**00:00.00 --> 00:20.52**

Thanks, guys, all right. So we're going to get started with our webinar today. Welcome everybody. Good afternoon. We are here to do our webinar on risk analysis and management contracting. I am Kimber Craig, Deputy Chief Procurement Officer for the State of South Carolina, with the Division of Procurement Services and the State Fiscal Accountability Authority.

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So we're going to talk today about risks and contracting and how to identify them, and what to do when you find them, and what is the best way to address risk when it comes to contracting.

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So we're going to start off with

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what is risk

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So obviously risk is the possibility of life's loss or injury, or something, or someone that creates or suggests a hazard. So we have lots of different um types of risks when it comes to contracting.

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Anytime that we have a contract we're going to have a possibility that something's going to go wrong, or that there could be a bad result. And we want to make sure that we address that in our contracting. So that is basically why you care.

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Because every contract has some level of risk. Some contracts have more risks, some have less risk.

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You really have to look at each one individually. There's not going to be a one size fits all when it comes to risk, and our goal is when we do our contracts, we want to have an acceptable level of risk. We want to make sure that we increase the positives with the contract and decrease the negatives

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So you know the reason…the way that we do that in contracts is, we have the our terms and conditions.

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And so our standard boiler plate has twenty nine pages of terms and conditions for purchases over fifty thousand dollars

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and those are all things that we use to help mitigate risk, or address risk, or transfer risk. We'll talk about what those things mean.

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So when we're looking at risk in a contract, what do you…where do you start? What's the first thing that you have to do when you're looking at risk from a contracting perspective?

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And so what we're going to do is you have to do a risk analysis.

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And a risk analysis involves identification, probability, impact and management. We're going to go through what all of these four steps are, and how we identify what those are.

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We do have some resources on our website. It's procurement.sc.gov. I think most everybody knows what that is.

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If you go to that website and go under the legal section, and under standard clauses and provisions, we have a section called “risk analysis and limiting contractors’ liability” and we have several different resources in that section.

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We've got a risk analysis, guide. We've got a section on limitation of liability clauses, guidance that goes along with that.

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So a lot of this information is included in that section. So if you're, after this webinar, if you have questions or you need to do something you can always call us, but you could also go to our website and get those resources that we have available there.

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So if I’m getting ready to a contract, and I want to do a risk analysis, I want to see what my potential pitfall areas are. I'm going to start out with identification.

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So how do I do that?

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Basically you're trying to identify what is the worst thing that can happen. So what you want to do for that is, be a pessimist.

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This is not the time to be optimistic. This is you're going to be, “what could go wrong, and how could it go wrong?”

**03:53.19 --> 04:07.29**

I used to have a roommate in college, and she was very much a circular thinker. And she would start down the trail, and it was always negative. It was like, “I'm going to go to the Student Union to get some, you know, get a snack.”

**04:07.71 --> 04:31.33**

“What if you missed class,” or “what if you go this way, and you see somebody, you know, that that you don't want to see,” or “you know your somebody's going to get you.” And she can turn it a trip to get a coke from Student Union into I was going to get kidnapped and sold to you know, some crazy person that was gonna keep me hostage forever.

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But you want to be like that when you're doing risk identification is what's the worst thing it happened. What could go wrong? How could it go wrong? And identify where I need to think about addressing that risk.

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Now, It's not all on you. We're procurement. We're not the expert on the product of the service that we're buying. You want to ask your end user.

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So when you talk to your end, user if the product's not delivered. What happens? What's the problem?

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If the product comes in and it's broken, What's the problem? If it's a service and the service doesn't get taken care of. What's the problem? What's the result? What are we going to have to do?

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You may have resources at your agency. If you're a larger agencyou may have a risk management area.

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They can help you identify what those, what those risks are. But you want to talk to those end-users and those risk people about how to identify where you can find those.

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And I understand there's a lot of places that you can have risk, you know. Some are very easy to identify, others are not. So you really have to kind of sit down and talk to people and think about what can go on.

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So we've got some examples of where you can have risk.

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So you have vendor risk. Can the vendor perform?

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What happens if the work isn't done? And are we going to have to find somebody else to complete the work? Are we going to have to pay for it twice?

**06:02.70 --> 06:12.82**

Are we going to have to delay other projects? Um, what is the risk that, if a vendor does not perform, what's going to go wrong?

