



# RISKED

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*A Risk Management Newsletter for the Schools Protection Program's Members*

## Team Leader's Message

Welcome our latest edition of Risk Ed containing articles which we hope you will enjoy and find both useful and informative. Please feel free to contact us at [protection.program@bc spp.org](mailto:protection.program@bc spp.org) with any suggestions for future topics and, as always, we will do our best to accommodate you. We have just reviewed our previous articles which are listed on our website alphabetically under the Publications tab and we recommend using this as a growing library of useful information.

After the success of last year's conference for our university clients, we are pleased to announce that another conference is being planned for the Spring of 2018. Building on the success of these past conferences, we are extending the mandate to include school districts, health authorities, ministries and crown corporations. It will be an exciting initiative and we will release more details as they become available. Feel free to contact us with any questions or suggestions you may have.

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## Program Updates

### New Staff Update:

Justin Dosanjh joined the SPP team as a Co-Op student and was with us January to April. He has completed his 3rd year in the UVIC law program and was working in an analytical role within our busy team; working on publications and other projects.

At the beginning of December 2016, Michael Dahlseide joined the SPP team as a Risk Management Consultant. He comes to us with 7 years of insurance industry experience and has his Chartered Insurance Professional (CIP) designation. Please join me in welcoming Michael to the Education team.

### New Submission Update:

Due to the additional staff in our team, we have updated our intake policy to allow for us to process new certificate requests and indemnity reviews in the most efficient manner. This will require some assistance from you and your local teams and offices. We are now asking that ALL new inquiries are sent to the general email address: [protection.program@bc spp.org](mailto:protection.program@bc spp.org). This mailbox is always monitored no matter who is in a meeting, out of the office or has fallen ill and will be the most efficient way to get a timely response. ◀

## Risk Management in Contracts

A contract is an agreement that is enforceable at law. It is the primary tool through which a School District (SD) govern relationships and understanding with the other party and there are many circumstances in which a SD will contract with another party including service contracts, sales agreements, leases, affiliation agreements and clinical trial agreements.

There are 5 components of a contract, all of which must exist in order for the contract to be legally binding on the parties. These components are:

1. Legal Capacity

The parties to the contract must have the legal capacity to enter into a contract. Legal capacity means that the parties are of legal age and are competent. It also means that the party is a legal entity (example: an SD is a legal entity, an individual school is not). Individuals signing the contract must have the authority to bind the legal entity to the agreement.

2. Offer & Acceptance

There must be a genuine intent to enter into the agreement from all parties. Allegations of coercion or intimidation can be grounds to render the contract void.

3. Consideration

To be legally enforceable something of value must be given by one party in return for the promise of action, or omission of action by the other party. Most commonly the consideration takes the form of money, but it could be something else of value (example: goods or services).

4. Legal Purpose

The purpose of the contract must be for legal endeavors (example: contracts for a supply of illegal drugs would not be enforceable at law).

5. Conditions

The contract must specify the terms that will govern the agreement.

### Policy for Risk Management in Contracts

Contracting has the potential to create many risks. Care in managing these risks can protect the SD from loss. Therefore, we recommend all SDs have a written policy in regards 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 exposure, the greater the level of authority required);
- Requirement that all contracts be reviewed for risk management considerations prior to acceptance;
- Designated central storage areas, 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;
- Archiving procedures for expired contracts, including how long they will be retained;

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## Risk Management in Contracts (cont'd)

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Anyone dealing with contracts must know if they have the authority to negotiate and sign the contract and, if they do not, who does. The SD's employees must understand the obligations under the contract and the risks associated with those obligations. Therefore, employees responsible for contract negotiation should receive instruction or training on how to effectively review a contract.

### **Contract Review**

In order to facilitate consistent and thorough contract review practices we recommend the SD develop a tool such as a checklist in order to ensure the quality of the review process. We have included a sample checklist at the end of this publication 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 SD, 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 are required to 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 SD
- Subcontractors must be approved by the SD and bound by all the same terms and conditions as the primary contractor
- Confidentiality issues are addressed and contractor is obligated to follow FOIPPA
- Contractor required to be trained and licensed to provide the services (where appropriate)
- Termination provisions are specified and reasonable
- Dispute resolution processes are identified

### **Indemnification**

The objective of all contracts should be the acceptance of responsibility by a party for loss arising from its own actions and those for whom it is responsible. Indemnification is an agreement between parties to protect one or both of them from loss or damage that it may incur as a result of the fulfillment of the agreement. An agreement to indemnify is voluntary and may create obligations beyond those imposed by negligence.

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## Risk Management in Contracts (Cont'd)

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SDs should consider the necessity of indemnification and hold harmless clauses in any contract, agreement, license or permit to protect the SD from claims arising out of the actions of the other party. The other party should agree to reimburse losses sustained by the SD (indemnify the SD), and to defend and pay for any losses itself with no SD involvement (hold the SD harmless) when the loss arises out of the actions of the other party. The intent of indemnification is that the SD be returned to the financial position it was in before the loss occurred.

