Risk Management Considerations

Know What you are Signing

Reviewing contracts and being aware of what risks or liability you may be assuming or not appropriately transferring should be a part of every organization's risk management program.

A contractual transfer of liability is an agreement under which one party (the transferor) shifts to another (the transferee) the loss exposures associated with an asset or activity. Municipalities are involved on both sides of such a transfer quite often, such as lease or rental agreements, building construction projects and contracted services.

Regardless of which side of the transfer your organization is on, the contractual requirements should be reasonable under the circumstances.

Every contractual transfer of liability should:

1. Cleary state the responsibilities of each party.
2. Ensure the transfer recipient is willing and able to handle the transfer and have control over the extent of the potential losses.
3. Be cost effective.
4. Be legally enforceable.
5. Be reviewed by legal counsel.

The method of transferring liability can be accomplished through the use of hold harmless or indemnification clauses, as well as through the use of waivers, releases and disclaimers within the contract. An indemnity clause is only as good as the guarantee, which is why whenever possible, such a clause should be followed by a request for insurance.

The transferor should be satisfied that the transferee has the following:

1. Financial strength.
2. Sufficient limits of coverage.
3. Added the transferor as an additional insured.
4. Current coverage.
5. No coverage restrictions which would affect the scope of their agreement.

The following two examples demonstrate where one party has legitimate reasons to transfer liability to the other.

Example #1: The Lease Agreement

Landlord A owns a building, a portion of which they agree to lease to Tenant B. Landlord A, as the owner of the building, owes a statutory duty to ensure that an entrant

will not be harmed while on their premises. Since Tenant B will have exclusive use and control of a portion of these premises, landlord A wants to make Tenant B hold them harmless and indemnify them from all claims arising out of Tenant B's occupancy. This would be reasonable under these circumstances.

Example #2: Contracted Services

Company A purchases the expert services of Company B for the provision of specific functions on their behalf. In the agreement, the service provider is required to be responsible and liable for all claims arising out of their performances of these services. As such Company B agrees to hold harmless and indemnify Company A from any third party claims arising from Company B's negligent performance or omission to perform the services as set out in the agreement. It is reasonable for the contractor, who is paid a fee for services, to be responsible for all claims arising from these services.

Always transfer liability to the responsible party when possible to avoid being involved in a claim over which your organization has little or no control of the circumstances. It is very important to carefully review all agreements, paying particular attention to who is assuming the risk and liabilities. It is always a good idea to obtain a legal opinion before you sign. Any legal fees incurred prior to signing a contract will likely be far less than the cost of resolving disputes following a claim.