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Market risk. This was a really big one a couple of years ago. Thankfully, a lot of the supply chain issues that we saw in the last couple of years have resolved, though some of them are still impacting things we do.

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But do we have delivery times that are going to be met? Is it something that we have to order from overseas, and it's going to take,

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you know, three months to get here, or six months to get here. So, what kind of issues can I run into as far as the market?

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Product or service risk. Is the product or service dangerous? This is probably the easiest one to identify.

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Is it something that can harm an employee or harm the public? What if you know, Is it a janitorial contract? And they're going to use a certain chemical that's toxic, or they're going to use

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a floor cleaner that's going to be really slippery, and people are going to come walking through our office, and we're going to have a slip and fall.

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Those are things that that people who can identify that are kind of easier to do.

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And then we have procurement contract risk. Do the specifications really meet the end user needs? Are we ordering what we need to get the job done? Um! Do we have adequate competition? Are we paying a good price? Are we paying more than we should? Those are risks.

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Are there funding issues? Is this tied to grant funding or other funding sources that are time-limited, and I need to have it done by a certain time.

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And then are the terms and conditions sufficient to address those risks? So those are all the kind of thoughts that you want to go through and and say, Okay, what are the what are the dangers? What are my pitfalls?

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What can go wrong, and what do I need to address?

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So once you have everything identified, the next step you need to do is look at the probability.

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So how likely is it to happen? Is it likely that the funding is going to go away, and that we won't be able to get the grant renewed? Is it likely that the product that they use is going to be slippery and and make people fall?

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Is it likely that the IT system that we've ordered is going to take longer to implement than what they say?

**08:33.04 --> 08:39.52**

Those are the things you need to look at. Is it a high chance that it's going to happen? Or is it a pretty low chance?

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If you're doing a janitorial contract. How likely is it that somebody's going to forget to take out the trash one day?

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Probably pretty likely. That that seems to happen a lot that we have to deal with.

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So that's something you may want to address differently than something that's not going to happen very often.

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So once you figured out what could happen, how likely it is that's going to happen. The next thing you want to look at is the impact.

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So what's the result? So how bad is this situation going to be If it goes wrong?

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So think about it from a perspective. If I’m doing an IT contract for a learning management systems for procurement services,

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and I find out that there was a data breach. Well, what kind of data did they get? Well, they know that Carla Lindler attended a Webinar on risk management on March nineteenth, 2024.

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Probably not a whole lot of damage to anybody to know that Carla was in that class.

**09:49.63 --> 10:06.04**

If I have a system for electronic health records for a university. And now I know that Carla was a student at the University, and now I have all Carla's health records, and I know Carla's personal identifying information,

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That's a huge impact. So because I've got violations of HIPAA. I've got violations of FERPA If it’s at a university.

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So the same thing happened. There was a breach of the system. But the impacts were very different, depending on the types of system and the types of data that were breached.

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So you want to take into consideration,

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You know, something bad happened. But how bad is it? It's not always going to be equally bad.

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So once we've taken all these things into consideration or risk analysis, we end up with a risk what we call a risk-level table.

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So we think, okay, here's the list of risks that we have for each one. I've got a probability that it's either almost certain to happen, likely to happen, unlikely, very rare.

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And then the severity, if it does happen, the impact is either going to be negligible, negligible - sorry I can't say that word - low, moderate, or high.

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So that will classify things. So if you've got a risk that's pretty rare, not likely to happen, the result of it's negligible, it's not that big a deal: it's gonna fall in that very low category.

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I may address that risk very differently than one that is almost certain to happen, and is a high impact.

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That's going to be where I really want to focus my intention when I come to a contracting perspective, how do I address the risks that are in that extreme or high category?

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The moderates you want to address, and those are going to be done differently. And then your lows and your very lows, you may decide to not do anything.

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It just depends on what that is, and what the impact is, and what the result is to your agency.

**11:59.86--> 12:05.50**

So once you know, kind of, where everything falls, how do I manage that?

**12:06.15 --> 12:13.10**

So there's several different things that you can do. These are all business decisions. There's not a one-size-fits-all solution.

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Um, a lot of times when we're doing solicitations on behalf of agencies, we'll ask a question from a risk perspective, and the answer will be, “Well, whatever you think.”

