



Policy on Decision Making in Limiting Contractor Liability in Crown Procurement Contracts

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Policy on Decision Making in Limiting Contractor Liability in Crown Procurement Contracts

1. Effective date

1.1 This policy is effective as of September 1, 2003.

2. Context

2.1 In contractual matters, contractors are responsible for managing risks and liabilities under their control. The Crown is responsible for managing risks under its control and for losses arising from those risks. This division of responsibility reflects both the common and civil law. Based on this legal principle, the Crown, may or may not include a clause (or clauses) in Crown procurement contracts, to ensure that it is protected from losses caused either by the contractor's performance of the contract or from the performance of the product or service delivered.

2.2 In certain circumstances, it is in the public interest for the Crown to assume all or part of a contractor's potential liabilities. This transfer of potential risk or liabilities is set out in a limitation of liability or indemnification clause. This policy addresses the use of these clauses. It provides for a risk-based, administratively efficient management regime that responds to program delivery challenges, recognizes market place realities, and supports effective stewardship of public funds.

3. Definitions

3.1 For definitions and the Procurement and Project Management Framework, please see Annexes 1 and 2 respectively.

4. Policy statement

4.1 It is Government policy that:

- *Protection of the Crown.* The government will ensure that Crown procurement contracts provide for appropriate indemnification of the Crown.
- *Contractor responsibility.* Contractors are responsible for managing risks under their control and must retain financial responsibility for losses arising as a result of the work they perform under contract, and in particular for liabilities from third party claims.
- *Exceptional transfer of risk.* A substantive transfer of risk and potential liabilities of the contractor to the Crown, which would normally be the contractor's responsibility, should occur only in exceptional circumstances when there is a compelling reason in the public interest.
- *Risk-based implementation.* Indemnification and limitation provisions are to be implemented in a way that is risk-based and administratively efficient, and supports due diligence by the Crown and contractors in managing risk and contract performance.

4.2 The main objective of this policy is to achieve a balance amongst the protection required by the Crown when entering into Crown procurement contracts, market place conditions and conditions important for assuring program and service delivery results.

4.3 This policy will result in the Crown being properly protected from liabilities in a cost effective manner when entering into Crown procurement contracts through the strategic identification and management of risks consistent with effective program and service delivery to Canadians.

5. Authority

5.1 This policy is issued pursuant to paragraph 7(1)(a) of the *Financial Administration Act* and supersedes the *Interim Policy on Indemnification in Contracting* dated August 15, 1995.

6. Application

6.1 This policy applies to departments as defined in section 2 of the *Financial Administration Act* (including the Canadian Forces) and to Crown procurement contracts subject to the *Government Contracts Regulations* and the *Contracting Policy*.

6.2 This policy does not apply to acquisition card purchases, where the only contract between the Crown and a contractor is the bill of sale, and where transfers of liability may be a normal condition of such sales. Where acquisition cards are used to make payments against contracts, standing offers, or supply arrangements, the indemnification or limitation of liability provisions of those contracting instruments are subject to this policy.

7. Policy requirements

7.1 Departments are required to use the risk-based models described in detail in Annex 4 in order to support decision making when using clauses indemnifying or limiting liabilities of contractors. The four models are tied to risk-based management strategies to

reflect the broad spectrum of circumstances in Crown procurement contracts. Decision trees found in Annexes 5 to 10 support these models.

- **Model 1:** Standard commercial or military products and services and construction contracts commonly available in the marketplace. (Annex 4, sections 1.1 to 1.5)
- **Model 2:** Complex developmental products, services and construction contracts. (Annex 4, sections 2.1 to 2.5)
- **Model 3:** Contracts where there is limited scope for negotiating liability provisions, such as government-to-government agreements, or where no other viable alternative to serve a program requirement exists. (Annex 4 sections 3.1 to 3.5)
- **Model 4:** Highly specialized services contracts in support of assuring the health, safety and economic well being of Canadians. (Annex 4, sections 4.1 to 4.7).

7.2 Consistent with government policy, the Crown will self-underwrite all risks under its control and for which it is legally liable (Refer to section 3(b) of the *Risk Management Policy*).

7.3 The presence of a limitation or an indemnification clause in a contract does not give rise to a contingent liability for reporting purposes in the Public Accounts of Canada. Only once an event to indicate that a possible liability exists has occurred would a contingent liability be reported in accordance with the Treasury Board Accounting Standard (TBAS) 3.6.

8. Summary of ministerial authorities

8.1 All departments may use silence in a contract (defined as not including an indemnification of the Crown clause in Annex 1) or include a standard clause indemnifying the Crown. A summary of ministerial authorities is attached as Annex 3.

8.2 In accordance with Annex 4, the Deputy Minister of Public Works and Government Services Canada (PWGSC) and officials designated by the Deputy Minister may:

- a. limit a contractor's first party liability(ies);
- b. limit a contractor's third party liability (ies) in accordance with Model 3 of Annex 4 ; or
- c. establish commodity groupings.

