



# ***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, employment agreements, leases, affiliation agreements and clinical trial agreements.

A contract is an agreement that is enforceable by law. It is the primary tool through which HCAs govern relationships and understanding with other parties. A contract should communicate information and lay out the obligations of each party clearly and precisely. Ambiguity or inconsistency within a contract can cause confusion, financial loss, and conflict which can erode trust and damage relationships between parties. A contract should be in writing and reviewed by legal counsel.

There are 4 essential elements of a contract<sup>1</sup>, all of which must exist for the contract to be legally binding on the parties:

1. Offer & Acceptance

A contract is created when one party accepts an offer from another party. Acceptance is only valid if the party is accepting the exact terms of the offer with no variation.

If the offeree proposes to accept the terms but with variations, a contract cannot be formed until the offeree provides a counteroffer and it is accepted.

2. Consideration

Both parties need to provide consideration for a contract to be legally enforceable. A promise cannot be enforced unless something has been promised or given in return. Consideration needs to be either payment or something else of value such as goods, services, etc.

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<sup>1</sup> Smith, A., Baker, P., & Edwards, T. (2018, February 13). *The Basics: Do you have a contract? Is there a binding agreement in place?* Gowling WLG. <https://gowlingwlg.com/en/insights-resources/articles/2018/do-you-have-a-contract/>

### 3. Certainty of Terms

The contract must specify the terms that will govern the agreement. Although all essential terms must be agreed upon before the contract can be binding, and the agreement cannot be vague or ambiguous, not every term has to be agreed upon before binding.

In the courts, it may be found that parties have entered into a binding contract even if not all terms have been agreed upon yet. “However, if terms are missing they must be capable of being implied by the court - the court must be able to fill in the gaps. In some cases, the court may be able to infer a standard of reasonableness, either on the basis of common law, or statute”.<sup>1</sup>

To avoid the chance of a dispute, it is always best to agree to all important terms before binding.

### 4. Intention to Be Bound

A party must be intending to enter into a contract and be bound by that contract; that is, the party knows that if the terms of the contract are not fulfilled, the other party can seek to have it enforced. Both parties need to have this intention.

There are two other essential requirements, but they are often considered more part of the context of the contract. These are public policy and legal capacity.

To be valid, the contract has to pass what one might call the public policy test. For example, a contract for the purchase and sale of illicit drugs is not a valid contract (that is, not enforceable in the courts) even if it has all the essential elements because the transaction is illegal and so to have the courts enforce such a contract goes against public policy.

Legal capacity: in order to be bound by a contract, a party must have legal capacity - which is the ability to enter into the contract. Adults are considered legally capable unless they have been assessed as incapable by reason of some mental condition.<sup>2</sup>

## **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 HCAs have a written policy in regard 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 of exposure, the greater the level of authority required);

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<sup>2</sup> K. Kitson (personal communication Feb 10, 2021), Senior Claims Examiner/Legal Counsel, confirmed the four essential elements of a contract, provided the definition for “intention to be bound” and gave information on public policy and legal capacity.

- 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 (physical or virtual), 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; and
- Archive 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 negotiating and managing contracts should receive appropriate training.

### **Contract Review**

To facilitate consistent and thorough contract review practices, we recommend that HCA's develop a tool, such as a checklist, 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 must 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 the contractor is obligated to follow the *Freedom of Information and Protection of Privacy Act (FOIPPA)*;
- Contractor is required to be trained and licensed to provide the services (where appropriate);
- Termination provisions are specified and reasonable; and
- Dispute resolution processes are identified.

## **Indemnification**

The objective of all contracts should be for each party to be responsible for losses stemming from its own actions or those for whom it is responsible. Indemnification is an agreement for one party to make whole the other(s) from loss or damage that they incur as a result of the terms set out in the indemnification clause. Indemnification triggers could include negligence, breach of the agreement or simply the actions of the indemnifying party.

**The *Financial Administration Act* requires that all indemnities provided by most HCAs<sup>3</sup> must receive prior approval** from the Minister of Finance or the Executive Director of the Risk Management Branch of the Ministry of Finance. HCPP co-ordinates this process for you.

HCA's are frequently asked to provide an indemnity in contracts. An agreement to indemnify is voluntary and may create unintended onerous obligations beyond those imposed by negligence. 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 and omissions over which the HCA has control or for which it has agreed to accept responsibility. HCA should 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.

HCA's should also 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 intent of indemnification is that the HCA be returned to the financial position it was in before the loss occurred. 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.

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<sup>3</sup> HCAs that must receive approval for the indemnities they grant include all health authorities by definition of a government corporation under the *Financial Administration Act*: [https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96138\\_01#section1](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96138_01#section1)

## **Release of Liability, Waiver of Rights, Disclaimer**

As part of managing the transfer of risks it can be helpful to know the difference between a waiver, release and a disclaimer.

A **waiver and release** are similar and generally have the same effect in a contract. A waiver / release is a provision which asks a party to relinquish its legal rights to sue for negligence. Both attempt to relieve one party from a responsibility or obligation that it may have otherwise had. Both are often used when there is some risk associated with an activity that could appropriately be assumed by the individual undertaking that activity.

A **disclaimer** is used by a party seeking to be relieved of a responsibility or obligation related to the subject of the disclaimer.

For more detailed information on these clauses please refer to our risk note *Waivers, Limitations of Liability and Indemnification Clauses in Contracts*.

