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AS A FEDERAL GOVERNMENT TECHNOLOGY OR LIFE SCIENCE CONTRACTOR, I DON'T NEED INSURANCE, RIGHT?



It's a common question. The government does not have a propensity to sue its contractors and there is the mythical illusion of Sovereign Immunity.

With increased government spending, particularly in the Homeland Defense and Military sectors, technology and life science companies now see the government as one of their best sources of revenue growth.

There are, however, unique risk management concerns for these firms that are significant when working with many local, state and federal agencies.

What about Sovereign Immunity?

Well, depends on which version. It is true that the government can be somewhat insulated from liability under this concept (which is a hold over from immunity granted to the monarch in old England).

However, to a large extent, this concept of reduced exposure is a misconception held by business people. Some factors to consider:

- Sovereign Immunity usually only applies to property damage or bodily injury and has no application to financial damages or lost opportunity.
- Statutes vary by state, as well as agency.
- Application of the statute can vary from contract to contract.
- When in force, they usually do not protect a contractor entirely, but instead establish a cap of damages:
 - The caps may apply only to the government, not the contractor.
 - The caps may not apply to actions brought by government employees or third parties.
 - Caps that benefit the general contractor may not pass through to the subcontractor.
 - Do caps apply to all allegations such as intentional acts and gross negligence?

- Do the caps apply to defense costs?

Don't let Sovereign Immunity lull you into a false sense of security. It rarely obviates the need for proper insurance coverage. Always consult with legal counsel and your insurance broker when entering into a government contract.



Ok, but I am working for Homeland Defense, I am covered under the Safety Act, right?

Perhaps, but to what extent? After 9/11, Congress passed and the President signed the Homeland Security Act of 2002. Provided in the statute is a limit of liability to technology companies providing products and services described as qualified anti-terrorism technology.

The law also provides for the Secretary of Homeland Defense to judge what technology is eligible. See the Act for specific details and criteria.

In any event, liability is limited only to the amount of insurance purchased by the contractor **IF** that amount is reasonable by current market and availability standards **AND** does not distort the pricing of the product or service "unreasonably".

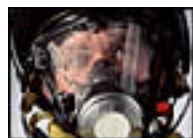
Other risk issues to consider concerning the Safety Act are:

- How much liability insurance is reasonable and what is a reasonable price?
- Does the pricing of the coverage unreasonably distort the price of my contract?
- There is no immunity or protection from punitive damages.
- Absent bodily injury or property damage, there is no immunity for financial loss.

Again, there is some limited immunity and caps; however, it does not mean you do not need insurance.

Does being a government contractor mean my coverage will be cheaper and more available?

Depends. Underwriters usually do not look at government contractor risks any different than regular private risks. That is to say, insurance companies are not convinced that working for the government makes you a better and safer risk.



In fact, contractors working for Homeland Security draw even more underwriting scrutiny in certain cases. Products related to detection, airport or sea port security, as well as government installations, present red flags for underwriters.

Why so?

The losses, if they happen, are "mega losses" and involve several lines of coverage including property, workers' compensation, life and disability insurance.

I am a Life Science company; none of this applies to me, right?

Wrong. The detection and treatment of biological warfare agents has resulted in the funding of many clinical trials. While it is true that in some cases, when the trial is run exclusively by the government, the agency will assume liability for finished products. However, that does not necessarily apply to research and supply. Therefore, appropriate clinical trials insurance is still prudent.

I am an emerging company, when is the right time to acquire coverage?

Purchasing insurance has a strategic implication as well. Many contractors discover that their products or services have commercial applications. Entering the commercial market increases liability exposure dramatically. As a contractor, customers will require proof of coverage before buying your product. If selling directly to the public, you will be exposed to consumer lawsuits.

However, entering the insurance market at that point will be tough in terms of pricing and coverage. Insurance companies react favorably when there is a history of positive claims experience. Also, some of the liability policies are written as "claims made," which would preclude coverage for claims that occurred even a month prior to purchase of the policy.

In addition, a company is a more valuable acquisition target when liability coverage is in place. Potential buyers will be more attracted to a firm with a history of liability insurance that is available to protect them for post acquisition claims.

All of this only applies to liability coverage, right?

Depends. Are you sending employees overseas to work at government sites? If so, you need to take a look at your employee benefits coverage for geographic limitations and/or limitations while placing employees in a "hostile area" or a specific country.

The Defense Base Act extends Longshoreman and Harbor Workers coverage for employees permanently assigned to a military installation. Therefore, your workers' compensation needs to be adjusted.

RCM&D has an entire practice dedicated to the Life Science and Technology sector. For questions or to request additional information, please contact Harry Wallace at 240.482.1716 hwallace@rcmd.com or Kris Althouse at 410.339.5238 kalthouse@rcmd.com



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