SDs are frequently asked to provide an indemnity in contracts. Before granting this request the SD must carefully review the contract terms to ensure the indemnity provided is only for liability which arises from the contract and only for acts over which the SD has control or for which it has agreed to accept responsibility. 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.

### Insurance

Requiring contractors to prove they carry sufficient insurance to cover the exposures inherent in their services provides assurance the contractor has the financial capacity to indemnify and hold the SD 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.

Type of Insurance	When to request this coverage
Commercial General Liability (CGL)	All contracts that deal with a commercial or business arrangement between the contractor and the SD.
Professional Liability	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 SD or a third party. Includes medical professionals, lawyers, accountants, IT consultants, engineers, architects and others.
Environmental Impairment Liability	Risk that the contractor's operations or products will cause the discharge, dispersal, release or escape of irritants, contaminants or pollutants into or upon land, air or water.
Tenants Legal Liability	The SD is leasing or renting a building(s) to a tenant.
Property Insurance	Assets owned by SD in the care, custody or control of the contractor OR the contractor owns that if lost or damaged would impair their ability to perform the contract.
Builders Risk Insurance (Course of Construction)	All SD are required to place insurance for construction projects with a value in excess of \$250,000.00 through the provincial construction insurance program which is administered by SPP. For Projects under \$250,000 the contractor hired to build the project is required to carry the coverage.
Fidelity Bonds	Contractors with access to student's property for example, home support workers, security or janitorial personnel

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## Risk Management in Contracts (Cont'd)

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### Limitations of Liability

Limitation of liability clauses are increasingly relied upon by service providers to minimize the risk exposures of contracting parties. A limitation of liability, unlike a waiver, does not fully release the other party from liability. Instead, it limits the degree to which one party can be held responsible by capping, or limiting the amount of damages the SD 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, a contract will seek to limit 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. 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. SDs 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 their liability arising from indirect damage could leave no means of recovery from them for the costs associated with restoring the lost data.

A contractor should be willing to indemnify for the scope of services they are paid to provide without unreasonable limitations. Prior to agreeing to accept limitations, SDs need to think about what could potentially go wrong as a result of the services, how likely it is to occur, and if it does occur, what is the impact to the SD. If the limitations requested are reasonable in light of the potential impacts to the SD they may be accepted. If not, further negotiation is required.

### CONTRACT REVIEW CHECKLIST

Issue	Yes	No	Comments
1. <b>Identification of Parties:</b> <i>Are all of the parties to the contract identified?</i>			
<i>Are all of the parties legal entities?</i>			
2. <b>Definitions:</b> <i>Are capitalized words defined at the outset of use?</i>			
3. <b>Term:</b> <i>Is the length of the contract specified?</i>			
<i>Are the renewal terms (if applicable) clearly defined?</i>			

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## Risk Management in Contracts (Cont'd)

(Continued from page 5)

Issue	Yes	No	Comments
4. <b>Termination:</b> Are termination provisions specified?			
Does the SD have the ability to terminate the contract with notice?			
5. <b>Performance Measures:</b> Is there a full description of each party's obligations and responsibilities?			
Are the obligations and responsibilities measurable? Attainable?			
6. <b>Insurance requirements:</b> Are the requirements for insurance specified?			
Are the insurance requirements appropriate for the risks associated with the contract?			
Does the contract require the SD to be notified of material change or cancellation of any required insurance policy?			
7. <b>Limitations of Liability:</b> Do limitations of liability exist in the contract?			
Are the limitations of liability reasonable in the context of the agreement?			
8. <b>Indemnification/Hold Harmless:</b> Is there an indemnity and a hold harmless within the contract?			
If so, are the parties assuming responsibility only for their own acts?			
9. <b>Changes to Contract:</b> Does the contract specify that any changes must be made in writing and signed by all parties?			

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## Risk Management in Contracts (Cont'd)

(Continued from page 6)

10. <b>Jurisdiction:</b> <i>Is the Province of BC specified as the jurisdiction for governing law?</i>			
11. <b>Assignment:</b> <i>Does the contract prohibit assignment to another party without the written approval of the SD?</i>			
12. <b>Subcontractors:</b> <i>Does the contract require all subcontractors to be approved by the SD in advance?</i>			
<i>Are any subcontractors clearly bound by all the same terms and conditions as the primary contractor?</i>			
13. <b>Confidentiality:</b> <i>Are confidentiality issues addressed within the contract?</i>			
<i>Is the contractor required to comply with FOIPPA?</i>			
14. <b>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>			
15. <b>Signatories:</b> <i>Are the names, titles and signatures of the appropriate parties recorded on the signature page?</i>			
16. <b>Appendixes/Schedules:</b> <i>Are any appendixes and/or schedules referred to in the contract attached?</i>			

## Insurance and Risk Management in Lease Agreements

Poor drafting of language in a lease agreement can lead to ambiguity and confusion between landlords and tenants which is particularly troublesome should a claim occur. Because the landlord usually provides the lease agreement when the School District (SD) is the tenant, the SD should negotiate with the landlord to arrive at language that ensures a fair and enforceable transfer of risk between the parties and avoids potential liability and insurance issues.