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Well, we aren't at your agency. Your agency has to understand what the damage is to them, how they want to address it. We can provide guidance on

**12:35.82 --> 12:47.57**

options, but at the end of the day it's a business decision, and there's not a one-size-fits-all solution. And we'll say, “just use the standard clause or just use the standard um insurance levels.” Well,

**12:48.58 --> 13:02.12**

they're not really a whole lot of standards when it comes to that. We'll talk about that in a minute. But so the options that I have. When I've identified my risk, I can assume those risks. I can eliminate the risks. I can mitigate the risk.

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I can also insure the risks or transfer the risks. So,

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assume the risk means that I’m going to take that risk, and if something bad happens, then i'm going to have to deal with the fallout for that. I can eliminate it, which means the risk just no longer exists at all.

**13:22.24 --> 13:55.56**

I can mitigate it, which means I’m going to lessen the impact. I can insure it, which means I’ll have some payments or some other ways to do it. Or I can transfer the risk, which means somebody else is going to have to bear the burden of the risk.

**13:37.03 --> 13:42.47**

So that's it in a nutshell of how to identify how to manage.

**13:43.07 --> 13:52.06**

But we're going to go through an example to kind of show you how to identify some risks, and then what you can do to manage those risks.

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So here is our example today.

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This is Robert Stewart Craig the third. This is my seventeen-year-old son, who is a teenage driver.

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For those of you who have kids who drive, this is probably one of the most risky decisions that you will ever be faced with in your life.

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He is seventeen, so he's been driving for a couple of years. We're going to kind of go through the risk analysis that we did with him, and how we handled him, deciding to drive. So

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first thing we have to do. Teenage driver, identify the risks, assess the probability and determine the impact.

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Well,

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if you're a mother and you have a son, you can come up with some pretty crazy risks. And remember, I said, you want to think about the worst the worst thing that can happen.

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So if I started thinking about my son driving, of course you get the: he could get into an accident. He could damage his car. He could damage somebody else's car. He could hurt himself. He could hurt someone else.

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He's going to get a speeding ticket. He's going to have, you know, his insurance is going to go up. I'm going to have to pay for gas for another vehicle.

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Um, you know those are kind of some standard things. But then, you know, as a mother, you start getting a little bit. Sometimes you can go a little crazy

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or off the rails. Yeah, I don't know where he is. I don't know what he's doing. I don't know who he's with. What is he…He's, you know, now he's with a group of people that I don't know, because he's off goodness knows where, and they decide that they're going to take a road trip out of state. I don't know what he's doing. He gets into trouble out of state. I can't get to him.

**15:38.79 -->15:46.58**

I mean there's all kinds of things that you think can happen. How am I going to address these risks? What am I going to?

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But then i'm looking at the probability.

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He's a teenage boy. The probability that he's speeding and may get a ticket is probably pretty high. Knock on wood, so far he has not gotten a ticket or an accident.

**16:01.23 -->16:20.39**

Um, several of his friends have been in several accidents. He has a friend that's on his third vehicle, because he seems to keep hitting other cars. So um, you know, probability things can happen, or quite high with teenage drivers. I was a teenage driver one time, so I know I've been there.

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Some things are more likely than others. Probably pretty likely he's going to speed. I don't think it's very likely he's going to take a road trip to Vegas,

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but you never know it could happen. And then the result was, what is the result of that if it if it does happen? So, if he does get a speeding ticket I will have higher insurance costs.

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if he gets, you know, he's in a car accident, and he could have some long-term injuries he could have injuries for someone else that has long-term injuries. So there's some pretty significant results that can result from any risk that he takes while he's driving.

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So you really So once you figure out Okay, there's there's lots of things.

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Let's think about each one.

**17:08.37 --> 17:09.97**

How am I going to handle it?

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So if I want to say I want to eliminate all risks. I don't want to have a risk. I don't want to do any…take a problem. I'm going to eliminate everything. So,

**17:23.22 --> 17:35.40**

Three ways I can do that. I can buy him a bike. You don't get a car. You gotta go somewhere on a bike. I can drive him everywhere he goes myself, and I don't have to listen to him. I can make him ride with all his friends.

**17:35.72 --> 17:40.02**

No risk. Everything is covered. We can call it a day. Well.

**17:41.12 -->17:45.36**

That can be…sounds very easy, but it's not always the most practical.