8.3 In accordance with Annex 4, prior Treasury Board approval is required in all instances dealing with:

- a. indemnification of the contractor;
- b. departmental requests to limit a contractor third party liability(ies);
- c. departmental requests, (other than those from PWGSC) to limit contractor's first party liability(ies); and
- d. departmental requests to use PWGSC's commodity groupings, risk assessment, financial models, and resulting contractual clauses.

8.4 The authority to use PWGSC's commodity groupings and any other exceptional departmental authorities are listed in Appendix C of the *Contracting Policy*.

8.5 *Emergency Contracting Authority.* When an emergency arises where a limitation of liability or indemnification of the contractor is justified, and where a delay to seek approval of the limitation or indemnification would be injurious to the public interest, the contracting authority is to obtain, at a minimum, a preliminary approval from its departmental senior financial officer, or his or her delegate, before entering into the contract. Departments are to include the financial assessment as well as all the limitation or indemnification details in the report that is sent to the Treasury Board of Canada Secretariat (TBS) within 60 days of the authorization or beginning of the work. The departmental senior financial officer, or his or her delegate is to approve this report.

9. Responsibilities

9.1 Departments are responsible for Crown liabilities arising from their contracting activities, including contracting carried out for them by PWGSC. Departments are also responsible for losses contractors may suffer from risks that are under the control of the Crown or that are caused by the Crown's fault.

9.2 Because departments retain the responsibility for funding any liabilities arising from their contracting activity or contracting done through a common service agency, their senior financial officer or his or her delegates is to sign-off in cases where there is a substantive transfer of the contractor's liabilities to the Crown. This is required to ensure that areas of potential risk to departmental budgets are brought to their attention.

9.3 Departments are to ensure that officials receive the appropriate training and information necessary to discharge their functions associated with this policy, including establishing or obtaining appropriate risk assessment and risk management advice to support decision making, particularly in complex or higher risk situations.

9.4 Departments are to implement this policy within the context of the requirements and authorities in the appropriate Treasury Board policies and related regulations and legislation.

9.5 PWGSC, as a common service provider, will make commodity groupings and related risk assessments, financial models and standard contractual clauses available to departments.

9.6 PWGSC is to re-evaluate the risk assessments and financial models used as the basis of commodity groupings in the fifth year following their creation or whenever significant changes occur that may have an impact on their representativeness of risks and potential losses to the Crown.

10. Monitoring, evaluation and review

10.1. Departments are to monitor the policy's implementation and ensure that problems or issues are acted on and, when applicable brought to the attention of TBS. Periodic internal audits or reviews are conducted in order to verify that the policy is appropriately implemented.

10.2 In accordance with Annex 4, PWGSC, acting in its capacity as a common service agency, will ensure that TBS is informed of all transactions involving substantive transfers of liabilities and sign-offs by departmental senior financial officers in order to support the effective evaluation of the policy.

10.3 TBS will continually assess the effectiveness of this policy.

10.4 TBS will evaluate this policy in the fifth year following its coming into effect.

11. Treasury Board of Canada Secretariat publications

- *Policy on Decision Making in Limiting Contractor Liability in Crown Procurement Contracts* - Implementation Guide
- *Policy on Decision Making in Limiting Contractor Liability in Crown Procurement Contracts* - Training Manual

12. Enquiries

Please direct enquiries about this policy instrument to the organizational unit in your department responsible for this subject matter. For interpretation of this policy instrument, the responsible organizational unit should contact: [TBS Public Enquiries](#).

Annex 1 - Definitions

In the context of this policy, the following definitions apply.

contingent liability (*responsabilité éventuelle*)

a potential liability, which may become an actual liability if and when one or more future events occur or fail to occur.

contractor (*entrepreneur*)

a person, firm or corporation entering into a Crown procurement contract.

Crown (*l'État*)

Her Majesty the Queen in Right of Canada, including departments and departmental corporations as defined in the *Financial Administration Act*.

Crown procurement contract or contract (*marché de l'État ou marché*)

an agreement between a contracting authority and a contractor to provide a good, perform a service or construct a work for appropriate consideration.

financial cap (*plafond financier*)

the maximum amount or amounts specified in the contract for which a contractor can be liable to the Crown.

first party (*première partie*)

the Crown or the contractor.

indemnification (*indemnisation*)

a legally binding promise whereby one first party undertakes to accept any responsibility for losses or damages another party may suffer or be liable for. This usually refers to the obligation to pay money to compensate for damages suffered by a first or third party.

liability (*responsabilité*)

the legal obligation to do something or refrain from doing something including the responsibility of associated costs.

limitation of liability (*limitation de la responsabilité*)

the establishment by contract of a predetermined maximum financial responsibility which might be more or less than that imposed by law in the absence of such contractual limitation.

non-substantive transfer (*transfert non substantiel*)

where the limitation of liability of the contractor to be included in the contract is more than the potential liability that might reasonably be expected based on the circumstances and potential losses that might arise from specified risks taking into account their probability.

silence in the contract (*silence*)

absence of a clause indemnifying the Crown with regard to first and third parties liabilities. The liability will then be subject to the common or civil law.

substantive transfer (*transfert substantiel*)

where the limitation of liability of the contractor to be included in the contract is less than the potential liability that might reasonably be expected based on the circumstances and potential losses that might arise from specified risks taking into account their probability.

third party (*tiers*)

any party other than those entering into the Crown procurement contract.

