



# Risk Management Considerations for Contracting with Professionals

Intact Public Entities regularly advises clients that they should, as a matter of policy, contract out of potential liability exposures rather than accepting them. However, based upon the agreements we examine on behalf of our clients and the situations we have described to us, it seems that people are constantly attempting to have you assume their liability.

We especially see this in contracts with professionals such as engineers, architects and other consultants who provide scientific or technical services under the terms of an agreement. You should always guard against assuming liability arising out of the provision of such professional services.

## When using a professional's contract, note the following:

Who Assumes the Environmental Risks in the Contract?

In addition to seeking professional indemnity, some third party contracts may also look to you to assume the liability of engineers and other technical consultants for claims arising from impairment of the environment. Even if you have purchased environmental liability insurance, it will not include the liability of an independent contractor providing services for you.

Watch Out for the Limitation of Liability Clause

We often see the Limitation of Liability Clause in professional service agreements. Pay particular attention to this clause. We strongly recommend you have your legal counsel review the wording. A Limitation of Liability Clause limits the third party's liability to a dollar amount – usually the cost of the contract. The clause may further exclude consequential damages. It may also include an "exceptions to liability" statement (that is not limited to any dollar amount), such as patent infringement, negligence and breach of contract.

Indemnification/Hold Harmless Clause

Is an Indemnification/Hold Harmless Clause included in the contract? If yes, is the professional assuming liability for their actions in carrying out the services specified in the contract?

Here is a sample of an Indemnification/Hold Harmless Clause:

*The (Professional) shall indemnify and hold harmless the (Municipality), its officers, members of municipal council and employees from and against any liabilities, claims, expenses, demands, loss, cost, damages,*

*actions, suits or other proceedings by whomsoever made, directly or indirectly arising out of the (Contract) attributable to bodily injury, sickness, disease or death or to damage to or destruction of tangible property including loss of revenue or incurred expense resulting from disruption of service and caused by any acts or omissions of the (Professional), its officers, agents, servants, employees, customers, invitees or licensees, or occurring in or on the premises or any part thereof and, as a result of activities under this agreement.*

3. Always work with your legal counsel when contracting for any service. Ask them to either write the contract or review the contract proposed by the third party.
4. Send the contract to Intact Public Entities.

### **Risk Management Considerations:**

1. Control the contract. Since you are the one contracting and paying for the service, you should be in control of the contracting process. Use your own contract.
2. Always make insurance coverage a requirement in your contracts. For professional services contracts, you will require both Professional/Errors & Omissions (E&O) insurance as well as a Commercial General Liability policy. Below is a draft of a Professional/E&O insurance provision.

*The (Professional) shall take out and keep in force Professional Liability insurance in the amount of \$\_\_\_\_\_ providing coverage for acts, errors and omissions arising from their professional services performed under this Agreement. The policy SIR/deductible shall not exceed \_\_\_\_\_ per claim and if the policy has an aggregate limit, the amount of the aggregate shall be double the required per claim limit. The policy shall be underwritten by an insurer licensed to conduct business in the Province of \_\_\_\_\_ and acceptable to the (Municipality). The policy shall be renewed for 3 years after contract termination. If the policy is to be cancelled or non-renewed for any reason, 90 day notice of said cancellation or non-renewal must be provided to the (Municipality). The (Municipality) has the right to request that an Extended Reporting Endorsement be purchased by the (Professional) at the (Professional's) sole expense. A certificate of insurance evidencing renewal is to be provided each and every year.*

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