
Section 5

N - Limitation of Liability

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Remarks: THIS CLAUSE IS TO APPEAR IN FULL TEXT IN PROCUREMENT DOCUMENTS. Use the following clause ONLY in Information Management or Information Technology contracts that come within the Treasury Board Special Authority to Public Works and Government Services Canada (PWGSC). (See the Deskbook, Appendix A, Commodity Groupings Risk Table.)

Contracting officers should consult Legal Services for a possible adjustment to paragraph 2.(a) if the contract is a defence contract in which the powers under section 22 of the *Defence Production Act* are invoked.

If the contract is for telecommunications services regulated by a tariff established by the Canadian Radio-Television and Telecommunications Commission, some of these provisions will be overridden by the tariff. (See *Legal Services for details*.)

1. For Informatics Professional Services (IPS) contracts and call-ups against Standing Offers with values below the NAFTA threshold:

The liability of contractors to the Crown for losses they cause to the Crown and third parties is specified in the clause below. The contract should not include any insurance conditions. The Crown will rely on the protection provided by the clause below.

2. For contracts and call-ups against standing offers, including IPS procurements with value above the NAFTA threshold:

Where this clause is used, the resulting contract must include an insurance covenant as recommended by PWGSC departmental policy, which will require at minimum a specified insurance limit, coverage commensurate with the type of contract (Commercial General Liability and / or Errors and Omissions coverage) and other related insurance clauses as required. Either a Certificate of Insurance or an equivalent letter of self-insurance will be required for all contracts in which this clause is used. Please contact PWGSC's Risk Management and Insurance Advisory Services, at 819-956-7379.

N0000D (10/12/04) Limitation of Liability - Information Management of Information Technology

1. **Liability of Canada and the Contractor to Third Parties:** Each Party to this Contract agrees it is responsible to any third party for injury or losses that the third party may suffer to the extent such Party to this Contract caused them, where the third party has a cause of action directly against that Party in respect of the injury or losses. The Parties agree that with respect to such third party claims against the Contractor, the Contractor shall be responsible for damages arising out of the injury or losses to the extent that it caused them, including those situations where Canada may be required to pay the damages caused by the Contractor as a result of joint and several liability. With respect to third party claims where the third party does not have a cause of action directly against the Party causing the damage, this subsection 1 does not prevent or restrict in any way Canada's right to pursue and enforce any rights that it may have against the Contractor. In the event of any conflict between this subsection 1 and any other subsection of this clause, this subsection 1 shall prevail.
2. **Extent of Contractor's Liability for Damages:** Regardless of the basis on which Canada may be entitled to claim damages from the Contractor (whether in contract, tort or any other cause of action), the Contractor is liable to Canada only for the following:
 - (a) all damages and costs resulting from intellectual property right infringement as set out in this Contract;
 - (b) all damages for physical injury, including death, caused by the Contractor, its employees, agents or subcontractors;
 - (c) all direct damages for loss of or physical harm to tangible property and real property caused by the Contractor, its employees, agents or subcontractors;
 - (d) all damages for breach of confidentiality;

N - Limitation of Liability

- (e) all damages arising from claims for liens, attachments, charges or other encumbrances or claims upon or in respect of any materials, parts, work-in-process or finished work furnished to, or in respect of which any payment has been made by, Canada, provided that this paragraph does not apply to claims of intellectual property infringement which claims are covered in paragraph 2. (a) above; and,
- (f) any other direct damages caused by the Contractor, its employees, agents or subcontractors in relation to this Contract, including reprourement costs as defined below, and restoration of records to the extent that the Contractor fails to comply with subsection 4 below, up to an aggregate maximum for this paragraph 2. (f) of the greater of _____ (Insert risk factor, to be determined as per the applicable Commodity Groupings Risk Table) times the total estimated cost, or \$1,000,000.

However, if the Contract is primarily for the provision of maintenance services or for the license of software, and the payments under the Contract are to be made on a recurring basis such as an annual or monthly fee, then the aggregate maximum for this paragraph 2. (f) will be the greater of the total estimated cost times _____ (insert risk factor to be determined as per the applicable Commodity Groupings Risk Table) divided by the total time period of the Contract in whole years, or \$1,000,000.