## **Insurance**

Requiring contractors to prove they carry sufficient insurance to cover the exposures inherent in their services provides assurance that 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.

<b>Type of Insurance</b>	<b>When to request this coverage</b>
Commercial General Liability ("CGL")	All contracts that deal with a commercial or business arrangement between the contractor and the HCA.
Professional Liability/Errors and Omissions ("E&O")	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	Where the contractor's operations involve hazardous materials (e.g. removal of asbestos, medical waste disposal, etc.) there is a risk that the contractor's operations or products will cause the discharge, dispersal, release or escape of hazardous substances, irritants, contaminants or pollutants into or upon land, air or water.
Tenants Legal Liability	The HCA is leasing or renting a building(s) to another party.
Property Insurance	Assets owned by HCA in the care, custody or control of another party OR the contractor owns certain assets that if lost or damaged would impair their ability to perform the contract.
Construction Insurance	All HCAs are required to place insurance for construction projects with a value in excess of one million dollars (\$1,000,000.00) through the provincial construction insurance program which is administered by HCPP.  HCPP administers two types: <ul style="list-style-type: none"> <li>• Course of Construction/Builders' Risk</li> <li>• Wrap Up General Liability</li> </ul>
Automobile Liability	Only when vehicles owned, operated or licensed by the contractor will be used extensively in the performance of the contract (excluding driving to / from worksite). <b>Note:</b> evidence of ICBC automobile insurance cannot be provided on a Certificate of Insurance. An ICBC APV47 form is acceptable proof in those circumstances.

**Subrogation Clause**

When an HCA has suffered damage or injury caused by another party, the HCA has a right to recover costs associated with that loss from the responsible party. Subrogation is when an HCA transfers its right of recovery to HCPP. In other words, after paying the loss HCPP **steps into the shoes** of the HCA and can legally pursue the third party that caused the insured damage or injury.

While many counterparties will ask for a waiver of subrogation clause in the HCAs insurance requirements, HCPP cannot provide such a waiver. This is because HCPP is a steward of public funds and must act responsibly, seeking recovery wherever possible.

**HCPP will not waive subrogation, and if an HCA agrees to a subrogation clause it would put the HCA in breach of their contract with the counter party.**

## **Limitations of Liability**

Limitation of liability clauses are increasingly relied upon by counterparties to minimize their risk exposures. They limit the degree to which one party can be held responsible by capping or limiting the amount of damages for which it is responsible. A limitation of liability clause may limit either financial responsibility or the type of damage incurred.

A contract may cap the amount paid to a specific dollar amount, or an amount no greater than the fees paid or payable under the contract. HCAs need to consider the potential financial impact of risk exposure and ensure any limitations are reasonable. In particular, the amount of fees paid or payable may have 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 its liability to losses arising from direct damage only could leave the HCA with no way to recover the costs associated with restoring lost data from the provider.

Prior to agreeing to accept limitations, HCAs should conduct a risk assessment;

1. What could potentially go wrong?
2. How likely it is to occur?
3. 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
<b>1. Identification of Parties:</b> <i>Are all of the parties to the contract identified?</i>			
<i>Are all of the parties legal entities?</i>			
<b>2. Definitions:</b> <i>Are capitalized words defined at the outset of use?</i>			
<b>3. Term:</b> <i>Is the length of the contract specified?</i>			
<i>Are the renewal terms (if applicable) clearly defined?</i>			
<b>4. Termination:</b> <i>Are termination provisions specified?</i>			
<i>Does the HCA have the ability to terminate the contract with notice? Without notice?</i>			
<b>5. Performance Measures:</b> <i>Is there a full description of each party's obligations and responsibilities?</i>			
<i>Are the obligations and responsibilities measurable? Attainable?</i>			
<b>6. Insurance requirements:</b> <i>Are the requirements for insurance specified?</i>			



Are the insurance requirements appropriate for the risks associated with the contract?			
Does the contract require the HCA to be notified of material change or cancellation of any required insurance policy?			
Does the contract require HCPP to waive subrogation against the counterparty? <b>**HCPP cannot waive its right of subrogation**</b>			
<b>7. Limitations of Liability:</b> Do limitations of liability exist in the contract?			
Are the limitations of liability reasonable in the context of the agreement?			
<b>8. Indemnification/Hold Harmless/Release:</b> Is there an indemnity and a hold harmless within the contract?			
Are the indemnity triggers within the control of the indemnifying party?			
If the indemnity is being provided by the HCA to another party has it been approved by the Risk Management Branch?			
Does the contract ask for a release of liability, waiver of rights or a disclaimer? Is this appropriate and reasonable in this context?			
If the HCA is using its own subcontractors, has it flowed through the HCA's indemnity obligations to the subcontractor?			
<b>9. Changes to Contract:</b> Does the contract specify that any changes must be made in writing and signed by all parties?			

<b>10. Jurisdiction:</b> <i>Is the Province of BC specified as the jurisdiction for governing law?</i>			
<b>11. Assignment:</b> <i>Does the contract prohibit assignment to another party without the written approval of the HCA?</i>			
<b>12. Subcontractors:</b> <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>			
<b>13. Confidentiality:</b> <i>Are confidentiality issues addressed within the contract?</i>			
<i>Is the contractor required to comply with FOIPPA?</i>			
<b>14. Dispute Resolution:</b> <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>			
<b>15. Signatories:</b> <i>Are the names, titles and signatures of the appropriate parties recorded on the signature page?</i>			
<b>16. Appendixes/Schedules:</b> <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.