

CONTRACTUAL RISK GUIDELINES

Updates and Recurring Issues

Contractual Risk Guidelines

Personal Service Contracts and Workers Compensation

- ❖ **Personal Service Contracts**
 - ❖ Contracts with a particular individual for services
 - ❖ Sole Proprietorship – business with no employees

Contractual Risk Guidelines

Personal Service Contracts and Workers Compensation

- ❖ **Workers Compensation Coverage**
 - ❖ Mandatory coverage applies to employees
 - ❖ Optional coverage for employers and self-employed

Contractual Risk Guidelines

Personal Service Contracts and Workers Compensation

❖ **Contract Language**

- ❖ Workers compensation coverage meeting all statutory requirements. In the event Contractor does not secure workers compensation coverage for activities under this agreement, Contractor agrees to waive, release, and hold the State harmless from any and all claims for injuries arising out of or in furtherance of Contractor's activities under this agreement.
- ❖ Alternative: expressly require the purchase of optional coverage

Contractual Risk Guidelines

IT Contracts-Hosting of State Data Involving Personal Identifying Information

❖ Draft Contract Language

- ❖ In the event CONTRACTOR will host data, or provide for the hosting of data through a third-party entity, CONTRACTOR shall secure and maintain Cyber Liability and Security Insurance or equivalent insurance product(s), with minimum liability limits of not less than \$5,000,000 and first party limits of not less than \$1,000,000, that will provide, without cost to the CONTRACTOR or STATE, an immediate response in the event of a data breach, including meeting all notification obligations of CONTRACTOR and STATE and in the event the data breach involves personal information as defined by N.D.C.C. § 51-30-1(4), available free credit monitoring for any affected individual for a minimum period of one year. CONTRACTOR shall defend, indemnify, save and hold harmless, the STATE, its officers, agents and employees from liability of any nature or kind, including costs and expenses, for or on account of any and all suits, claims, or damages of any character whatsoever, resulting from injuries or damages sustained by any person or persons or property by virtue of performance of this contract, arising or resulting in whole or in part from the fault, negligence, wrongful act or omission of the Vendor, or any subcontractor, or their employees or agents.

Contractual Risk Guidelines

Risk Management Template Language Issues

- ❖ Template is a tool for analysis and a starting point for indemnity and insurance requirements
- ❖ Simply lifting the language is not a substitute for proper analysis and tailoring the requirements to actual risks

Contractual Risk Guidelines

Risk Management Template Language

❖ **Recurring Issues**

- ❖ Auto liability requirements when no driving on behalf of the state will take place
- ❖ Professional liability requirements for non-professional services
- ❖ Insurance requirements that relate to being made an additional insured when no such requirement exists in the contract
- ❖ Outdated contract/template language

Contractual Risk Guidelines

Purchase Orders/ Vendor Contracts

- ❖ Provisions found in many vendor contracts that impact Risk Management and are specifically addressed in the Attorney General's Contract Drafting Manual
 - Indemnity Provisions
 - Limitation of Liability
 - Venue
 - Choice of Law
 - Attorneys Fees

Contractual Risk Guidelines

Purchase Orders/ Vendor Contracts

❖ Addressing Impermissible Provisions

- ❖ Manually delete the impermissible provisions (e.g. cross them out and initial)
- ❖ Create a general addendum that can be attached and incorporated as part of any vendor contract
- ❖ Negotiate alternative language or a specific addendum to the contract

Contractual Risk Guidelines

Purchase Orders/ Vendor Contracts

❖ Indemnity Obligations

- ❖ State entities generally lack authority to agree to indemnify a vendor/contractor for third-party claims or losses
 - ❖ Why? Potential commitment of public monies beyond an agency's spending authority.
 - ❖ Contractually assumed liability is excluded from RM Fund.
- ❖ Addressed specifically in the AG's Contract Drafting Manual