The lease agreement should be reviewed prior to signing. There are multiple sections in a lease which are related to and will have an impact on risk and insurance. The purpose of this article is to assist the SD in understanding the clauses and how they will affect risk and insurance where the SD is the tenant. Each party should arrange its own program of insurance, avoiding duplication.

### Landlord's Insurance

A landlord should be required to provide insurance on the building and its fixtures (all risk property) and commercial general liability to protect the landlord against loss arising from their own negligence. This requirement should be stated in the lease.

The cost of the landlord's insurance will usually be flowed through to the tenant as a portion of the operating costs, included in the rent. If this is the case, it is a requirement of the Schools Protection Program (SPP) that the insurance MUST contain a waiver of subrogation in favour of the SD. This means the landlord's building insurance will pay for damage, if any, caused by the SD. This is reasonable because the SD has paid for that insurance.

If a lease makes the SD responsible for insuring the building on behalf of the landlord and the SD is unable to negotiate otherwise, the SD should contact SPP for further advice. SPP does not provide coverage for the landlord's benefit and the SD will usually have to arrange commercial insurance through the private insurance markets.

### Tenant's Insurance

The tenant should provide insurance on its property (contents in the building) including tenant's improvements and commercial general liability to protect the tenant against loss arising from its own negligence. You may find a requirement that this insurance contain a waiver of subrogation in favor of the landlord. Such a waiver is not reasonable because the landlord has not contributed to the cost of the tenant's insurance. We would recommend that the SD, as tenant, not routinely accept a waiver of subrogation or waive its rights of recovery against the landlord. If this is done, the SD and/or SPP will be unable to recover from the landlord if the landlord negligently causes damage to the SD's property.

The tenant may also be required to provide insurance on plate glass and/or boilers and machinery. If this type of property is within the control of the SD, this is reasonable and can be covered by SPP. Note that the SPP provides all risk property insurance and commercial liability insurance that meets the terms of most commercial leases. If you have any doubt about the ability of SPP to meet the insurance requirements of a specific lease, please contact SPP directly.

We recommend that the lease include the following language to acknowledge SPP as the Tenant's coverage provider:

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## Insurance and Risk Management in Lease Agreements (Cont'd)

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“Notwithstanding anything contained in this paragraph, the landlord acknowledges that the tenant is insured for all risk property insurance and commercial general liability insurance under the provisions of the Schools Protection Program and the landlord confirms that the tenant is deemed to be in compliance with the provisions of this paragraph provided that the tenant remains insured under the Schools Protection Program throughout the term.”

### Landlord as Additional Insured

It is common practice for a landlord to be included as additional insured under the tenant's insurance policy. This provides the landlord with protection against liability arising from their ownership, use or operation of the leased property as long as it arises as a result of negligence on the part of the tenant. A landlord may be added as additional insured to SPP liability coverage; however, a landlord may not be added as additional named insured.

### Subrogation Waivers

Subrogation gives an insurer the right to recover their insurance payouts from negligent parties, in the name of their insured. Waivers of subrogation deny insurers this right. The SPP will not agree to waive its rights of subrogation. If pressed to do so, SDs should contact SPP for advice.

### Indemnity Provisions

Under an indemnity provision, one party agrees to reimburse another party for certain types of loss. An indemnity can be narrow, only encompassing bodily injury or property damage arising from one party's negligent acts or omission; or it can be broad, encompassing all loss irrespective of how caused. For this reason it is important to review the indemnity provisions carefully to ensure that the desired objectives are met.

### Release

Parties to a contract have certain rights. A release from one party means the party agrees to forfeit a right it may have otherwise had. For example, the landlord may seek to be released from liability for death or injury of any nature whatsoever that may be sustained by the tenant or employees, agents or customers of the tenant arising from any occurrence in, upon, at or relating to the leased premises. Furthermore, the landlord may ask to be released for any damage or damages caused by explosion, fire, theft, breakage, failure of sprinkler, drainage or plumbing systems, or removal of snow, rain or ice, or by steam, gas, water, rain, snow or other substances leaking, and so on. We recommend that you accept this only with the insertion of the words “except to the extent caused or contributed to by the negligence of the landlord or those for whom the landlord is responsible in law or for which the landlord is insured or required to provide insurance pursuant to this agreement”. This ensures the landlord retains responsibility for those risks within its control. ◀

## About Our Organization...

We are the Client Services Team for the Schools Protection Program (SPP). SPP is a self-insurance program which is funded by the School Districts. The program is housed within the office of the Risk Management Branch of the Ministry of Finance, which also has responsibility for similar programs such as the Health Care Protection Program, and the University, College & Institute Protection Program. As part of the services of our program, we provide risk management, and claims and litigation management services to SPP member entities including all the School Districts.

**RiskEd** is published twice a year by the Schools Protection Program

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See us at:

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