**17:46.13 --> 17:58.25**

Um, I do not live in in Columbia. I live out in a rural area in Calhoun County. I'm certainly not close enough for him to bike to school, or pretty much anywhere else. So buying a bike, probably isn't going to work for us.

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I'm not a Uber driver. I do have a job. I do not have time to drive him everywhere he needs to go at the drop of a hat. Um. So that's kind of difficult. To ride with friends, you know some of his friends.

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yeah, they may have cars, but they're all over the place, and they've got schedules. And, you know we are, again, we are out in in the country, so to speak. So may I be able to ride with friends as many places as he would need to go. So

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Eliminating. You could do some of this. You might not be able to do all of it. Again, not always practical. If you're looking at a contract perspective and trying to eliminate, risk

**18:41.27 --> 18:52.34**

It's not very often you're going to say we're just not going to solicit for this item at all. But what you want to do is, look at things where, hey? This option is a risk. I’m not going to put this option in the contract.

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Or I'm going to do this, but not that. So, you eliminating again. It's easy to cut something out. Not always practical.

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So

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with my son. Can't eliminate the risk completely. So then, what am I going to do?

**19:08.85 --> 19:21.61**

I’m going to mitigate. I'm going to do everything that I can to make any result of any bad decision or bad action on his part, make it less severe, less serious, and less painful. So

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I’m going to make sure he wears seat belts.

**19:25.11 -->19:41.07**

I'm going to send him to driver training class. He knows how to drive and the consequences of not driving correctly. I'm going to have him an old car, so that if he does get into an accident it's not something that's going to be really expensive to fix.

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So I mean i'm not going to give my sixteen year old a brand new, you know, eighty thousand dollar vehicle to drive. He's driving a 2007 Toyota pickup truck.

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That's all. It's reliable. It gets him where he needs to go, and

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if he beats it up, it's not going to be a major impact. Those are some things that we do to mitigate risks. Same thing in a contract, you would think, are there provisions? Are there things that I can put in the scope of work

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that will mitigate the impact. So if I’m doing a janitorial contract, and I’m concerned that they're not going to, um, clean the bathrooms and keep them up to a level that I need to do. I'm going to have some mitigations in there that we're going to do inspections.

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We're going to have routine reports, things like that that can mitigate the risk. I may have liquidated damages, that if there is something that's a problem that they will have a liquidate damage to make the State whole and lessen the risk for it.

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Now, when we talk about liquidated damages.

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Um, they can't be a penalty to a vendor,

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so that it, if they don't perform

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it, rises to the level of a penalty. So if you say, well, if you don't empty the trash cans,

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every night that you don't, You don't empty the trash cans, you're gonna have to pay the State a thousand dollars.

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Well, that’s a penalty, because there's not a thousand dollars worth of damage to the State for not emptying a trash can.

**21:26.50 --> 21:44.08**

So it needs to be a reasonable amount that would cover the estimated costs that the State,

the estimated cost to the State for any delays or any damages, or anything that would happen as a result of the vendor's failure to perform.

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It does have to be determined at time contracting

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and one form that we often see in IT service contracts that we don't really think of as liquidated damages but are, are things that are in a service-level agreement.

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So if your service level agreement says that your system has to be available, 98.9% of the time, and anything below that you get a credit of five percent, that is a form of a liquidated damage. So that's something that you can do to mitigate risks.

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The next one is insure. This one…

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somewhat self-explanatory. If you want to insure your risk, you want to have somebody buy you a policy to cover it.

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Seems straightforward, but it's not always, because again, insurance levels will depend on the amount of risk. It's not a one-size-fits-all. There are coverage limits and deductible limits that are listed in our standard clauses,

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but those amounts are just they’re amounts, they’re placeholders. You really want to look into your contract to find out are those amounts

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Sufficient.

**22:57.41 --> 23:12.48**

You may have too much insurance at the levels that are in the clause you may have too little. It may be just right. You want to look and check and see what is the possible loss? And do I have enough insurance to cover that loss?

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The other thing that you want to take into account when you're doing insurance is to make sure that you have the right type of insurance.

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Um, I've seen clauses where we've got every - standard clause has just about every type of insurance that you can have, whether it's workers’ comp, general liability, auto insurance.

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And I've seen solicitations where people will be buying promotional items that are shipped to the State via ups or Fedex,

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and we're requiring the vendor to have an automobile liability policy.

