

## Should governments limit supplier liability in the aftermath of 9-11?



**D**URING A RECENT *Summit* editorial advisory board meeting, we discussed the changes that have come about in the procurement profession as a result of 9-11. One of our editorial board members, Steve Tudor of IBM Canada, suggested that there could come a time when governments might not even get bidders for some mega-projects due to the 9-11 consequent scope and risk of being sued into non-existence. He also offered to introduce me to experts in his organization to explore the issue. Confident as I always am in the entrepreneurship of the government supplier community, I was somewhat taken aback. Having managed public affairs for an insurance company way back in the early eighties, I was doubly intrigued. After all, liability is a favoured subject of pillow talk among actuaries, accountants,

**Sit down, take a deep breath, sip a beverage, open your mind and stay awhile while we chat with:**



**Paul McCullough**  
Business Unit Executive  
Public Sector  
IBM Canada

photo  
not  
available

**Lindsay Gorrell**  
Legal Counsel  
IBM Canada

risk managers, insurers, re-insurers, lawyers and other such cognoscenti. Not only did that lead to this "Chatroom" subject, I even suggested, begged, cajoled, pleaded with *Summit's* irascible but ever so understanding editor to let me do a feature article on the subject (*it wasn't all that difficult – stay tuned nextish – ed*).

As someone semi-initiated to such arcane arts (what's the old adage: nothing so dangerous as a little knowledge?), here are a few of the thoughts that occurred to me about the issue of mega-liability and indemnity from it.

- Definition of a terrorist act could be a 'Pandora's Box' – whether someone is a terrorist or a war hero can depend on which side you're on!
- Determining whether an event is terrorist-driven or not could be difficult – though not the case for 9-11, it could be for disease outbreak, contamination, accident or other situations.
- Omission, mistake, and any consequent fault or liability is a hugely moving target in our world of technological innovation and global dynamics.
- If governments indemnify against liability, what's the purpose of being liable?
- If mega-liability is such a new and challenging phenomenon, why limit indemnification to anti-terrorist and public safety security projects?

I'm sure many of you can think of more.

Let us know!

Steve Tudor's expert colleagues at IBM Canada turned out to be public sector sales and distribution star Paul McCullough and legal guru Lindsay Gorrell, who were both most generous with their time, experience and opinions. I think it's a very good start at a highly complex and somewhat contentious issue, so... let's chat!

### It's a bird; it's a plane; it's a tragedy

**McCullough:** The common public safety objective for buyer, seller and consumer is a more secure environment. Since the tragic events in the US we have learned clearly the risks and consequences inherent in a terrorist episode. The impact of those events is in a completely different league than the traditional areas in which we have done business. If you look at the liability surrounding the infamous 9-11 terrorist attack, anyone who was remotely involved, from the World Trade Center to the City of New York to the security firms to Boeing, are parties that are named at various levels in various suits.

**Gorrell:** This is not just a theoretical concern. It is very real. The liability concern with respect to anti-terrorism or anti-money laundering projects in particular arises largely from third party claims. A third party claim in a catastrophic event could amount to a billion dollars, which would bankrupt most consulting firms. The bulk of the families in the 9-11 disaster have claims that are still being dealt with. The whole process is not only frustrating and difficult for the families but

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for everyone involved. What has happened since 9-11 is that the many governments, including those in Canada and the US, have now finally created large pools of money to fund anti-terrorism and anti-money laundering projects that large companies are now bidding on. Certain pools of money have been created in Canada and Canadian companies are now bidding on these projects.

### Keeping up with the Joneses

**Gorrell:** Laws are being changed and developed to address the unknowability and unpredictability of third party claims related to anti-terrorist or anti-money laundering initiatives. The US government has been so concerned at the reluctance of its large, well-established consulting firms to take on these kinds of projects that it has passed the *Safety Act*. It provides for a shared risk by limiting the amounts that a consulting firm would be liable in deploying public safety technologies. The *Safety Act* applies to public safety projects that focus on anti-terrorism or anti-money laundering. Though the process under the *Act* is unwieldy, prolonged and difficult, it appears to be working and these technologies are now getting into the field. There is no counterpart legislation in Canada nor is any counterpart being proposed, so Canadian companies that want to bid on a project that has public safety aspects are faced with the problem of very carefully weighing the risks. If they consider those risks to be sufficiently high, they have to make their bid conditional on the government or some other deep-pocketed entity providing an indemnity.

**McCullough:** The US *Safety Act* is far from perfect but it does lay out the underlying principles, that gave rise to it. Many of the solutions that government would like to implement to combat terrorism deal with the requirement to exchange information – the capabilities and technologies that many large organizations

have. In the US, there is a recognition in the analysis of 9-11 that the environment that existed before the *Safety Act* deterred companies from coming forward with information sharing innovations at exactly the time that there was a greater need for innovative solutions. Terrorism is a global issue and we share a border with the US. Many of the issues involved are cross-border issues, so Canada can look to the US *Safety Act*, at least in intent as a model we can investigate. You can argue the merits of the *Safety Act* but the intent is something we can certainly learn from here in Canada.

### Is everyone out of the pool?

**McCullough:** There probably are a number of examples of projects where solutions haven't been offered up by suppliers because of the risk of the failure to be indemnified on implementation. The very least an organization would have to do would be to burden their proposal commensurate with the risk. That could well render them uncompetitive and the outcome is still one where the best solutions may not come forward. The contract could well go to those who are prepared to undertake the most risk rather than those who are prepared to offer the best innovation or best solution. Often firms of the scale to offer global solutions are the ones that have the most to lose and decline in such circumstances. Smaller firms, or those who have relatively little to lose if they are bankrupted, have much less risk in bidding. This is predominantly a federal issue. First, most of these projects are federal initiatives and secondly, the federal government is the one with deep enough pockets.

**Gorrell:** A particular concern of large consulting companies is that they would like to be able to approach the Canadian government to bring attention to the problem, the issues of risk and liability in the public safety arena. The Canadian government certainly understands all of

this. The problem is the smaller companies out there who are willing to bid on these projects, whereas the larger companies may stay away under the current circumstances. Where these smaller companies win these projects, they may well be judgment-proof, that is, willing to go under if they are liable. That creates a feeling among large firms that they are not able to put significant pressure on the Canadian government at any level to obtain risk reduction (through indemnification, for example) when offering their solutions up. Larger firms like IBM have established, sophisticated internal risk assessment resources as part of their overall operation. It is one thing for a large consulting firm to contract with Canada to provide services, but for the most part, such contracts do not involve a huge risk of third party claims against either the government or the consulting firm. When you are talking about a project that involves installing, designing or developing systems to thwart terrorism, there is the possibility of third party claims and related liabilities over which you really have no control. Such concerns over liability are raised in the context of such sophisticated risk analysis, not dealt with on an *ad hoc* basis. Each project comes with its own risk and is assessed in a very comprehensive fashion according to its own merits. The bottom line is to get the best public safety solutions out there to benefit all concerned. ~~~

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