Guide to contract risks

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Local government contracting, an introduction

Local governments in Western Australia purchase billions of dollars-worth of goods and services annually, procuring and commissioning projects large and small, working with many different service providers and suppliers of goods, and making an important contribution through their purchasing power to local economies and wider marketplaces.

The main device for regulating relationships between local governments and their service provider and suppliers of goods is a contract.

LGIS members, enter into contracts during the normal course of their business when supplying or procuring a wide range of goods and services. These contracts can be as simple as purchasing a box of pens from a local stationery supplier through to building significant infrastructure. Common examples of the types of contractual agreements include:

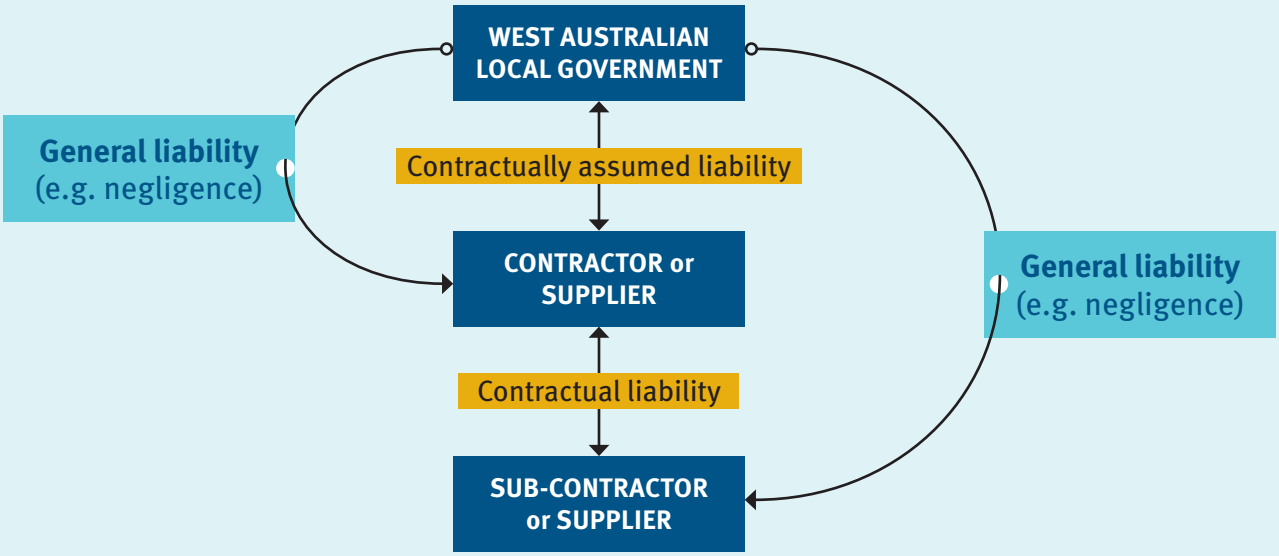
- Design and/or construction of projects such as road upgrades, sporting facilities
- Community infrastructure such as libraries
- Performing works or delivering services for others, for example undertaking:
  - Maintenance work on state-controlled roads
  - Purchase of materials, plant and equipment
  - Engaging performers in support of an event
  - Leasing of land (as lessee and as lessor)
- Utilising external entities to provide services on behalf of the Member, for example
  - Operating a public swimming pool, recreational facility or camping ground
  - Utilising the services of a labour hire provider
  - Hiring out facilities to community groups or other members of the public
  - Engaging contractors and professional consultants

In the context of local government authorities (LGA)' in WA, contracts come in many different forms. For example, the WALGA-prepared member contract for supply of goods, the various iterations of the Australian Standards General Conditions of Contract, and bespoke contracts prepared by the local government itself, such as a lease, licence and hire agreement. Local governments can be the contract-giver or the contract-receiver. In other words, they can be setting the terms and conditions of the contract or they can be subject to the terms and conditions set by the other party (e.g. state government, private sector companies).

Whatever the circumstances, contracts do more than just allow the parties to agree the substance of what and how they will do business. Contracts also provide important mechanisms for allocating, sharing, retaining and transferring risk. Understanding the allocation of risk in a contract is critically important to those in local government who have responsibility for preparing, negotiating, agreeing and managing contracts. Getting this right can help ensure that the contract runs smoothly, achieves its objectives, and allows for the parties to focus on deploying appropriate measures to mitigate the risks that come with every contract. Getting it wrong can result in significant inconvenience, financial embarrassment, and a potentially indeterminate liability.

This LGISWA contract risk guide is designed to give our members a snapshot insight into the key mechanisms and common approaches to allocating risk in contracts. It does not provide an exhaustive account of the subject but rather highlights some of the crucial features of a contract and the important clauses that will often crop up whenever the parties to the contract discuss risk. The guide provides some examples of contractual risks that LGIS members should be aware of during the contracting process and explains the relationship between contractual assumed liability risk and the general liability risk exists irrespective of contracts.

Illustrating the relationship between contract liability and general liability



Risk and liability

What is risk?

The ISO 31000:2015 Risk Management Guidelines define risk as the effect of uncertainty on objectives.

An effect is a deviation from the expected, and can be positive, negative or both, and can address, create or result in opportunities and threats.

Risk is usually expressed in terms of risk sources, potential events, their consequences and their likelihood.