Contractual Risk Guidelines

Purchase Orders/ Vendor Contracts

❖ Indemnity Obligation Workarounds

- ❖ State may agree to be fully responsible for its actions and that of its officers and employee consistent with North Dakota law
- ❖ State may agree to or assume any reasonable affirmative obligation related to the receipt of a product, service or lease of property. Address vendor's concerns of derivative liability by promising to do or refrain from doing that which gives rise to the vendor's concerns
- ❖ Provide certificate of financial responsibility
- ❖ Explain North Dakota does not retain joint and several liability, but rather has adopted modified comparative fault
- ❖ Challenge vendor to articulate a situation whereby they could be held derivatively liable for the negligence of the State or its employees

Contractual Risk Guidelines

Purchase Orders/ Vendor Contracts

❖ **Limitation of Liability Provisions**

- ❖ Direct loss, including property damage and personal injury cannot be limited
- ❖ Only certain types of contracts/purchases
- ❖ By statute, Legal Counsel (AAG/SAAG) and Risk Management must be consulted
- ❖ Written documentation must be maintained

Contractual Risk Guidelines

Purchase Orders/ Vendor Contracts

❖ **Limitation of Liability Workarounds**

- ❖ Agency may define its bargained for expectations in any way it deems appropriate
- ❖ Agency may agree to broad warranty disclaimers and agree to accept full risk that products or service will not be error free or work without interruption or problem
- ❖ Service credits, limited replacement or repair obligations as a means of addressing limited warranties do not operate as a limitation of liability
- ❖ Include language that focuses the direct loss exclusion on extra-contractual losses involving personal injury and damage to tangible property - those items for which a vendor maintains a commercial general liability policy

Contractual Risk Guidelines

Purchase Orders/ Vendor Contracts

❖ **Venue and Choice of Law Provisions**

- ❖ Lack of authority to agree to litigate in another jurisdiction
- ❖ Lack of authority to agree to be governed by the laws of another jurisdiction
- ❖ Legislature determines the standards for State liability and the conditions under which the State may be sued

Contractual Risk Guidelines

Purchase Orders/ Vendor Contracts

- ❖ **Venue and Choice of Law Workarounds**
 - ❖ Contract may be silent on venue and choice of law
 - ❖ Limiting choice of law provision to contract interpretation only and preserving all limitations contained under North Dakota law has been done in the past.
 - ❖ Consult Attorney General's Office!

Contractual Risk Guidelines

Purchase Orders/ Vendor Contracts

❖ Attorneys Fees Provisions

- ❖ AG Guidelines suggest fee shifting in favor of the State
- ❖ Lack of Authority to agree to pay attorneys fees
- ❖ Not covered by Risk Management if the basis for fee award is contractual
- ❖ Compromise is to be silent on fee shifting

Contractual Risk Guidelines

Purchase Orders/ Vendor Contracts

❖ Insurance Requirements

- ❖ Statutory caps of \$250,000 per person, \$1,000,000 per occurrence are limits on recovery, **NOT** coverage limits under the Risk Management Fund
- ❖ Risk Management purchases an excess/reinsurance policy with limits of up to \$10,000,000
- ❖ Risk Management Fund responds to all basis of liability, auto, professional, employer liability etc., that would be covered by multiple lines of private insurance
- ❖ State meets almost any reasonable insurance requirements that might be requested by a vendor

Contractual Risk Guidelines

Purchase Orders/ Vendor Contracts

- ❖ **Insurance and Requests to be Made an Additional Insured**
 - ❖ Vendor **cannot** be made an additional insured to the Risk Management Fund
 - ❖ Coverage under the Fund is set by statute, N.D.C.C. Chapter 32-12.2, not policy language
 - ❖ Only way in which an outside entity can be made an additional insured would be to purchase a private commercial insurance product
 - ❖ The purchase of liability insurance requires approval from OMB

Resources

- ❖ **Guidelines to Managing Contractual Risk**
www.nd.gov/risk/publications/manuals-guides
- ❖ **Attorney General Contract Drafting Manual**
www.ag.nd.gov/Manuals/Manuals.htm
- ❖ **N.D.C.C. 32-12.2**
www.legis.nd.gov/cencode/T32C12-2.pdf

Questions?