

2. INDEMNIFICATION AND INSURANCE REQUIREMENTS

Officer responsible
Support Services Manager

Author
Murray Sinclair DDI 941-8852

The purpose of this report is to clarify delegations for varying the Council's terms and conditions for the supply of physical works or professional services that require contractors/consultants to fully indemnify the Council for any loss that the Council may suffer as a result of the contractor's/consultant's actions.

The Council's current terms and conditions for the supply of physical works or professional services contain the following indemnity and insurance clauses:

Indemnity:

The contractor/consultant shall at all times indemnify the Council in respect of any loss, damage or expense suffered or incurred by the Council as a direct or indirect consequence of act, error or omission by the contractor/consultant and for which the contractor/consultant is legally liable. The indemnity shall survive the termination of this contract.

Insurance:

The contractor/consultant shall take out and maintain at its own cost, at all time during the term, public liability insurance for an amount of, not less than \$1 million. All such insurance shall be on such terms and with such insurers as the Council may reasonably require.

If these terms and conditions relate, in any way, to the provision of professional services, the contractor/consultant shall take out and maintain at its own cost, at all times during the term, professional indemnity insurance for an amount of, not less than \$1 million. All such insurance shall be on such terms and with such insurers as the Council may reasonably require.

The contractor/consultant shall, if requested by the Council, provide the Council with written evidence that the insurance required above is in force and the contractor/consultant shall produce, whenever reasonably required by the Council, the relevant policies and evidence of payment of current premiums.

If the contractor/consultant fails to provide such evidence of insurance as may be required by the Council, the Council may after notifying the contractor/consultant in writing arrange or keep in force that insurance and, for the purpose of doing so, pay the relevant premiums and deduct a corresponding amount from any monies payable by the Council to the contractor/consultant under this contract.

The above wording was recommended for use by the Council's liability insurer (NZ Mutual Liability RiskPool) during a liability audit undertaken by RiskPool in 1998. The purpose behind the inclusion of such wording is to reduce the Council's exposure to losses caused by the actions of contractors/consultants that the Council engages.

While the abovementioned clauses are generally accepted a number of consultants are reluctant to agree to them. In the absence of alternative agreements, such as the Council's terms and conditions consultants by and large use the 'Conditions of Contract for Consultancy Services' which have been developed jointly by the Institute of Professional Engineers, Association for Consulting Engineers NZ, Transit NZ, and the Association of Local Government Engineers NZ. The 'Conditions of Contract for Consultancy Services' contain the following clauses:

"6.1 Consultants Liability:

Where the consultant breaches the Agreement, the consultant is liable to the client for reasonably foreseeable claims, damages, liabilities, losses or expenses caused directly by the breach.

6.2 Limitation of Liability:

The maximum amount payable whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses shall be the lesser of five times the fee and \$500,000.

OR

The maximum amount payable shall be (amount to be inserted).

6.5 Insurance:

The consultant shall take out and maintain:

- *Professional indemnity insurance for the amount of the liability under 6.2; and*
- *Public liability insurance of \$1 million or the amount of public liability required is (amount to be inserted);*
- *Provision for reasonable defence costs.*

NB: where no amount is specified in the second option, the first option shall apply.”

It is common practice by consultants to limit their liability to the lesser of five times the fee or \$500,000.

The limitation of liability clause contained in the ‘Conditions of Contract for Consultancy Services’ conflicts with the Council’s requirement for consultants to fully indemnify the Council for losses incurred and for which the consultant is legally liable. Should the Council accept agreements that contain a limitation of liability any loss incurred as a result of a consultant’s actions the maximum that the Council could recover as per the ‘Conditions of Contract for Consultancy Services’ would be the lesser of five times the fee and \$500,000. A limitation of liability increases the Council’s risk to financial losses, losses the Council would not incur under the wording contained within the Council’s terms and conditions for the supply of physical works or professional services.

The Council’s insurers require that in the event of any payment of a claim, the insurer will be subrogated to the extent of such payment to all the insured’s rights of recovery and the insured shall do everything that may be necessary to effect recovery. Insurers could view agreements containing a limitation of liability as restricting their ability to recovery payments for claims made and considered this to be a breach of the insurance conditions. The level of insurance cover held by contractors/consultants generally relates to their ability to meet any such loss.

From past experience it has not always been possible to persuade consultants to adhere to the Council’s indemnity and insurance clauses and officers have agreed to use the indemnity and insurance clause contained within the ‘Conditions of Contract for Consultancy Services’ as a substitution so that the preferred consultant can be engaged. This leaves the Council exposed to a financial risk that would not have been incurred had the Council’s indemnity and insurance been agreed to. There will be occasions when the Council cannot engage any consultant on the Council’s terms and conditions. In such cases it is recommended that the Support Services Manager be granted delegated authority to vary the Council’s terms and conditions.

It is unclear whether Council officers have the authority to enter into an agreement that limits the Council’s ability to recover losses incurred as a result of the actions of contractors/consultants. The potential risk nor the likelihood of it occurring is not always able to be quantified accurately. To clarify this situation it is recommended that delegated authority be granted to the Support Services Manager to vary the wording of the indemnity and insurance clauses contained in the Council’s existing terms and conditions for the supply of physical works or professional services.

- Recommendation:**
1. That, as a general principle, the Council’s terms and conditions for the supply of physical works or professional services be confirmed.
 2. That the Support Services Manager, in conjunction with the Legal Services Manager, be granted delegated authority to vary the indemnity clause contained within the Council’s terms and conditions for the supply of physical works or professional services terms and conditions in individual cases.
 3. That the Support Services Manager, in conjunction with the Legal Services Manager, be granted delegated authority to vary the requirements contained within the Council’s terms and conditions for the supply of physical works or professional services terms and conditions for contractors/consultants to maintain a minimum of at least \$1 million professional indemnity insurance and/or a minimum of at least \$1 million public liability insurance.