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There's no reason for somebody who is going to make a promotional item and ship it to the State to have an auto insurance policy.

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Um, It's they're not going to be using any automobiles in the performance of the contract.

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So what you want to do is look and make sure that you're not requiring coverage that you don't need, because there is a cost to the vendor to purchase and maintain that insurance, and they're going to pass that cost along to you in the form of their price.

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So if you're asking for too much insurance,

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or you're asking for insurance coverage that you don't need, you can end up with higher prices. So what you want to do is, look at what your potential loss is, what those areas are, and make that insurance amount match that.

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One of the big areas that we see with insurance is the cyber insurance.

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It's still a relatively new market in the insurance world. So there's not standards for cyber the same way there are for workers comp or general liability.

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So the cyber insurance can really be expensive, and you can result in either vendors choosing not to compete, or in higher prices, depending on the limits that you require for your cyber insurance.

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So again, insurance seems straightforward. But you really want to think about what you're asking for and making sure you've got the right amounts.

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We also can look at bonding. We have performance bonds, we have payment bonds that are bid bonds.

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They’re not necessarily guaranteed performance, but they do provide a source of funds if a contractor does not perform, so it's somewhat similar to insurance.

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One of the questions that we got in the when people were registering was to go through the bonds, and every single section of what they mean. That's

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more of an in-depth conversation than we can be today. So I think maybe we want to look at doing a different Webinar strictly on bonds, and going through bonds section by section, would be very beneficial. But do know that bonds are something that you can use to help mitigate your risk.

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Typically, we see them more often in the contracting/construction world than we do in goods and services. So bonds can apply to IT. So

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for the sake of our example insurance, we're going to buy car insurance, for my son. It’s required by the State. Anybody who's had a child drive, know that your insurance takes a certain increase once you add a teen driver to your policy.

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But is well worth it in the big scheme of things to pay for that risk.

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So next strategy for addressing risk is to transfer.

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So this is where somebody else comes responsible for the risk, and they are absorbing that cost if there is a problem. So, for our example, we can make my son responsible.

**26:58.92 --> 27:13.63**

He's got to buy the insurance. He's going to have to buy his gas. He's going to have to help pay for his car, so he's got some skin in the game, so to speak, so that he knows if he's paying for his insurance, he wants to

**27:14.20 --> 27:18.60**

drive safely, not get a ticket, so we can keep these discounts down.

**27:19.92 --> 27:28.53**

Historically in the contracting world. Most of our contracts put all the risk on the contractor,

**27:29.48 --> 27:41.72**

and our terms and conditions have been written that the state is always made whole. And if there's a problem it's one hundred percent on the vendor. Well, vendors don't really like that.

**27:42.10 --> 27:57.06**

Um, you know they want to be able to share the risk. So one of the ways that we can transfer risk to the vendor, but then still retain some, uh you know, kind of…spread the pain, I guess…is a limitation of liability clause.

**27:57.57 -->28:05.05**

So the limitation liability clause, it says. ”Okay, vendor, you're going to be responsible for this risk up to a certain amount.

**28:05.59 --> 28:27.05**

and then, after that amount, you don't have any more responsibility.” Now, these are not always the easiest thing to do. Vendors a lot of times we'll see in IT contracts that the limitation liability is the amount you paid for the contract for the previous year.

**28:27.65 --> 28:35.69**

That's usually a pretty low threshold for a risk that has a higher damage to the state.

**28:36.49 --> 28:53.26**

So what you want to do is if you're going to use a limitation liability clause. You really want to make sure that you have fully analyzed the risks. You have fully analyzed um the potential damages, and that the limitation is set to a level where the vendor

**28:55.08 --> 28:56.15**

has some

**28:57.24 -->28:59.81**

responsibility, and it is

**29:00.73 -->29:11.51**

significant enough that they are going to be able to perform and do everything they can to perform. If the limitation of liability amount is set too low,

**29:12.56 -->29:22.04**

the vendor may not be concerned. It's like “Oh, well, my limitation, my liability is one hundred thousand dollars. That's pocket change to me in my world.”

**29:23.12 --> 29:29.99**

They're not going to have a lot of incentive to make sure that the risk doesn't occur, or that something bad doesn't happen.