- 3. The Contractor shall not be liable to Canada for the following:
 - (a) damages of third parties claimed against Canada except those referred to in paragraphs 2. (a), (b), (c), (d) or (e) above;
 - (b) harm to Canada's records or data, except for the restoration set out in subsection 4 below, and subject to the limitation set out in paragraph 2. (f) above; or
 - (c) special, indirect or consequential damages (other than the payments referred to in paragraph 2. (a) above, and the damages referred to in paragraph 2. (b) above), even if the Contractor is made aware of the potential for such damages, including lost profits and lost savings.
- 4. Canada is responsible for maintaining adequate backup of its records and data to enable their restoration if needed for any reason. If Canada's records or data are harmed by the Contractor's or a subcontractor's negligence or willful act, the Contractor is responsible for restoring Canada's records and data to the same state as in the last available backup copy.
- 5. For the purposes of this clause:
 - (a) "total estimated cost" shall mean the dollar amount shown on the first page of the Contract in the cell titled "Total Estimated Cost";
 - (b) "reprourement costs" shall mean all identifiable direct costs incurred by Canada to reprocore the Work with another contractor, including deinstallation and return of the Work to the Contractor, administrative costs of selecting another contractor or retendering all or part of the Contract, as applicable, and any increase in the price payable by Canada for the other Work having equivalent functionality, performance and quality; and
 - (c) the term "Contract" shall apply to stand-alone contracts, and to each call-up, purchase order and other contractual document, irrespective of its title, issued under a Standing Offer or a Supply Arrangement.

Remarks: THIS CLAUSE IS TO APPEAR IN FULL TEXT IN PROCUREMENT DOCUMENTS. Use the following clause when limiting a Contractor's liability to the Crown and remaining silent on Contractor's liability for third party claims. Typically, this clause would be used in conjunction with the commodity groupings, (other than Information Management or Information Technology which has its own clause) or after a risk assessment has been performed to determine the risk exposure and amount of protection required by the Crown.

N - Limitation of Liability

Limiting a Contractor's liability should be an exception to the normal practice of using the standard terms and conditions. When the decision is made to limit a contractor's liability to the Crown, contracting officers, in conjunction with client departments, must be able to demonstrate that the risks associated with the procurement have been analyzed and that the limitation of liability provides adequate protection to the Crown. Decisions with respect to limiting a Contractor's liability should be made prior to the Request for Proposal release or in instances of sole source contracts, prior to the start of negotiations.

N0001D (10/12/04) Limitation of Liability - Limits First Party and Remains Silent on Third Party Claims

1. Notwithstanding any other clause in the Contract but subject to the remaining provisions of this clause, the Contractor's total cumulative liability to Canada for all losses or damage suffered by Canada as a result of all breaches of the Contractor's obligations under the Contract or the faulty carrying out of the Contract (including any such liability in tort, negligence or any other cause of action) shall be limited to _____ (insert \$ amount) **

**** Note:** It is preferable to add the following wording for multi year service contracts: "for losses or damage caused in any one year of carrying out of the Contract, each such year starting on the date of coming into force of the Contract or its anniversary".

2. The foregoing limitation shall not apply:
 - (a) to any breach of the repair or replacement or rework warranty obligations of the Contract;
 - (b) to any breach of intellectual property rights that results in Canada losing in whole or in part the enjoyment of anything delivered under the Contract; or
 - (c) to any liability of Canada to a third party.

Remarks: THIS CLAUSE IS TO APPEAR IN FULL TEXT IN PROCUREMENT DOCUMENTS. Use the following clause when limiting a Contractor's liability to the Crown and requiring the Contractor to indemnify the Crown against third party claims. Typically, N0001D is used when a Contractor's first party liability is limited and third party is unlimited. N0001D relies on the law to protect the Crown against third party claims, whereas this clause states the Crown's position with respect to third party claims.

Limiting a Contractor's liability should be an exception to the normal practice of using the standard terms and conditions. When the decision is made to limit a Contractor's liability to the Crown, contracting officers, in conjunction with client departments, must be able to demonstrate that the risks associated with the procurement have been analyzed and that the limitation of liability provides adequate protection to the Crown. Decisions with respect to limiting a Contractor's liability should be made prior to the Request for Proposal release or in instances of sole source contracts, prior to the start of negotiations.

