice, specifications, prescription or design could be negligent or faulty by means of error or omission and cause a loss to HCA or a third party. Includes medical professionals, lawyers, accountants, IT consultants, engineers, architects and others.
Environmental Impairment Liability	Risk that the contractor’s operations or products will cause the discharge, dispersal, release or escape of irritants, contaminants or pollutants into or upon land, air or water.
Tenants Legal Liability	The HCA is leasing or renting a building(s) to the contractor.
Property Insurance	Assets owned by HCA in the care, custody or control of the contractor OR the contractor owns that if lost or damaged would impair their ability to perform the contract.
Builders Risk Insurance (Course of Construction)	All Health Care Agencies are required to place insurance for construction projects with a value in excess of \$1,000,000.00 through the provincial construction insurance program which is administered by HCPP.
Fidelity Bonds	Contractors with access to patient’s property for example, home support workers, security or janitorial personnel

Limitations of Liability

Limitation of liability clauses are increasingly relied upon by service providers to minimize the risk exposures of contracting parties. A limitation of liability, unlike a waiver, does not fully release the other party from liability. Instead, it limits the degree to which one party can be held responsible by capping, or limiting the amount of damages the HCA can recover from the provider for loss arising out of the agreement. A limitation of liability clause may be drafted so that it apportions the potential liability between the parties, or the clause may limit the dollar amount for which the other party can be held liable.

Frequently, a contract will seek to limit liability to an amount no greater than the amount of fees paid or payable under the contract. In reality, the amount of fees paid or payable has no bearing on the degree of risk in the contract. It is never acceptable to limit liability for death, bodily injury, breach of security or confidentiality or infringement of intellectual property.

Limitations of liability can also apply to the type of damage incurred. For instance, contracts will often seek to limit liability to direct damage only. HCAs need to consider the potential for indirect or consequential loss related to the product or service for which they are contracting. For example: Computer servicing contracts can result in loss of data without direct damage to the equipment itself. The indirect cost to restore lost data can be significant. Allowing a provider to limit their liability arising from indirect damage could leave no means of recovery from them for the costs associated with restoring the lost data.

A contractor should be willing to indemnify for the scope of services they are paid to provide without unreasonable limitations. Prior to agreeing to accept limitations, HCAs need to think about what could potentially go wrong as a result of the services, how likely it is to occur, and if it does occur, what is the impact to the HCA. If the limitations requested are reasonable in light of the potential impacts to the HCA they may be accepted. If not, further negotiation is required.

CONTRACT REVIEW CHECKLIST

Issue	Yes	No	Comments
1. Identification of Parties: <i>Are all of the parties to the contract identified?</i>			
<i>Are all of the parties legal entities?</i>			
2. Definitions: <i>Are capitalized words defined at the outset of use?</i>			
3. Term: <i>Is the length of the contract specified?</i>			
<i>Are the renewal terms (if applicable) clearly defined?</i>			
4. Termination: <i>Are termination provisions specified?</i>			
<i>Does the HCA have the ability to terminate the contract with notice?</i>			
5. Performance Measures: <i>Is there a full description of each party's obligations and responsibilities?</i>			
<i>Are the obligations and responsibilities measurable? Attainable?</i>			
6. Insurance requirements: <i>Are the requirements for insurance specified?</i>			

<p><i>Are the insurance requirements appropriate for the risks associated with the contract?</i></p>			
<p><i>Does the contract require the HCA to be notified of material change or cancellation of any required insurance policy?</i></p>			
<p>7. Limitations of Liability: <i>Do limitations of liability exist in the contract?</i></p>			
<p><i>Are the limitations of liability reasonable in the context of the agreement?</i></p>			
<p>8. Indemnification/Hold Harmless: <i>Is there an indemnity and a hold harmless within the contract?</i></p>			
<p><i>If so, are the parties assuming responsibility only for their own acts?</i></p>			
<p><i>If the indemnity is being provided by the HCA to another party has it been approved by the Risk Management Branch?</i></p>			
<p>9. Changes to Contract: <i>Does the contract specify that any changes must be made in writing and signed by all parties?</i></p>			
<p>10. Jurisdiction: <i>Is the Province of BC specified as the jurisdiction for governing law?</i></p>			

11. Assignment: <i>Does the contract prohibit assignment to another party without the written approval of the HCA?</i>			
12. Subcontractors: <i>Does the contract require all subcontractors to be approved by the HCA in advance?</i>			
<i>Are any subcontractors clearly bound by all the same terms and conditions as the primary contractor?</i>			
13. Confidentiality: <i>Are confidentiality issues addressed within the contract?</i>			
<i>Is the contractor required to comply with FOIPPA?</i>			
14. Dispute Resolution: <i>Are dispute resolution processes specified in the event of any disagreements?</i>			
<i>Are any provisions for formal dispute resolution (arbitration etc) based in BC?</i>			
15. Signatories: <i>Are the names, titles and signatures of the appropriate parties recorded on the signature page?</i>			
16. Appendixes/Schedules: <i>Are any appendixes and/or schedules referred to in the contract attached?</i>			

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It should be clearly understood that this document and the information contained within is not legal advice and is provided for guidance from a risk management perspective only. It is not intended as a comprehensive or exhaustive review of the law and readers are advised to seek independent legal advice where appropriate. If you have any questions about the content of this Risk Note please contact your organization's risk manager or chief risk officer to discuss.