Annex 2 - Procurement and Project Management Framework

The Government of Canada's Procurement and Project Management Framework consists of legislation, regulations, policies and best practices aimed at the acquisition of goods and services and the carrying of construction in a manner that enhances access, competition and fairness and results in best value or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people, the most relevant of which are listed below.

Legislation and regulations

The *Financial Administration Act* and its *Government Contracts Regulations* P.C. 1987-1355, June 30, 1987 (SOR 87-402 as amended by SOR 91-651, SOR 92-503, SOR 96-472 and SOR 97-115) as included in Appendix B to the *Contracting Policy*

Trade Agreements

- The *World Trade Organization - Agreement on Government Procurement (WTO-AGP)*
- The *North American Free Trade Agreement (NAFTA)*
- The *Agreement on Internal Trade (AIT)*

Policies

- [Contracting Policy](#)

Related Policies

- [Policy on Transfer Payments](#)
- [TBS Risk Management sub site](#) including [Risk Management Policy](#)
- [Project Management Policy](#)
- [Major Crown Projects Policy](#)
- [TB Enhanced Management Framework for IT](#)
- [Policy on Alternative Service Delivery](#)
- [Volunteers Policy](#)
- [Policy on Delegation of Authorities](#)
- [Treasury Board Accounting Standards](#) (re: *Contingent Liabilities*)

Annex 3 - Summary of Ministerial Authorities

Risk Transfer Strategy	Departments	Shared Services Canada	Public Works and Government Services Canada	Departments can seek Treasury Board Approval
Common or Civil Law (Silence, Standard Clause Indemnifying the Crown)	Yes	Yes	Yes	Not applicable
Use Commodity Grouping	By Special authority	Yes	Yes	Yes
Create Commodity Grouping	No	No	Yes	Yes
Limit First Party Liabilities	No	Yes	Yes	Yes
Limit Third Party Liabilities	No	In defined and approved circumstances	In defined and approved circumstances	Yes
Indemnify Contractors	No	No	No	Yes
Create Special Authorities	No	No	No	Yes

Annex 4 - Policy Implementation Models Requirements

1. **Requirements** - Standard Commercial or Military Products and Services and Construction Contracts - Model 1
2. **Requirements** - Complex Developmental Products, Services and Construction Contracts - Model 2
3. **Requirements** - Limited Scope for Negotiating Liability Provisions - Model 3
4. **Requirements** - Highly specialized Services contracts in Support of ensuring the Health, Safety and Economic well-Being of Canadians - Model 4

Policy Implementation Models - Requirements

The government uses a variety of measures to support risk and performance management in Crown procurement contracts. These range from good procurement planning, financial measures to encourage performance such as milestone payments, performance bonds and letters of credit, and effective ongoing contract management, monitoring and review.

The following risk-based models deal with one very narrow component of the overall framework for managing risk and performance in contracts. They do not address the broader questions of effective contract and risk management and decision making, but rather focus on the question of decision making in the use of limitation of liability and indemnification clauses in Crown procurement

contracts, particularly decisions to limit a contractor's liability.

The models provide general direction with respect to appropriate management strategies to support decision making in using these clauses in contracts and minimizing the Crown's exposure to financial losses as a result of actions under the contractor's control. The models also aim to ensure that the liability provisions that are ultimately included in a contract effectively support business decisions and measures to meet a contract's performance objectives and expected results. Decisions leading to the contractor's limitation of liability or indemnification can be a key step in the management of risk and performance, particularly in complex contracts.

The models assist in

- setting out the government's position with regard to the protection it expects from contractors with whom it enters into Crown procurement contracts subject to the *Government Contracts Regulations* and the *Contracting Policy*;
- specify how decisions on indemnification or limitation of liability are to be taken; and
- provide a risk-based, administratively efficient approach to management and decision making with respect to indemnification and liability provisions in contracts in order to meet program and service delivery needs.

1. MODEL 1 - Standard commercial or military products and services and construction contracts commonly available in the marketplace

1.1 This model includes a wide range of goods, services and construction contracts in well-established markets. These contracts involve proven technologies and/or well-established methodologies and standards. These contracts may or may not require significant oversight and consideration of risk. These contracts will not result in a substantive transfer of risk and potential liabilities of the contractor to the Crown. If procurement involves a non-standard modification to a product, which would change the risk profile of the program or procurement, then it is part of Model 2.