N0002D (10/12/04) Limitation of Liability - Limits First Party and Indemnifies the Crown Against Third Party Claims

1. Notwithstanding any other clause in the Contract but subject to the remaining provisions of 1 and 2 of this clause, the Contractor's total cumulative liability to Canada for all losses or damage suffered by Canada as a result of all breaches of the Contractor's obligations under the Contract or the faulty carrying out of the Contract (including any such liability in tort, negligence or any other cause of action) shall be limited to _____ (insert \$ amount) **

**** Note:** It is preferable to add the following wording for multi year service contracts: "for losses or damage caused in any one year of carrying out of the Contract, each such year starting on the date of coming into force of the Contract or its anniversary".

The foregoing limitation shall not apply:

N - Limitation of Liability

- (a) to any breach of the repair or replacement or rework warranty obligations of the Contract,
 - (b) to any breach of intellectual property rights that results in Canada losing in whole or in part the enjoyment of anything delivered under the Contract, or
 - (c) to any liability of Canada to a third party.
2. The Contractor agrees to indemnify and save harmless Canada, the Minister and their servants and agents from and against any claim, action, suit or other proceeding or any loss or damage for which they or any of them may be liable to another person arising out of the Contractor's faulty carrying out of or breach of the Contract, except that Canada and the Minister shall not claim such indemnity to the extent that the loss or damage has been caused by Canada. The Minister shall give notice to the Contractor of any such claim, action, suit or proceeding and the Contractor shall, to the extent requested by the Attorney General of Canada, at its own expense participate in or conduct the defence of the claim, action, suit or proceeding and any negotiations for settlement of the same with all reasonable assistance and co-operation by Canada, but the Contractor shall not be liable to indemnify Canada for payment of any settlement unless it has consented to the settlement.

Remarks: THIS CLAUSE IS TO APPEAR IN FULL TEXT IN PROCUREMENT DOCUMENTS. Use the following clause when limiting a Contractor's liability to the Crown for first and third party claims. Limiting a contractor's liability to the Crown should be an exception to the normal practice of using the standard terms and conditions. Limiting a Contractor's liability to the Crown for third party claims should be avoided at all costs, as the exposure of risk to the Crown could be astronomical. Limiting a contractor's third party liability can only be done under a very limited number of circumstances, the main one being sole source contracts.

When the decision is made to limit a Contractor's liability to the Crown, contracting officers, in conjunction with client departments, must be able to demonstrate that the risk associated with the procurement have been analyzed and that the limitation of liability provides adequate protection to the Crown or in the event that there is a substantive transfer of risk to the Crown, that appropriate approvals have been sought. Decisions with respect to limiting a Contractor's liability should be made prior to the start of negotiations.

N0003D (10/12/04) Limitation of Liability - First and Third Party Claims

1. Notwithstanding any other clause in the Contract but subject to the remaining provisions of this clause, the Contractor's total cumulative liability to Canada for all losses or damage suffered by Canada as a result of all breaches of the Contractor's obligations under the Contract or the faulty carrying out of the Contract (including any liability of Canada to a third party and including any liability in tort, negligence or any other cause of action) shall be limited to _____ (**insert \$ amount**) **

****Note:** It is preferable to add the following wording for multi year service contracts: "for losses or damage caused in any one year of carrying out of the Contract, each such year starting on the date of coming into force of the Contract or its anniversary".

The foregoing limitation shall not apply:

- (a) to any breach of the repair or replacement or rework warranty obligations of the Contract,
 - (b) to any breach of intellectual property rights that results in Canada losing in whole or in part the enjoyment of anything delivered under the Contract.
2. For greater certainty, this clause shall not oblige Canada to indemnify the Contractor against the Contractor's direct liability to any third party, or limit the Contractor's liability to Canada for any amount in respect of the Contractor's direct liability to a third party that Canada is required to pay as a result of joint and several liability. Neither shall this clause require any contribution by Canada in relation to any such direct third-party liability of the Contractor.

