

## Contracts – Insurance Clauses

### OVERVIEW OF ISSUE

One of the most important tasks in the management of a contract is to identify the goals, the expectations and the reasons for entering into a contract. Having them clearly determined makes it easier to assess risks and to then put mechanisms in place for mitigation.

Insurance and indemnification clauses are fundamental to a well-drafted contract. The indemnification clause identifies the party that must pay damages. The insurance clause supports the promise made in the indemnification by providing the indemnifier the financial resources for losses that may result from a claim. Insurance requirements should be clear and fair, appropriate to the risks, and the limits adequate for the claims that may arise. This Risk Note addresses insurance provisions and provides an example of an insurance clause while another risk note addresses the indemnification clause and provides an example.

Refer to related Risk Notes for further details:

- [Contracts – Important Clauses](#)
- [Contracts – Indemnification with Hold Harmless and Defense Provisions](#)

### KEY POINTS

- The indemnification of risks in the contemplated activity is an important part of the process in managing contract risks
- Careful review of insurance limits and specifications is required

### THINGS TO CONSIDER

#### Definitions

- **Per occurrence limit of liability** - The per occurrence limit is the maximum amount of money the policy will pay for any one insured loss.
- **Aggregate limit of liability** - The maximum amount the insurance policy will pay in one year notwithstanding the number of claims.
- **Certificate of insurance** - Evidence of insurance attesting to the currency of the coverage; usually sufficient proof that adequate, appropriate and current insurance is in place.
- **Certified copy of the policy** - Is the most recent copy of the policy, stamped and signed, which includes the declaration page, wordings and any endorsements.
- **Occurrence coverage** - A policy covering claims that arise out of damage or injury that took place during the policy period, regardless of when claims are made (*International Risk Management and Insurance*).
- **Claims-made coverage** - A claims-made policy applies when a claim is made against an insured for the first time during the policy period, regardless of when the loss actually took place. If the policy has a retroactive clause, the loss must occur on or after the retroactive date.
- **Error and omission insurance** – Insurance that protects professionals against liability for committing an error or omission while performing their duties.
- **Waiver of subrogation** – An agreement between two parties where one party agrees to waive their rights to recover against the other party in the event of a loss.

#### Insurance Requirements

- Different specifications are required for different contracts. Review the scope of work and consider the types of losses or harm that could arise from the activities contemplated in the contract. The insurance requirement portion of the contract must clearly state the types of insurance coverage, per occurrence limit of liability, aggregate limit of liability, additional insured if any, evidence of insurance and days of notice. Be as specific as possible. Consider reviewing these provisions with your insurer.

#### Types of Insurance

- **General Liability Coverage**
  - Designed for bodily injury and property damage arising from the insured's operation, general liability coverage is often sufficient for contracts involving the provision of services (e.g. maintenance of premises or equipment), or liability for non-clinical operations (e.g. fundraising events or a gift shop on hospital premises) but is insufficient against liability arising out of professional work (e.g. clinical work).
  - Watch for gaps in coverage that can occur in general liability policies. For example, personal injury can be excluded by endorsement, which in turn exposes the insured to threats such as invasion of privacy.
- **Professional Liability Coverage**
  - Designed to protect professionals against liability arising from errors and omissions in the performance of their duties.

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- Should there be even a very small exposure to professional liability, ensure professional liability coverage is required in the contract.
- **Products Liability Coverage**
  - Exposure may arise out of a defect in a product sold, distributed, manufactured or made available to the public.
  - This may be part of a general liability policy, but it can be subject to an aggregate limit of liability.
  - Though the figure is often the same, most policies will indicate a per occurrence limit and an aggregate limit, which has different uses. However, it is preferable not to have an aggregate limit.
- Other types of Insurance
  - Other types of insurance may apply under specific types of circumstances including:
    - Clinical Trials Insurance: This type of insurance provides a financial resource for those who sponsor or conduct clinical trials;
    - Data Liability: This type of insurance covers electronic data incidents that result in damage to, loss of, loss of use of, corruption of and failure to access electronic data;
    - Crime insurance: This provides coverage for the insured's loss of money, securities, and other property caused by employee dishonesty, forgery, loss inside and outside the premises, computer fraud, counterfeit money, credit card fraud and social engineering.

### Limit of Liability

- Limits should reflect the risk and loss exposure, not the value of the contract. The following should be considered when establishing the limit of liability: risks involved in the services provided by the contractor; contractor's past loss history; losses from similar services; experience of other facilities with the same provider or with the same type of operation.

### Certificate of Insurance

- Most contracts require evidence of current insurance to be submitted in the form of a certificate or memorandum. Request certificates of insurance from all contractors, professionals, tenants and parties to a contract and during the entire term of the contract. Make note of insurance expiry dates.