1.2 Decisions with respect to clauses to limit liability or indemnify contractors should be made prior to the request for proposal (RFP) release but no later than bid closing. In cases of negotiations in non-competitive situations, decisions with regard to the applicable indemnification regime are to be taken before the start of negotiations.

1.3 **Commodity groupings.** Consistent with responsible spending in designing administrative processes, frequently bought commodities can be managed as standard groups with systematic risk reviews and associated financial modelling. Commodity groupings should be reserved for instances where clearly they represent a cost-effective and practical way of dealing with individual suppliers without creating an undue risk to the Crown.

1.3.1 Only PWGSC may establish commodity groupings upon completing a systematic risk review, associated financial modelling and supported by appropriate clauses tailored to the commodity.

1.3.2 Where the risk review suggests that it is necessary:

- a. a financial assessment of potential liabilities is to be completed and appropriate professional advice, be it legal, financial, technical, or risk, is to be sought and the risks to be addressed specifically by limitation or indemnification provisions in the contract are to be identified. Where particular departments have significant funds at risk in areas subject to commodity groupings, they should be actively engaged in establishing the grouping.
- b. where the financial assessment indicates it is necessary, the potential financial capacity of contractors to meet potential liabilities in the review be checked.

1.3.3 It is recognised that not all procurements will fall into a predetermined commodity grouping as a result of their size, complexity, or risk profile. Also procurements that are done on a very irregular basis, such that significant circumstances may reasonably be expected to vary from one procurement to another, may not permit either the development or use of a commodity grouping.

1.3.4 Commodity Groupings are handled by PWGSC in one of four ways:

- a. silence in the contract;
- b. limitation of a first party liability(ies) by the inclusion of a financial cap sufficiently high to demonstrate adequate financial protection (with no substantive transfer of contractor's liabilities to the Crown) based on the risk assessment and indemnifying the Crown for liability for third party claims resulting from actions or omissions on the part of the contractor;
- c. limitation of a first party liability(ies) by the inclusion of a financial cap sufficiently high to demonstrate adequate financial protection (with no substantive transfer of contractor's liabilities to the Crown) based on the risk assessment and silence with regard to liability for third party claims;
- d. inclusion of a standard indemnification of the Crown clause.

1.3.5 If PWGSC has established a commodity grouping, departments, with the prior approval of Treasury Board, may use such a grouping and enter into the contract without a further review, subject to the department determining if any risks unique to their operations may have an impact on the procurement. The use of these groupings is also subject to other departmental contractual authorities.

1.3.6 Regardless of the approach set out for a commodity grouping, departments may decide to use silence in the contract or provide for indemnification of the Crown, subject to departmental contracting authorities.

1.4 **Goods, services and construction contracts with no commodity groupings.** When PWGSC has not established a commodity grouping, departments are to first consider whether a contract poses foreseeable or anticipated risks.

1.4.1 For transactions where there are no foreseeable or anticipated risks which is the majority of contracts, transactions are handled in one of two ways:

- a. silence in the contract; or
- b. inclusion of a standard indemnification of the Crown clause.

1.4.2 For transactions where there are foreseeable or anticipated risks, a review of potential risks and, if appropriate, financial assessments are to be undertaken and the contract tailored to the circumstances of the procurement.

1.4.2.1 Where the risk review suggests that it is necessary:

- a. a financial assessment of potential liabilities is to be completed and early and appropriate professional advice, be it legal, financial, technical, or risk, is to be sought and the risks that need to be addressed specifically by limitation or indemnification provisions in the contract are to be identified as such; and
- b. where the financial assessment indicates it is necessary, the financial capacity of potential contractors to meet potential liabilities specified in the review is to be checked.

1.4.2.2 These transactions are handled in one of four ways:

- a. silence in the contract;
- b. limitation of a contractor's first party liability(ies) by the inclusion of a financial cap sufficiently high to demonstrate adequate financial protection (with no substantive transfer of liabilities to the Crown) based on the risk assessment and indemnifying the Crown for liability for third party claims resulting from actions or omissions on the part of the contractor;
- c. limitation of a contractor's first party liability(ies) by the inclusion of a financial cap sufficiently high to demonstrate adequate financial protection (with no substantive transfer of liabilities to the Crown) based on the risk assessment and silence with regard to liability for third party claims;
- d. inclusion of a standard indemnification of the Crown clause.

1.4.2.3 For these transactions, departments may:

- a. use silence in the contract or provide for indemnification of the Crown;
- b. alternatively, engage PWGSC as contracting authority early in the contracting process to limit a contractor's first party liability(ies) (with no substantive transfer of liabilities to the Crown) through a financial cap;
- c. finally, when acting as the contracting authority, limit a contractor's first party liability(ies) (with no substantive transfer of liabilities to the Crown) through a financial cap with prior Treasury Board approval.

