



RISK NOTE

Subject: **Template Information Technology and Management Consulting Professional Services Agreement**

Health Care Agencies (HCAs) frequently enter into contractual relationships with providers of information technology (IT), management consulting (MC) and services related to either. Depending upon the extent of the services, the risks to the HCA can be significant. Types of risks include direct loss from failure in performance of the services as well as indirect loss as a consequence of such failure. As with all contracts, the objective of the Information Technology and Management Consulting (IT/MC) General Services Agreement (GSA) is a fair apportionment of risk between the parties and a reasonable acceptance of responsibility from those best able to control the risk.

Service providers are increasingly relying on limitation of liability clauses to minimize their risk exposures. A limitation of liability, unlike a waiver, does not fully release the other party from liability. Instead, it limits the degree to which the service provider can be held responsible by capping, or limiting the amount of damages the customer 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, an IT/MC provider will seek to limit their 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. A provider who is negligent can do more damage in one day under a \$1,000.00 contract as a more prudent provider could in years under a multi-million dollar contract.

Providers of IT/MC services cannot reasonably guarantee the business success of their clients. Economic and "other" financial losses resulting from a system that fails to deliver the expected result are difficult to quantify and fall outside the scope of available insurance coverage. Therefore, it is reasonable that IT/MC service providers limit themselves to some degree from the full effect of damage they may potentially cause.

The Premier's Technology Council recommended in 2002 that there be a standardization of some of the clauses that appeared in the service contracts with the information

technology industry. Similar limitations in MC service agreements were noticed and a working group of government and industry representatives, including the Risk Management Branch, developed revised contract clauses. The clauses developed include limitations of liability that are acceptable to the broad Provincial public sector including HCAs.

Using standard limitations of liability provides a level playing field for vendors and also addresses the risk of inequitable assumption of risk. Vendors should be sufficiently insured against loss arising from services they provide and be willing to accept responsibility for damages they cause. It is not acceptable for the IT/MC provider to limit liability for bodily injury or damage to real property or tangible personal property; infringement of third-party intellectual property rights; or breach of confidentiality.

The Province of BC has customized an agreement for IT/MC GSA which can be found at the following link, [Province of BC IT/MC GSA](#). As publicly funded bodies, the HCAs can adopt the provincial standard as their template agreement after review by their legal counsel.

This current version of the IT/MC GSA reflects the changes made to the Province's basic GSA in July 2017. It substantially includes the clauses used in the previous version with minor revisions to clarify the meaning and intent of the clauses. Special terms that had been included in Schedule F have now been integrated into the main body of the agreement.

We encourage the use of the IT/MC GSA appropriately adapted for HCAs' contracting needs.

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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.