

Risk Analysis and Limitation of Liability (Single and Multi-Agency) Clauses and Guidance

Clause #	Text	Guidance on Use
4013-1	<p>INFORMATION FOR OFFERORS TO SUBMIT – RISK ANALYSIS (JAN 2020): When both parties fully understand the risks associated with a proposed contract, they can better manage and more appropriately allocate those risks. Accordingly, and for purposes of evaluation, you should submit the following: (i) an identification of key risks involved in the contract’s performance and non-performance; (ii) an identification of the key risks to successful performance; (iii) an analysis and evaluation of the risks identified; and (iv) recommendations for managing the risks. Please address risks to everyone involved, such as the agency, contractor, expected users, and business partners. In responding, you are welcome to use the Risk Analysis Table found at www.procurement.sc.gov/legal/resources. [04-4013-1]</p>	<p>This clause asks vendors to disclose known risks. This effort signals to vendors your awareness of their concerns and your understanding of the need for an appropriate allocation of risk. When vendors respond to this, it can provide the agency with valuable insights into the potential risks to the agency.</p> <p>See the Division’s “Risk Analysis Framework for Service Contracts”</p>
7B117-1	<p>LIMITATION OF LIABILITY – SINGLE AGENCY (JAN 2020):</p> <p>(1) Contractor’s liability for damages to the Using Governmental Unit shall not exceed [<i>a dollar amount</i>].</p> <p>(2) The parties waive claims against each other for (i) exemplary or punitive damages and (ii) special or consequential damages.</p> <p>(3) The foregoing limitations shall not apply: (a) to claims for physical damage to real or tangible personal property, (b) to claims regarding bodily injury, sickness, disease or death, (c) to claims arising from reckless or intentional misconduct, (d) to amounts due or obligations under a clause (regardless of how named) providing for liquidated damages, or if such a clause is ruled unenforceable as a penalty, (e) to amounts due or obligations under the following clauses, if included: (i) Indemnification-Third Party Claims-General, (ii) Indemnification-Third Party Claims-Disclosure of Information, (iii) Indemnification-Intellectual Property, (iv) Information Security–Safeguarding Requirements, (v) Information Security-Location of Data, (vi) Information Use and Disclosure–Standards, or (vii) Service Provider Security Representations; (f) to amounts due or obligations under a clause imposing a duty to defend or indemnify, or (g) to any loss or claim to the extent the loss or claim is covered by a policy of insurance maintained, or required by this contract to be maintained, by contractor.</p> <p>(4) The absence in any subcontract of a similar clause limiting contractor’s liability shall not effectively increase the obligation of the Using Governmental Unit beyond what it would have been had the subcontract contained such a clause.</p>	<p>Use rarely. For most contracts, avoid this clause. It is often appropriate for software licensing and complex information-technology contracts, such as cloud services or large software-development projects.</p> <p>Always receive clause-specific written approval from the using governmental unit before including this clause in a solicitation.</p> <p>Do not modify this clause without first consulting legal counsel.</p> <p>YOU MUST INSERT A DOLLAR FIGURE THAT REPRESENTS THE CAP.</p> <p>When determining an appropriate cap for subsection (1), always perform a risk analysis that identifies the risks and analyzes the probability of the risk manifesting and the consequences of the harm. Also consider to what extent contractor insurance requirements (see clauses 07-7B056-2 and 07-7B058-</p>

Clause #	Text	Guidance on Use
	<p>(5) The Using Governmental Unit's liability for damages, if any, shall in no event exceed [<i>a dollar amount</i>]. Nothing herein shall be construed to waive any law or clause regarding the availability or appropriation of funds, sovereign immunity, or any other immunity, restriction, or limitation on payment or recovery provided by law.</p> <p>(6) The State of South Carolina's total liability for any obligation under any clause imposing any duty of confidentiality or non-disclosure shall not exceed an amount equal to fifty thousand dollars. [07-7B117-1]</p>	<p>1) may help determine how much risk must be covered under the cap.</p> <p>Never agree to limit the cap in subsection (1) to total contract price, absent careful consideration and compelling circumstances; doing so may effectively eliminate the recovery of any damages to the agency—leaving only a refund for something you may not have received. In some circumstances, doing so may undermine the contractor's financial incentive to fully perform.</p> <p><u>Additional Discussion re: Damage Caps & Multipliers</u></p> <p>The model language contemplates the cap will be a dollar figure rather than a multiplier of the total contract value. A dollar figure, arrived at after a thorough risk analysis, is usually the better choice. Vendors, however, often want to use the total contract value, or a multiple of that value, as the cap. Although the Division discourages the use of a multiplier, one may be appropriate in certain circumstances. For example, consider using a multiplier when: (a) it is unknown how much of a given item or service will ultimately be procured; (b) it is foreseeable a subsequent change order might be issued to add additional goods or services; or (c) the term of the contract might be extended for many years such as where the contract provides the State with a short, initial term but multiple annual renewal options. In such circumstances, use of a multiplier will automatically increase the damage cap making it unnecessary for the procurement officer to try and</p>