1.5 Under Model 1, prior Treasury Board approval is required in all instances dealing with an indemnification of the contractor where the Crown accepts any responsibility for losses or damages the contractor may suffer or be liable for and in all instances dealing with contractor third party liabilities.

2. MODEL 2 - Complex developmental products, services and construction contracts

2.1 This model includes complex procurements that have a high degree of uncertainty or risk because of the untested nature of the technology or the unproven, unique or developmental nature of the deliverable. The uncertainty or risk could also be magnified by the use the government intends to make of the deliverable.

These transactions also include procurements involving non-standard modifications of proven military or commercially available products and services.

2.2 Early in the planning stages, departments are to systematically assess potential risks. This is to be supported by the early engagement of the appropriate expertise (i.e. financial, risk, technical, legal, contracting) and should include, among others, the following elements as they relate to the potential contract:

- cost estimates and cost impact assessment;
- internal and external risk factors, such as externally imposed deadlines, departmental experience in managing this type of contract, untested technology, environmental issues, late delivery, national security, contingencies and government-furnished resources;
- technical requirements of the department;
- potential contractor management experience and technical capacity required;
- potential contractor financial capacity to meet liabilities specified in the assessment/review;
- impact on, and of, policies, programs, operations and government budgetary considerations for the project to be delivered; and
- legal risks.

2.2.1 The assessment is to identify the risks that need to be addressed specifically by limitation or indemnification provisions in the contract, the potential cost of expected losses that might arise as well as their probability and circumstances under which such losses might arise. Based on this assessment and on each specific area or type of risk, a financial model of the risks, their probability and potential liabilities/expected losses is to be completed, and the performance management strategy established for the contract.

2.2.2 Departments are then to develop appropriate risk management strategies. The management strategy is to describe the potential risks to be reduced throughout the life of the contract and the complexity in managing them. This strategy is to be supported by a performance management regime for the contract.

2.2.3 Decisions with respect to clauses to limit liabilities or indemnify contractors should be made prior to RFP release but no later than bid closing. In cases of negotiations in non-competitive situations, decisions with regard to the applicable indemnification regime are to be taken before the start of negotiations.

2.3 If the assessment does not identify any of the exceptional circumstances listed under section 2.4 below, transactions are handled in one of four ways:

- a. silence in the contract;
- b. limitation of a contractor's first party liability(ies) by the inclusion of a financial cap sufficiently high to demonstrate adequate financial protection (with no substantive transfer of liabilities to the Crown) based on the risk assessment and indemnifying the Crown for liability for third party claims resulting from actions or omissions on the part of the contractor;
- c. limitation of a contractor's first party liability(ies) by the inclusion of a financial cap sufficiently high to demonstrate adequate financial protection (with no substantive transfer of liabilities to the Crown) based on the risk assessment and silence with regard to liability for third party claims;
- d. inclusion of a standard indemnification of the Crown clause.

2.3.1 For these transactions, departments may :

- a. use silence in the contract or provide for indemnification of the Crown;
- b. alternatively, early in the contracting process engage PWGSC as contracting authority to limit a contractor's first party liability(ies) (with no substantive transfer of liabilities to the Crown) through a financial cap;
- c. finally, when acting as the contracting authority, limit the contractor's first party liability(ies) (with no substantive transfer of liabilities to the Crown) through a financial cap with prior Treasury Board approval.

2.4 Only in exceptional circumstances where there is a compelling reason in the public interest and based on the risk assessment and financial modelling, the Crown may consider assuming potential contractor liabilities in circumstances such as, but not limited to the following:

- i. when the Crown is imposing on the contractor a liability in excess of the financial protection available at a reasonable cost to the contractor by virtue of the risk inherent in the nature of the relationship captured in the contract or work being performed;
- ii. when the risk involved in the specific contract is of an unusual nature whether by its seriousness or financial implications;
- iii. when the risks are clearly non-insurable or when the cost of insurance is prohibitive;
- iv. where clearly no other viable alternative exists to serve a program or service delivery requirement.

2.4.1 If the transaction falls within one of these exceptional circumstances and the Crown assumes responsibility for part of the contractor's liability, transactions are handled:

- a. by limiting the contractor's first party liability(ies) based on the risk assessment and indemnifying the Crown for liability for third party claims resulting from actions or omissions on the part of the contractor; or
- b. by limiting the contractor's first party liability(ies) based on the risk assessment and silence with regard to liability for third party claims.

2.4.2 For these transactions, departments are to obtain their departmental Senior Financial Officer's or his or her delegate's approval. Departments may:

- a. early in the contracting process engage PWGSC as contracting authority to limit a contractor's first party liability(ies) (with substantive transfer of liabilities to the Crown);
- b. when acting as the contracting authority, limit the contractor's first party liability(ies) (with substantive transfer of liabilities to the Crown) with prior Treasury Board approval.