N - Limitation of Liability

Remarks: THIS CLAUSE IS TO APPEAR IN FULL TEXT IN PROCUREMENT DOCUMENTS. Use the following clause in conjunction with general conditions in Information Management or Information Technology contracts using Commodity Groupings. It protects Canada by providing that the Contractor will pay the cost of infringement claims against Canada that are related to the software or other work that has been supplied by the Contractor under the contract. It also provides Canada options like termination and refund where other settlement options are not reasonably available and notifies the Contractor of its obligations and options in respect of defence.

Contracting officers need to fill in the blank with the following information:

- (a) When used in conjunction with general conditions 9601, insert in the blank: "**23, Royalties and Infringement, of general conditions 9601**";
- (b) When used in conjunction with general conditions 9676, insert in the blank: "**20, Royalties and Infringement, of general conditions 9676**";
- (c) When used in conjunction with general conditions 9624, insert in the blank: "**21, Royalties and Infringement, of general conditions 9624**";
- (d) When used in conjunction with general conditions 2010 or 2029, delete entire sentence: "*Section _____, is hereby amended by replacing the section in its entirety by the following:*".

N0005D (10/06/05) Intellectual Property Right Infringement

Section _____, is hereby amended by replacing the section in its entirety by the following:

"Intellectual Property Right Infringement

1. If a third party claims that equipment or software that the Contractor provides under the Contract infringes any intellectual property right, the Contractor, if requested to do so by Canada, will defend Canada against the claim at the Contractor's expense. In this regard, the Contractor will pay all costs, damages and legal fees that a court finally awards, provided that Canada:
 - (a) promptly notifies the Contractor in writing of the claim; and
 - (b) co-operates with the Contractor in, and allows the Contractor full participation in, the defence and related settlement negotiations; and
 - (c) obtains the Contractor's prior approval to any agreement resulting from settlement negotiations held with the third party.

The Contractor shall participate in any claims, action or proceeding arising under subsection 1 and no such claim, action or proceeding shall be settled without the prior written approval of the Contractor and Canada.
2. If such a claim is made or appears likely to be made, Canada agrees to permit the Contractor to enable Canada at the Contractor's expense, to continue to use the equipment or software or to modify or replace it with equipment or software which has published specifications equal or superior to the equipment or software being replaced. If the Contractor determines that none of these alternatives is reasonably available, Canada may elect, at the Contractor's expense, to independently secure the right to continue to use the equipment or software, or Canada may require the Contractor to accept the return of the equipment or software and to refund all monies paid to the Contractor under the Contract for the equipment and software, as well as all amounts paid for services and license and development fees.
3. The provisions of subsections 1 and 2 do not apply in situations where the Contractor was instructed by Canada to purchase a specific item of equipment or software from a specific source on behalf of Canada. In this case, the Contractor shall ensure that its subcontract for the equipment or software states that:

N - Limitation of Liability

"If a third party claims that equipment or software that the subcontractor supplies under the Contract infringes any intellectual property right, the subcontractor, if requested to do so by either the Contractor or Canada, will defend the Contractor and Canada against that claim at the subcontractor's expense and will pay all costs, damages and legal fees that a court finally awards."

In the event that the Contractor is unable to incorporate this into its subcontract, then it shall advise Canada of the situation and not proceed with the subcontract without receiving written notice from Canada that the level of intellectual property right infringement protection is acceptable.

4. Without prejudice to Canada's right to terminate the Contract for default prior to completion of the Work, the above represents the Contractor's entire obligation to Canada regarding any claim of infringement.
5. The Contractor has no obligation regarding any claim based on any of the following:
 - (a) Canada's unauthorized modification of the equipment or software, or Canada's unauthorized use of the equipment or software in other than its published specified operating environment;
 - (b) the combination, operation or use of the equipment or software with any product, data or apparatus that the Contractor did not provide under the Contract, or which combination, operation or use the Contractor did not authorize or approve in advance, if infringement would not have occurred but for such combination, operation or use."

N0005D (10/12/04) Intellectual Property Right Infringement

Effective 10/06/05, this clause is superseded by N0005D.