**29:30.63 --> 29:40.95**

So you really want to take a good look at that. Now, the positive on the limitation liability, especially in my complex IT services

**29:41.62 --> 29:46.14**

some vendors will not even bid if there's not a limitation of liability included.

**29:46.73 --> 29:56.76**

Um, their risks are just too high. So without any limitation, they're not even going to participate in a solicitation which means you could lose out on a potentially very good vendor.

**29:57.40 --> 30:04.68**

You may end up paying more money than you might otherwise. So you really want to

**30:06.06 --> 30:22.90**

take into consideration: number one, do I need it, and number two, if I do - make sure that amount is right. But you certainly don't want to include a limitation liability in every contract. Those are going to be in your more sophisticated and complex contracts.

**30:24.32 --> 30:29.00**

So I've transferred the risk to my son.

**30:29.74 --> 30:30.80**

So now I have. I

**30:33.04 --> 30:43.80**

eliminated some risks. I've mitigated some risks. I've ensured some risks, and I transferred some risks. At this point, what is left to do?

**30:44.74 --> 30:48.46**

The only thing lab at this point is to assume the risks.

**30:49.03 --> 30:57.18**

After you've done all you can, and you've gotten the risk level down to an acceptable amount to the agency or to yourself,

**31:57.93 -->31:05.29**

then you have to accept the remaining risk. And so I’m going to assume any outstanding risks at this point.

**31:06.13 --> 31:10.05**

So when I’m talking about my son, you’re gonna let him drive.

**31:10.97 --> 31:12.46**

So that's how you just

**31:13.77 --> 31:17.01**

you let the contract go forward, and you

**31:18.64 --> 31:28.01**

take care that you have done everything that's possible to mitigate any risks, to insure any risks, and you can accept and live with the risks that are left. Now,

**31:29.19 --> 31:34.92**

for my child, when I let him drive, had to go, get some Xanax, and do some yoga

**31:35.88 --> 31:45.60**

to help me assume these risks, because it was very nerve racking for a parent, especially with my oldest. It's my first one to

**31:46.41 --> 32:00.99**

hand over those keys and let him go on out the door on the own. I out the door on his own and drive. It was a benefit. I'm very happy. He can do that and run errands. He can help drive his sister places. But then it is nervous.

**32:01.61 --> 32:15.34**

You know you get nervous about what can happen, and the bad things that can happen. And so what you do is You've gone through your risk analysis. You've done everything you can to take care of those risks. And now you just have to accept it and let it go.

**32:16.33 -->32:34.85**

Same thing with a contract. Once you've done everything you can, you put the contract in place. You manage that contract. Stay on top of those risks, and if anything does occur, know that you have provisions in the contract that will help you deal with any adverse situations that you run into.

**32:37.55 --> 32:44.58**

\*reading the chat\* Petrina - Try not to try this move on every move on life360. That is one of my mitigation strategies as well.

**32:45.71 -->32:53.67**

The only problem with live360 is once you put it on their phone. They use it to track you more than you use it to track them, at least at my house.

**32:55.67 --> 33:06.42**

But that is the end of the end of our our presentation for day. It's pretty straightforward. If there are any questions you have on risk. We can put those in the chat and go through and answer those for you.

**33:08.28 --> 33:19.09**

I see we've got some people, Ann would like a whole department on the in-depth information on bond. So we will get that one, see if we can put that one together. We'll maybe get one of our

**33:20.08 --> 33:30.60**

one of our people from OSE. They deal with bonds quite a bit, and are probably more familiar with anybody on bonding issues, and we'll see if we can get them in here to do a Webinar for that.

**33:33.13 --> 33:34.37**

No questions

**33:48.45 --> 34:08.93**

Well, this was a quick one today. Again, so like I said, it's pretty straightforward. And if there are any questions that you have, you can always reach out to me. Reach out to someone on our staff. We'll be glad to answer those for you. If you have any other topics that you would be interested in for a Webinar, please let Kristi Sligh know, and she can

**34:09.27 --> 34:24.97**

work up getting some additional webinar topics and get those out there. I think these have been very, very popular and well received. We do, I'm not sure when the next one is scheduled or the topic for next month. But check our website. Those will be posted out there for the topics and the date,

**34:25.46 --> 34:38.22**

and also make sure you check our website for any other training opportunities. We are offering um in-person classes again, and we look forward to seeing you at those. Thank you very much.