2.4.3 At least once a year, PWGSC is to report the transactions completed under section 2.4.2 (a) above to the Treasury Board Secretariat, including a copy of the contractual clauses used, the financial model of the risks and the departmental Senior Financial Officer's or of his or her delegate's approval.

2.4.4 Alternately, if the transfer of risk is too great or the potential liabilities are too high, departments may decide not to proceed.

2.5 Under Model 2, prior Treasury Board approval is required in all instances dealing with an indemnification of the contractor where the Crown accepts any responsibility for losses or damages the contractor may suffer or be liable for and in all instances dealing with contractor third party liabilities.

3. MODEL 3 - Contracts where there is limited scope for negotiating liability provisions such as government-to-government agreements or where no other viable alternative to serve a program requirement exists

3.1 The third model includes procurements where the government's ability to negotiate contractual terms regarding liability provisions is limited such as multi-government collaborative procurement programs or purchases under foreign military sales that result in a Crown procurement contract. In such cases, the indemnification and/or limitation of liability provisions are already negotiated in existing agreements, often pursuant to policy or legislation in another jurisdiction, and the contractor may be unwilling to offer the Crown different terms for the same or similar acquisitions.

This model includes instances where there are patents, copyrights or other exclusive rights, or proprietary information issues or where there are technical reasons such as highly specialized knowledge or experience required.

3.2 In cases of procurements involving standard commercial or military products and services and construction contracts departments are to first consider whether a substantive transfer to the Crown of risks and potential liabilities that are under the control of the contractor is contemplated by the clauses in the existing contracts or proposed by the contractors, irrespective of whether it deals with

first or third party limitations of liability(ies).

3.2.1 Should a review of the proposed clauses determine that there is no substantive transfer of risks from the contractor to the Crown, departments may:

- a. early in the contracting process, engage PWGSC as contracting authority to limit the contractor's first and/or third party liability(ies), with no substantive transfer of liabilities to the Crown under this section only;
- b. when acting as the contracting authority, limit the contractor's first and/or third party liability(ies) with no substantive transfer of liabilities to the Crown with prior Treasury Board approval.

3.2.2 Should a review of the proposed clauses identify risks that could lead to the Crown incurring losses (i.e. a substantive transfer of liabilities), a more systematic risk review is to be undertaken in accordance with sections 1.4.2 and 1.4.2.1 above.

3.2.2.1 If there is a substantive transfer of liabilities from the contractor to the Crown, identified in the systematic risk review, irrespective of whether they deal with first or third party liability(ies), departments are to obtain their departmental Senior Financial Officer's or his or her delegate's approval.

3.2.2.2 Departments may:

- a. early in the contracting process, engage PWGSC as the contracting authority to limit the contractor's first and/or third party liability(ies) under this section only;
- b. when acting as the contracting authority, limit the contractor's first and/or third party liability(ies) to the Crown with prior Treasury Board approval.

3.3 In cases of complex developmental products, services and construction contracts, departments must assess whether a substantive transfer of risks from the contractor to the Crown is contemplated based on the clauses in the contract or proposed by the contractor. Departments are to ensure that all disciplines, including contracting experts, are brought together in the early stages in undertaking the risk assessment. The assessment should include among others, the following elements as they relate to the potential contract:

- cost estimates and cost impact assessment;
- internal and external risk factors, such as externally imposed deadlines, departmental experience in managing this type of contract, untested technology, environmental issues, late delivery, national security, contingencies and government-furnished resources;
- technical requirements of the department;
- potential contractor management experience and technical capacity required;
- financial capacity of potential contractor to meet liabilities specified in the assessment/review;
- impact on, and of policies, programs, operations and government budgetary considerations for the projects to be delivered; and
- legal risks including the clauses in the contract or proposed by the contractor.

3.3.1 The assessment is to identify the risks to be addressed specifically by limitation or indemnification provisions in the contract, the potential cost of expected losses that might arise as well as their probability and circumstances under which such losses might arise. Based on this assessment and on each specific area or type of risk, a financial model of the risks, their probability and potential liabilities/expected losses is to be completed, and the performance management strategy established for the contract.

3.3.2 Departments are then to develop appropriate strategies to manage risk. The selected strategy is to describe the risk and measures that will be taken to mitigate unwanted consequences. This strategy is to include the performance management regime for the contract.

3.3.3 This work is to be supported by the appropriate legal, financial, technical, contracting and risk expertise.

3.3.4 Should it be determined that there is no substantive transfer of liabilities from the contractor to the Crown, departments may:

- a. early in the contracting process, engage PWGSC as the contracting authority to limit the contractor's first and/or third party liability(ies) (with no substantive transfer of liabilities to the Crown) under this section only;
- b. when acting as the contracting authority, limit the contractor's first and/or third party liability(ies) (with no substantive transfer of liabilities to the Crown) with prior Treasury Board approval.

