

# Government Contracts For Technology Firms: Growth Market For Risk



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Declines in certain commercial sectors in addition to increased government spending for homeland security and war-related matters have made the market for products and services to governments an increasingly important opportunity for technology firms such as software companies, telecommunications companies and life science companies. In earlier times, many technology firms only knew the government as a supplier of grants and R & D support. Now, many in the tech sector have found various branches of the government to be one of the best sources for revenue growth. This whitepaper seeks to introduce certain risk management concerns for technology firms that are specific to working with local, state, federal and military agencies.

## *Sovereign Immunity*

The greatest misconception that business people have about government work is that the risk of liability is somehow lower due to statutes pertaining to Sovereign Immunity (SI). SI is a catch phrase that relates to limitations on liability for government agencies in regard to bodily injury or property damage liability. SI statutes exist at both the state and federal level. They also may be put in place in a very specific area and sometimes are even placed retroactively (such as certain liability limitations put into law arising out of the 9/11 crashes to the benefit of airlines). These statutes vary by state, and they also can vary by federal/military agency. Thus, the first lesson in working with governmental agencies is to make no assumptions about liability limitations and to check with legal counsel for an understanding of SI in the case of any individual contract.

Even if there are caps for liability, one needs to understand details in regard to the following matters:

- Are there exceptions to liability caps for wanton, reckless or intentional acts?
- Do the caps apply only to suits by or against the government but not to the main contractor?
- If there are liability caps for the main contractor, do they extend to subcontractors, which may be the position that a technology firm finds itself in?
- Do liability caps protect against suits brought by parties other than the government itself, e.g. government employees or unrelated third parties?

The bottom line is that SI typically does not prevent the need for insurance. For a company acting as a subcontractor on a government contract, there arguably may be more liability since the main contractor's protection may result in greater exposure for subcontractors when deep pockets are being sought by plaintiffs.

## *SAFETY Act*

A particular type of governmental immunity for private companies is that offered by the recently enacted Homeland Security Act of 2002. A section of the act, called the Support Anti-Terrorism by Fostering Effective Technologies Act (SAFETY Act), calls for the federal government to limit liability to the benefit of providers of technology products and services. These products and services must be deemed to be "qualified anti-terrorism technology" such as face recognition software or bomb-sensing equipment.

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The Secretary of Homeland Security determines whether a particular technology qualifies under the new act for the liability limitations. Eligibility for the protection depends in part on factors such as substantial utility and effectiveness, availability for use in public and private environments, cost-benefit analysis, and risk to the public from not using the technology.

Liability can be limited to the amount of insurance purchased if the amount of insurance equals reasonable market availability at prices that will not “unreasonably distort the sales price” of the product or service. Victims of any loss will then be compensated for economic losses including, medical costs, rehabilitation costs, lost wages and other economic factors. Suits can only be brought in federal courts. However, punitive damages and non-compensatory damages are not covered under the act.

### *Products Liability*

Insurers treat most government-related risk exposures for technology companies in a fashion similar to other commercial applications in regard to basis underwriting. That is, insurers require the same types of information, including copies of major customer contracts. There are some red flag areas, however, the most significant concern – contracts relating to Homeland Security. Devices used to detect terrorism activities at airports and at government installations are subject to particularly intense underwriting. Rates for Products Liability for these types of products have skyrocketed, and underwriting capacity has become more limited. Insurers do not want to have too much exposure on any one incident or series of related incidents when it comes to Homeland Security. This is due both to the catastrophic nature of the risk as well as to its possible accumulation of risk when combined with Property, Workers Compensation, Life and other insurable losses that can arise from a 9/11-type event.

Clinical trials of new drugs and vaccines are sometimes sponsored and run completely by government agencies. In some cases where the product’s application is in great demand for military or vaccine applications, government agencies will assume the Products Liability risks arising out of clinical trials. However, in other cases, the assumption of liability will have exceptions regarding the supply of the drug itself. In these cases, Clinical Trials Insurance will still be required for risk transfer.

A third matter is aircraft products liability. Many military contracts for technology services include applications to be used on military fighter jets, transport planes and helicopters. Often, insurers who provide Products Liability Insurance to technology companies have exclusions for losses arising out of Aircraft Products. The solution here is to consider the purchase of a separate Aircraft Products Liability policy. These policies are issued by specialty insurers.

### *Other Risk Exposures*

There are several other matters that may arise in government contracts. Technology firms that serve overseas military or government facilities may be required to send employees overseas. Group Health and Life Insurance programs have limitations based on exposures in certain countries and arising out of war and hostile activities. These need to be reviewed on a case-by-case basis. Also, permanent assignment as a private employee on a military site may require the purchase of Defense Base Act coverage, a program similar to Workers Compensation Insurance.

**For additional information about Risk Management for government contracts, contact your Account Executive at William Gallagher Associates.**

