



Contracting Challenges, Solved!

Jennifer Curran, City of Tigard Risk/Benefits Manager
Scott Moss, CIS P/C Trust Director
Kirk Mylander, CIS General Counsel



Outline

- Why do we care about contracts?
- Four handouts
- Three important concepts
 1. 3rd Party Insurance
 2. Indemnity
 3. Subrogation
- City of Tigard's review process
- Questions



Why do we care about contracts?

- Contracts are a primary means of transferring or accepting risk for your entity.
- Insurance limits on contracts matter: when a loss occurs, if it costs more than the limits, your entity may be on the hook for the loss.
- ***As members of the CIS Trust, each of us has a responsibility to the others to not place the Trust at risk by allowing lower limits and higher risks on contracts than is prudent.***
- Your entity may be a bigger target than a private owner, so the exposure may be greater than you think.
- Contracts protect your entity and the contractor by clarifying who is responsible for what.



Four Documents

Handouts

1. CIS Public Entity Contract Review Guideline
2. Tigard's Contract Summary Form
3. Tigard's Risk Assessment
4. Tigard's Contracting Minimum Insurance Matrix



PUBLIC ENTITY CONTRACT REVIEW GUIDELINE
Prepared by Kirk Myrland, General Counsel and
Suei Moss, PIC Trust Director

A. INTRODUCTION


1. **Scope and Purpose** Frequently, most contractual relationships are complex, and the volume and cost of the contract may become so large that when things go bad, or if there is a disagreement about the nature of a provision in the contract, that decision, the cost can be of critical importance. Public entities regularly enter into contracts for professional services, general services contracts, grants, transactions, intergovernmental agreements, procurement contracts, etc. An understanding of some contracting fundamentals, along with careful attention to the contract language at the negotiation stage, can avoid many contract disputes, or at least put your entity in a more favorable position if there is a dispute. Even in the management disciplines, there are also important "risk transfer" issues to be considered in the contract.

The purpose of this document is to provide CIS members with a framework for understanding and managing contracts. This is not intended to be a comprehensive analysis of contracts in contract law. Also, this does not cover Oregon's Public Contracting Law (ORS Chapter 276, What's Open-procure).

- An overview of basic contract law concepts that have practical application for our members.
- A more detailed discussion of contractual indemnity provisions.
- A discussion of insurance and CIS coverage.
- A list and brief discussion of common contract provisions.



CIS Contract Guidelines

- A. Introduction
 - 1. Scope and Purpose
 - 2. Legal Review
 - 3. CIS Review
- B. Basics of Contracting
 - 1. Six Elements of a Contract
 - 2. Contract Concepts
- C. Indemnity Provisions
- D. Insurance Provisions
- E. Insurance by Type of Contract
 - 1. Personal Services Contract
 - 2. Professional Services Contract
 - 3. Public Contracts
 - 4. Purchase Orders (PO) Agreements
 - 5. Construction Contracts
 - 6. Intergovernmental Agreements
 - 7. Memoranda of Understanding
 - 8. Lease Agreements
 - 9. Equipment Rentals
 - 10. Facility Use Agreements
- F. Typical Insurance Clauses



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Three Important Concepts

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Three Important Concepts

- 1. Third Party Insurance
- 2. Indemnity
- 3. Subrogation




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Third Party Insurance

- CIS: Coverage "D"
 - Assumed under contract as "additional member"
 - "Additional insured" = "additional member" on certificate of insurance
 - Will not cover 3rd party's sole negligence
 - One Exception



Indemnity

- Each entity remains responsible for its own people, own actions
 - Cover other party in event your people cause other party to get sued
 - Other party covers you in event their people cause you to get sued
- Do not agree to cover the other party in the event their own (sole) negligence causes them to get sued
- Liability, not property



Indemnification

- Indemnification example:
 - City contracts with Acme Painting
 - Painter drops bucket on head of citizen
 - Citizen sues Acme and City



Indemnification

Citizen v. Acme and City

- Three types of indemnification clauses:
 1. Broad
 2. Limited
 3. Mutual



Indemnification

Citizen v. Acme and City

- **Broad Indemnification:** The indemnitor agrees to take financial responsibility for any type of liability or loss that occurs under the contract, regardless of who is at fault.
- **Example:** *CONTRACTOR agrees to indemnify, defend, and hold harmless the CITY, and its officers, agents and employees against all liability, loss, and costs arising from actions, suits, claims, or demands arising from performance of this contract.*



Indemnification

Citizen v. Acme and City

- **Limited Indemnification:** The indemnitor takes financial responsibility only for the its actions under the contract and those of the its subcontractors, agents and employees. Usually requires the indemnitor to be financially responsible for injuries where the indemnitor's actions are the whole cause or partly the cause of the injury.
- **Example:** *CONTRACTOR agrees to indemnify, defend and hold harmless the CITY and its officers, agents and employees against all liability, loss and costs arising from actions, suits, claims or demands attributable in whole or in part to the acts or omissions of CONTRACTOR, and CONTRACTOR'S officers, agents and employees, in performance of this contract.*



Indemnification

Citizen v. Acme and City

- **Mutual Indemnification:**
 - Each party to the contract agrees to indemnify the other for their respective actions under the contract. Each party then "indemnifies and holds harmless" the other for any loss or liability the other incurs because of its actions under the contract.