3.3.5 In cases where substantive transfers of the contractor's liability(ies) to the Crown are effected, irrespective of whether they deal with first or third party liability(ies), departments are to obtain their departmental Senior Financial Officer's or his or her delegate's approval. Departments may:

- a. early in the contracting process engage PWGSC as contracting authority to limit the contractor's first and/or third party liability(ies) under this section only;
- b. when acting as the contracting authority, limit the contractor's first and/or third party liability(ies) to the Crown with prior Treasury Board approval.

3.3.5.1 At least once a year, PWGSC is to report transactions completed under sections 3.2.2.2 (a) and 3.3.5 (a) above to the Treasury Board Secretariat, including a copy of the contractual clauses used, the financial model of the risks and the departmental Senior Financial Officer's or his or her delegate's approval.

3.4 Transactions with a comparative risk profile found under Model 1 and Model 2 can also be found under Model 3 if the terms and conditions are predetermined or for technical or intellectual property reasons. However, no Model 4 transactions are to be dealt with

under Model 3.

3.5 Under Model 3, prior Treasury Board approval is required in all instances dealing with an indemnification of the contractor where the Crown accepts any responsibility for losses or damages the contractor may suffer or be liable for.

4. MODEL 4 - *Highly specialized services contracts in support of ensuring the health, safety and economic well-being of Canadians.*

4.1 The fourth category of contracts pertains to primarily services contracts and centres on departments' mandated responsibilities related to health, safety or the economic well-being of Canadians, or complex arrangements where government has statutory obligations to regulate in areas of standards and certification or, where the government has long-established responsibilities. Contracts in this class are often very closely tied to core policy and program considerations. Program concerns may often be at the centre of the factors contributing to risks to the Crown arising from these types of contracts. Risks inherent to this type of activity are magnified by the risks embedded in the nature of the function being performed on behalf of the government.

4.2 Early in the planning stages, departments are to develop a broad-based risk assessment. Because this is the most complex model with regard to limitation of liability or indemnification, it requires an interdisciplinary approach to risk assessment. This model requires the bringing together of financial, risk, legal, scientific, contracting, program and policy officials and likely requires not only specialists from across a department, but may also require discussion across government and with professional advice from the private and academic sectors early in the process.

4.3 The assessment should address the criteria listed in section 2.2 above, as well as, among others, the following:

- Type of risk: technological, financial, human resources (capacity, intellectual property), health and safety
- Source of risk: external (political, economic, natural disasters, etc.); internal (reputation, security, knowledge management, information for decision making, etc.)
- What is at risk: area of impact/type of exposure (people, reputation, program results, materiel, real property); and
- Level of ability to manage the risk: high (operational); moderate (reputation); low (natural disasters).

4.3.1 The assessment is to identify the risks that need to be addressed specifically by limitation or indemnification provisions in the contract.

4.3.2 Departments are then to develop appropriate management strategies. The management strategy is to describe the risk and complexities to be managed and reduced throughout the life of the contract. This strategy is to include a performance management regime for the contract. Departments are also to complete financial models of risks, their probability and potential liabilities. Cases in this model require a more detailed financial model than those provided in Models 2 or 3 if there is to be a substantive transfer of the contractor's liabilities to the Crown.

4.3.3 However, should the transfer of risk be too great or the potential liabilities too high, departments may decide not to proceed.

4.4 Decisions with respect to clauses to limit liability or indemnify contractors should be made prior to RFP release but no later than bid closing. In cases of negotiations in non-competitive situations, decisions with regard to the applicable indemnification regime are to be taken before the start of negotiations.

4.5 Only in exceptional circumstances where there is a compelling reason in the public interest and based on the risk assessment and financial modelling, the Crown may consider assuming potential contractor liabilities in circumstances such as, but not limited to the following:

- a. when the Crown is imposing on the contractor a liability in excess of the financial protection available at a reasonable cost to the contractor by virtue of the risk inherent in the nature of the relationship captured in the contract or work being performed;
- b. when the risk involved in the specific contract is of an unusual nature whether by its seriousness or financial implications;
- c. when the risks are clearly non-insurable or when the cost of insurance is prohibitive;
- d. where clearly no other viable alternative exists to serve a program or service delivery requirement.

4.5.1 If the transaction falls within one of these exceptional circumstances and the Crown assumes responsibility for part of the contractor's liability, transactions are handled:

- a. by limiting the contractor's first party liability(ies) based on the risk assessment and indemnifying the Crown for liability for third party claims resulting from actions or omissions on the part of the contractor; or
- b. by limiting the contractor's first party liability(ies) based on the risk assessment and silence with regard to liability for third party claims.

4.5.2 For these transactions, departments are to obtain their departmental Senior Financial Officer's or his or her delegate's approval. Departments may:

- a. early in the contracting process, engage PWGSC as contracting authority to limit a contractor's first party liability(ies) (with substantive transfer liabilities to the Crown). At least once a year, PWGSC is to report these transactions to the Treasury Board Secretariat, including a copy of the contractual clauses used, the financial model of the risks and the departmental Senior Financial Officer's or his or her delegates' approval
- b. when acting as the contracting authority, limit the contractor's first party liability(ies) (with substantive transfer of liabilities to the Crown) with prior Treasury Board approval.

