



Contract Policy Notice 2003-05 – Policy on Decision Making with Respect to Limiting Contractor Liability in Crown Procurement Contracts (Archived)

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DATE: July 24, 2003

SUBJECT: Policy on Decision Making with Respect to Limiting Contractor Liability in Crown Procurement Contracts.

SUMMARY OF POLICY CHANGES

1. Effective September 1, 2003 officials are to implement the *Policy on Decision Making with Respect to Limiting Contractor Liability in Crown Procurement Contracts*. The policy aims to ensure that the Crown will be properly protected from liability in a cost-effective manner. This will be achieved through a process that strategically identifies and manages risks, while ensuring effective program and service delivery to Canadians. This policy supersedes the 1995 *Interim Policy on Indemnification in Contracting*.
2. Specific changes have been made to the policy to clarify the policy's application and its implementation.
3. The policy provides four risk and market based models for departments to use as a starting point for their analysis. These models allow for tailored management strategies and take into account the differences between various types of contracts awarded under the Government Contracts Regulations.
4. Contracting Officials should note that:
 - Departments can use "silence" or a standard indemnification of the Crown clause. Departments may also use commodity groupings developed by PWGSC upon the approval of Treasury Board. Departments may engage PWGSC as a

contracting authority early in the process where it may be necessary to limit first party liability.

- PWGSC may establish "commodity groupings," limit contractor's first party liabilities, and limit third party liability with Treasury Board Approval in specified and special circumstances.
- Substantive transfers of liabilities are only permitted in exceptional circumstances and require Senior Financial Officer's sign off.
- Improved reporting and monitoring provisions are included in the policy.

BACKGROUND

1. Since 1995, it has been the government's policy to limit contractor's liabilities in certain defined circumstances.
2. Following an extensive review of the policy, it was concluded that the policy required clarification, the delegation structure needed to be amended, and the policy required a greater focus on risk management with respect to the decision making process in support of liability provisions in contracts.

POLICY APPLICATION

1. This policy applies to all departments as defined in section 2 of the *Financial Administration Act* (including the Canadian Forces) and **only** to crown procurement contracts subject to the *Government Contracts Regulations* and the Treasury Board Contracting Policy.
2. This policy does not apply to acquisition card purchases, 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 and liability provisions of those contracting instruments also apply.

POLICY - OBJECTIVES AND UNDERLYING PRINCIPLES

1. The objective of the policy is to achieve a balance between the protection required by the Crown when entering into Crown procurement contracts, market place conditions and concerns important to ensure program and service delivery results.
2. The policy is based on four underlying principles:
 1. Protection of the Crown
 2. Contractor responsibility
 3. Exceptional Transfer of risks to the Crown
 4. Risk-based implementation
3. This policy will result in the Crown being properly protected from liability in a cost-effective manner through a process that strategically identifies and manages risks and ensures program and service delivery to Canadians.

IMPLEMENTATION

1. An implementation guide has been developed and will be published on the Treasury Board of Canada Secretariat Contracting Policy Website. Training courses will be made available through Training and Development Canada and in key departments e.g. PWGSC.
2. Departments are responsible for implementing this policy within the context of the requirements and authorities in the appropriate Treasury Board policies and related regulations and legislation.
3. Please note that the versions released before the web publication date of July 7, 2003, contained an administrative error. If you have a copy that was released prior to July 7, 2003, please refer to the website publication as the error has been corrected.

CONTRACTING POLICY WEBSITE

This Contract Policy Notice and the new *Policy on Decision Making with Respect to Limiting Contractor Liability in Crown Procurement Contracts* are available on the TBS Website (www.tbs-sct.gc.ca), under the Policies - Contracting section.

ENQUIRIES

For policy advice and guidance, please contact:

Treasury Board of Canada Secretariat at
(613) 941-7180.

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