### Named Insured vs. Additional Insured

- A named insured owns the policy, manages the coverages, pays the premium, oversees claims and has access to confidential information. The named insured also has rights in the policy, e.g. receiving return premiums and payment

for damages that it would not want to share. Therefore, be very careful about adding an entity as an additional named insured.

- Additional insured is defined as person/entity not automatically covered as an insured under an insurance policy that is added as an insured at the request of the insured person/entity. As a rule, additional insureds are insured only in relation to a specific event, services, agreements or contracts related to the insured's operations. (International Risk Management and Insurance)
- An additional insured enjoys the protection of the policy but only as the additional insured's work relates to the operation of the named insured. This additional layer of protection provides organization coverage under the vendor's policy and allows the organization to greatly improve their ability to obtain a legal defense for any potentially covered claims. It is potentially broader indemnity than a Hold Harmless agreement alone and should be required in addition to the Hold Harmless clause ( – Indemnification Clause with Hold Harmless and Defense Provisions Risk Note for further details) If the organization is an "Additional Insured", the evidence of coverage should clearly state this and for what purpose.
- When considering adding a party to the insurance, ensure that liability is not assumed for operations that may cause unexpected problems. Be sure that you know why a person or an entity is being included as an additional insured. It is possible that the requestor is unable to get his own insurance and is relying on his additional insured status for coverage.
  - For example, a company providing fireworks for a special event may not be added as an additional insured unless it can provide the subscriber with proof of current, appropriate and adequate insurance to which the subscriber has additional insured status as well.
- An additional insured may not be added to Workers Compensation policies or some professional Errors and Omissions policies

### Auto Insurance

- The vendor should be required to provide evidence of automobile insurance if there is an automobile used in any phase of the work performed. If employees use their personal automobiles for work purposes and if leased or hired vehicles are used, the insurance should include non-owned and hired automobiles. Proof of personal liability insurance should be required for the sole proprietor of the vehicle.

### Workers Compensation

- Request the vendor or contractor to provide evidence of Workers Compensation unless the vendor is a sole practitioner. If Workers Compensation coverage is

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not required by the Province/Territory, obtain written confirmation from the consultant before waiving coverage requirement.

- In the absence of worker's compensation coverage, a vendor, contractor or another party to the contract may be asked to purchase Employer's Liability Insurance, which could pay compensation and legal costs of an employer if an employee or former employee sues for illness or injury resulting from his or her employment.
- As some employers may not be required to purchase worker's compensation coverage, there could be an exposure to injury and illness from the work being done on the subscriber's behalf.

### Property Insurance

- Responsibility for property owned by one of the parties is often dictated in the contract. There are two significant situations where responsibility for property should be spelled out clearly including: i) buildings in course of construction and ii) installations and leases involving tenant's improvements.
- Specifications should include appropriate limits of coverage

and usually "all-risks" form loss payee-by being named as loss payees have the right under the policy to be reimbursed for a loss to your property.

- It is important to include a Waiver of Subrogation on property risks in any Landlord tenant situation to eliminate any dispute over cause of loss.

### Other Insurance Considerations

- Ensure the contract's insurance coverage requirements specify that:
  - Your organization is to be given at least thirty (30) days' Notice of Cancellation prior to a material change in the insurance coverage, cancellation or non-renewal;
  - Insurance must be maintained for the duration of the contract and failure to maintain insurance may be considered a breach of contract. (Note: for construction projects and claims-made policies, ensure the duration of the coverage extends a number of years past the end of the project).

### Sample Insurance Requirements, Certificate of Insurance and Additional Insured Clause

**SAMPLE ONLY:** Please note that this is only a sample wording and your own insurance clause will vary according to the requirements involved and after final discussion with the other party. Please refer to your legal counsel before proceeding.

During the term of this agreement XXXX shall maintain in full force and effect general liability insurance (and professional liability insurance, if required) for a minimum of XXXX any one occurrence. Such insurance shall name XXXX as additional insured but only with respect to this agreement.

- The general liability insurance shall include at least the following:
  - Products and completed operations;
  - Personal injury;
  - Cross liability;
  - Contractual liability;
  - Thirty (30) days' prior written notice of material change to, cancellation, or non-renewal of the policy.

XXX shall provide XXX (hospital) with evidence of insurance upon request.



## REFERENCES

- Devaney P. (2012). How to maximize indemnity clauses-an important risk management tool.
- Kent N. (2006). The CGL policy and the additional insured endorsement in Canada.
- Keyes C., Donnelly T. (2011). Getting it right before the loss: indemnity, additional insured, and waiver of subrogation issues.
- International Risk Management and Insurance. (n.d.). [Insurance glossary](#).
- The Canadian Medical Protective Association. [Medical-legal issues to consider with individual contracts](#).