4.6 If the transaction does not fall within these exceptional circumstances as listed in section 4.5 above, and the Crown does not assume responsibility for part of the contractor's liabilities, transactions are handled in one of four ways:

- a. silence in the contract;
- b. limitation of a contractor's first party liability(ies) (with no substantive transfer of liabilities to the Crown) through a financial cap sufficiently high to demonstrate adequate financial protection based on the risk assessment; and indemnifying the Crown for liability for third party claims resulting from actions or omissions on the part of the contractor;
- c. limitation of a contractor's first party liability(ies) (with no substantive transfer of liabilities to the Crown) through a financial cap sufficiently high to demonstrate adequate financial protection based on the risk assessment; and silence with regard to liability for third party claims;
- d. inclusion of a standard indemnification of the Crown

4.6.1 For these transactions departments may:

- a. use silence in the contract or provide for indemnification of the Crown;
- b. alternatively, early in the contracting process engage PWGSC as contracting authority to limit a contractor's first party liability(ies) (with no substantive transfer of liabilities to the Crown) through a financial cap;
- c. finally, when acting as the contracting authority, limit the contractor's first party liability(ies) (with no substantive transfer of liabilities to the Crown) by providing a financial cap with prior Treasury Board approval.

4.7 Under Model 4, prior Treasury Board approval is required in all instances dealing with an indemnification of the contractor where the Crown accepts any responsibility for losses or damages the contractor may suffer or be liable for and in all instances dealing with contractor third party liabilities.

Annex 5



[Text version: Annex 5 - Decision making with respect to limitation of liability \(LOL\) - Decision Tree](#)

[Display full size graphic - Decision making with respect to limitation of liability \(LOL\) - Decision Tree](#)

Annex 6



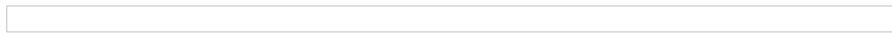
[Display full size graphic - Model 1: Standard Goods, Services, Construction Contracts](#)

Annex 7



[Display full size graphic - Model 2: Complex developmental products, services, construction contracts](#)

Annex 8



[Display full size graphic - Model 3: Scope for Government to Negotiate Liability Provisions is Limited](#)



[Display full size graphic - Model 3: Scope for Government to Negotiate Liability Provisions is Limited - Page 2](#)



[Display full size graphic - Model 3: Scope for Government to Negotiate Liability Provisions is Limited - Page 3](#)

Annex 9



[Display full size graphic - Model 4: Highly specialized services contracts in support of ensuring the health, safety and economic well-being of Canadians](#)

*Consistent with the new Alternate Service Delivery (ASD) policy

Annex 10

Note 1:

Commercially available products include a wide range of commodities and services, such as but not limited to:

- low dollar value buys for stationery items, office furniture, janitorial supplies;
- commercial vehicles;
- goods listed on numerous standing offer agreements such as laboratory equipment, computer equipment, janitorial services and basic construction services;
- consulting services such as economic studies and analyses.

If the procurement involves a non-standard modification to a product, which would change the risk profile of the program or procurement, then it is part of Model 2.

Acquisition card purchases are exempt from the present policy where the only contract between the Crown and a contractor is the sales receipt, and where transfers of liability may be a normal condition of such sales. Where acquisition cards are used to make payments against contracts, standing offers or supply arrangements, this policy applies and the indemnification or limitation of liability provisions of those contracting instruments also apply.

Note 2:

Complex procurements include but are not limited to buys such as:

- Commercially available goods and equipment for which non-standard modifications are sought by the client department;
- Major Crown Projects;
- Contracts that may be less than the Major Crown Project threshold but are inherently risky because of the technology or untested nature of the technology that is being developed to meet the government's requirement, e.g. Information Technology projects;
- Construction projects.

Note 3:

In cases of a limitation of first party liability, use PWGSC services, or obtain TB approval. In cases where the contractor wants to limit third party liability or be indemnified for first or third party liability, departments must obtain prior Treasury Board approval.

Note 4:

Business of Government procurements can be defined as the contracting out of responsibilities that have traditionally remained in the public sector domain, including the government's statutory obligations to regulate in areas of standards and certification, e.g. vaccine or air safety certification, the logistics needed to support military operations or land claim negotiations. These contracts are complex, one-of-a-kind initiatives that are subject to substantial external risks (technical, business change, political, and other project interdependencies) and require close senior management oversight.

Note 5: Internet Addresses of related policies:

- [TB Risk Management Policy](#)
- [TB Enhanced Management Framework for IT](#)
- [TB Management of Major Crown Projects](#)
- [TB Project Management Policy](#)
- [PWGSC Benefits Driven Procurement](#)
- [Security & Contracting Management Standard](#)