Clause #	Text	Guidance on Use
		<p>re-negotiate an increase to the cap when the contract is extended, a change order is issued, etc. Notwithstanding the preceding sentence, when issuing a change order to add new goods or services, make sure they pose the same level or risk as the original goods/services set forth in the contract. Otherwise, it may be necessary to negotiate an entirely new damage cap.</p> <p>If you use a multiplier, you are strongly encouraged to consider also using a fixed dollar amount to create a floor that offers a minimum layer of protection (i.e. the damage cap is the greater of: (i) [a fixed dollar amount]; or (ii) three times the contract value). If the limitation of liability contains only a multiplier and a change order reduces the contract's value, the contractor's exposure is likewise reduced. Using both a dollar figure and a multiplier in these situations helps to prevent such a scenario. If you use a multiplier, you must perform a risk analysis as provided above BEFORE deciding on an appropriate multiplier. If you use both a multiplier and a fixed dollar amount as recommended, perform the risk analysis first, then determine the appropriate damage cap in fixed dollars and finally select a multiplier based on the risk analysis and fixed dollar amount.</p> <p>Regarding subsection (2) Contractors may prefer to limit liability to direct damages. Likewise, contractors may wish to also exclude liability for specific sets of damages, such as loss of data or lost profits. Exercise caution! The existing clause provides contractors</p>

Clause #	Text	Guidance on Use
		<p>sufficient protection. Adding specifically-excluded categories can result in unintended consequences if they are drafted too broadly.</p> <p>Regarding subsection (3), this clause is meant to protect the State from certain events that are carved out from the liability limitation. In other words, there is no cap on the vendor’s liability if one or more of the enumerated events occurs. Do not modify any of the exclusions in this clause without first consulting your supervisor and legal counsel. Regarding subsection (3)(c), without such language, the contractor in theory could intentionally destroy state property or cause other harm and still be protected from full liability.</p> <p>Regarding subsection (4), this is meant to protect the State in the event a subcontract does not limit liability to the same extent that the contract does.</p> <p>Regarding subsection (5), This subsection limits the liability of the State. YOU MUST INSERT A DOLLAR FIGURE. Prior to Solicitation delete the phrase “a dollar amount” and replace with an actual number. See the discussion of subsection (1) above, as well as the section below titled “Use of a Multiplier,” for the appropriateness of using a multiplier. This cap on the agency’s liability should never be greater than the cap on the contractor’s liability set forth in subsection (1) above.</p> <p>Regarding subsection (6), vendor contracts often impose a duty of confidentiality on the State. Unlike</p>

Clause #	Text	Guidance on Use
		<p>private business, government is designed to be open and transparent. Without this paragraph, the State's liability for an inadvertent disclosure might be uncapped.</p> <p>See the Division's "Basic Guidelines for Using Limitation of Liability Clauses in Complex Information Technology Contracts."</p>
7B118-1	<p>LIMITATION OF LIABILITY – MULTI AGENCY (JAN 2020):</p> <p>(1) Contractor's liability for damages to any Using Governmental Unit shall not exceed [<i>a dollar amount</i>].</p> <p>(2) The foregoing limitation shall apply to each Using Governmental Unit independently.</p> <p>(3) The parties waive claims against each other for (i) exemplary or punitive damages and (ii) special or consequential damages.</p> <p>(4) The foregoing limitations shall not apply: (a) to claims for physical damage to real or tangible personal property, (b) to claims regarding bodily injury, sickness, disease or death, (c) to claims arising from reckless or intentional misconduct, (d) to amounts due or obligations under a clause (regardless of how named) providing for liquidated damages, or if such a clause is ruled unenforceable as a penalty, (e) to amounts due or obligations under the following clauses, if included: (i) Indemnification-Third Party Claims-General, (ii) Indemnification-Third Party Claims-Disclosure of Information, (iii) Indemnification-Intellectual Property, (iv) Information Security–Safeguarding Requirements, (v) Information Security-Location of Data, (vi) Information Use and Disclosure–Standards, or (vii) Service Provider Security Representations; (f) to amounts due or obligations under a clause imposing a duty to defend or indemnify, or (g) to any loss or claim to the extent the loss or claim is covered by a policy of insurance maintained, or required by this contract to be maintained, by contractor.</p> <p>(5) The absence in any subcontract of a similar clause limiting contractor's liability shall not effectively increase the obligation of the Using Governmental Unit beyond what it would have been had the subcontract contained such a clause.</p>	<p>See guidance for Clause # 07-7B117-1, LIMITATION OF LIABILITY – SINGLE AGENCY (JAN 2020), which is incorporated by reference. The guidance for the single agency clause applies to this multi-agency clause.</p> <p>The only differences between this clause and the single-agency clause are as follows:</p> <ul style="list-style-type: none"> • Subsection (2) is new, and • Subsections (2) through (6) of the single-agency clause are reflected here as subsections (3) through (7) <p>See the Division's "Basic Guidelines for Using Limitation of Liability Clauses in Complex Information Technology Contracts."</p>

Clause #	Text	Guidance on Use
	<p>(6) The Using Governmental Unit's liability for damages, if any, shall in no event exceed [<i>a dollar amount</i>]. Nothing herein shall be construed to waive any law or clause regarding the availability or appropriation of funds, sovereign immunity, or any other immunity, restriction, or limitation on payment or recovery provided by law.</p> <p>(7) The State of South Carolina's total liability for any obligation under any clause imposing any duty of confidentiality or non-disclosure shall not exceed an amount equal to fifty thousand dollars. [07-7B118-1]</p>	