Indemnification

Citizen v. Acme and City

- **Mutual Indemnification Example:** CONTRACTOR agrees to indemnify, defend and hold harmless the CITY and its officers, agents and employees against all liability, loss and costs arising from actions, suits, claims or demands for the acts or omissions of CONTRACTOR, and CONTRACTOR'S officers, agents and employees, in performance of this contract.

In accordance with the Oregon Tort Claims Act and the Oregon Constitution, CITY agrees to indemnify, defend and hold harmless the CONTRACTOR and its officers, agents and employees against all liability, loss and costs arising from actions, suits, claims or demands for the acts or omissions of CITY and CITY'S officers, agents and employees, in performance of this contract.



Subrogation

- Property owner loses property due to 3rd party's negligence
- Insurance company compensates property owner
- Insurance company seeks repayment from 3rd party who caused property loss
- Property, not liability



Subrogation

▪ Mutual Waiver of Subrogation

- Everybody remains responsible for their own property
- Building owner's insurance pays for building
- Occupant's insurance pays for contents
- Neither insurance company seeks repayment from other



Subrogation

Example:

- City leases building space to organization
- City insures structure
- Community organization insures contents



Contractors

All contractors should be required to carry commercial general liability insurance

When should your city require higher limits?

Consider higher limits for the following higher risk contracts:

- Heavy construction
- Significant right-of-way work
- Water or sewer line repair
- Significant engineering or architectural work
- Bridge repair

When should your city require lower limits?

Consider lower limits for the following types of contracts:

- Training (no direct physical contact)
- Agreements with other governments
- When contractor is providing advice or counsel and staff is making decisions



Contractors

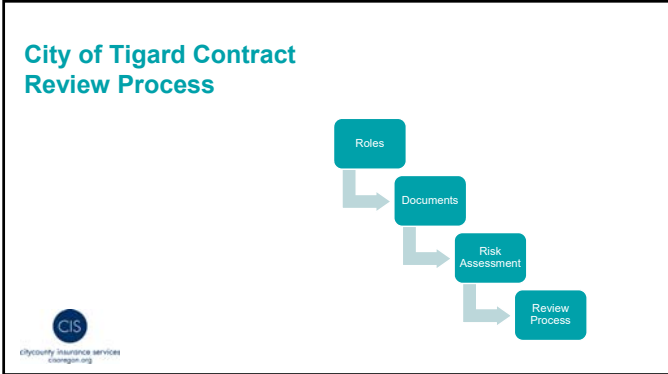
- All contractors must provide proof of workers' compensation insurance *before* work starts
 - Applies to any contractor employing one or more workers (sole proprietor exempt)
 - Failure to have WC coverage means your entity is liable for injuries of contractor's employees



Contracts: Facility Rental

- Always require an indemnity clause in a facility use agreement
- Consider requiring general liability insurance from the renter
 - You may use the CIS website (cisoregon.org/specialevents) to help the renter obtain coverage
- You may waive recreational use immunity if you charge to use the facility





City of Tigard's Contract Review Process

- Projects Manager
 - Staff member initiating contract & responsible for management of the contract
- Contract & Purchasing Team (Finance Dept.)
- Risk Management
- City Attorney
- City Council (contract review board)



City of Tigard's Supporting Documents

- Risk Assessment
- Insurance Requirements Matrix
- Contract Summary



City of Tigard's Review Process

- Project Manager
- Completes all preliminary requirements with assistance of Contract & Purchasing team (RFI, RFP, etc.)
 - Works with Contract & Purchasing to determine best type of contract to use depending on work to be done.
 - Completes Risk Assessment (see Risk Assessment document)



City of Tigard's Review Process

- Contract & Purchasing Team
 - Reviews every contract, IGA, MOU before being signed
 - Identifies other parties needed to review depending on contract language and dollar value
 - Makes sure all insurance requirements are met (see Insurance Requirements Matrix document)



City of Tigard's Review Process

- Risk Management
 - Review when there is a requested change to the pre-approved minimum insurance limits (See Contract Summary Form)
 - Change in indemnification language requested
 - Unusual or unfamiliar contract type
 - High-risk project identified



City of Tigard's Review Process

- Agent of Record
 - Provides expert assistance in evaluating and thinking through both the type and limits of insurance that may be required in a given contract



City of Tigard's Review Process

- Attorney Review
 - When anyone has a concern about the contract language, or requirements
 - High dollar value contracts
 - MOU or IGA's with complexity
 - Issues involving litigation, possible litigation, or settlements
 - Contracts/IGA/MOU initiated from outside our organization



Questions?

The first step to receiving an answer is being brave enough to ask a question.
 — Unknown



Contact Info

Scott Moss
 CIS P/C Trust Director
smoss@cisoregon.org
 503-763-3840

Kirk Mylander
 CIS General Counsel
kmylander@cisoregon.org
 503-763-3812

Jennifer Curran
 City of Tigard Risk/Benefits
 Manager
JenniferC@tigard-or.gov