Categories of risk?

There are three categories of risk:

- Risks within your control
- Risks within the control of the contractor
- Outside risks – neither party has control

As a rule of thumb, in contracts, the party best placed to control and manage a risk, should bear that risk, and therefore take responsibility for any liabilities emerging out of that risk (Abrahamson Principle).

Treating risks

You can treat risk by:

- Reducing risk
- Retaining risk
- Removing risk
- Transferring risk (usually to an insurer)
- Sharing risk

What is a liability?

A liability is a legal obligation to pay or compensate another party that may currently exist or be triggered by a future event.

It can arise from:

- Breaching a legal obligation
- Infringing someone else's rights
- Acting unlawfully
- Breaching a duty of care
- Engaging in misleading conduct
- Entering a binding agreement

Why is it important to understand contract risk?

Every contract has an element of risk. It can be performance related, it can be financial, it can be reputational or it can be legal - in the sense that it can create a liability. Managing risk in a contract is always easier when it is transparent, clearly understood and acceptable to the parties involved. It is always better to enter into contract with eyes wide open; understanding when, how and where you have assumed, shared or transferred liability risk is fundamental to effective management of the contract.

Risk transfer and your protections

Relationship to LGISWA protection schemes

When it comes to contracts, it is important to know:

1. What liabilities your local government will be protected against; and,

2. What liabilities may fall outside the scope of your LGISWA Protections (i.e. Liability, Property and Workers' Compensation Protections).

When the latter applies, it is crucially important that you understand where and how the contract creates risk, especially where that risk has the potential to produce a significant peril for you and your local government. Once you understand how risk is allocated in a contract and where the gaps exist, you can then concentrate on managing the practicalities of its performance and putting in place measures to mitigate the risks that you own.

How is risk transferred and how does it affect members' liability protection?

Our members benefit from the provisions of LGISWA protections, which, put simply, provides members with legal representation whenever a claim is made and makes payment where there is a finding of liability against the local government member. However, like many liability protection instruments the LGIS Liability Protection does not protect against all liabilities.

Some exclusions apply: one such exclusion relates to liabilities assumed through a contract. The reason for this is that when a liability is assumed through a contract it is often something that the law would not typically apply to the party in everyday circumstances, it is something extra that the contracting party has taken on as a requirement of contract. In other words, it is the cost of doing business.

In any contract, risk is typically transferred using several clauses within the contract, known as the 'risk clauses'. Often it will be necessary to take specific advice on the wording of the risk clauses, especially where the contractor proposes departures. Below is a brief overview of the main risk clauses and how they work:

1. **Limited liability:**
   These clauses essentially set a financial ceiling on the liability of the parties. The practical effect from a member perspective (when acting as Principal in a contract) is that the local government will be responsible for any financial liabilities above the cap. A limit of liability can also confine the scope of that liability (i.e. the circumstances giving rise to the liability) to specific situations (e.g. negligence of either party) or to a specific timeframe. It can also have important implications for insurance.

2. **Exclusion of liability:**
   These clauses seek to exclude, restrict or qualify rights, which a party would otherwise have had under the contract. They will typically exclude certain types of losses, such as loss of business opportunity or loss of goodwill.

3. **Indemnities:**
   Put simply, an indemnity is a promise made by one party in a contract to cover the loss or damage suffered by the other party. Indemnities expedite recovery of losses and trigger regardless of fault. Where an indemnity applies the beneficiary of the indemnity (either the local government or the contractor) does not have to prove anything other than that they suffered a loss or damage. Indemnities make recovery of losses a straightforward process, the only requirement is that the loss satisfies the criteria set out in the indemnity clause in the contract. There are many pitfalls to be aware of when negotiating indemnities, especially where the contractor has proposed departures. **You should seek advice as there is no one-size-fits all approach and small changes to the wording can make a big difference to risk in the contract.**

4. **Consequential Loss (CL):**
   This is a tricky area to explain and understand, even to those qualified in law. It is therefore always best to take advice on consequential loss clauses. Generally however, CL may be defined in the 'Definitions and Interpretation' section of the contract, covering things such as loss of profit, loss of use or even reputational damage. In very simple terms, if you agree to exclude a contractor's liability for CL, it is essential that you specifically identify in the contract the types of losses that you agree to exclude as a CL; meaning you understand that you will not recover those losses.

5. **Liquidated damages (LDs):**
Sometimes referred to as delay damages, LDs can be beneficial because they create a certainty of knowing the extent that your local government will be protected if a contractor fails to perform their obligations under the contract. LDs can also incentivise a contractor to perform on time. It is important however to ensure that there is some thought put into calculating the amount of LDs, otherwise, in a dispute, a court may deem them a penalty and strike them out.

6. **Proportionate liability:**
Most contracts will make mention of how the parties to the contract are to deal with liability where there are two or more parties sharing responsibility for causing the loss or damage. As Principal, your local government will often want to exclude proportionate liability from applying in the contract, especially where there is a possibility of multiple sub-contractors involved in a project. The way this is done is by using the following wording that appears in many standard contracts used by local governments in WA:

> "EACH PARTY AGREES THAT PART 1F OF THE CIVIL LIABILITY ACT 2002 (WA), TO THE EXTENT THAT THE SAME MAY BE LAWFULLY EXCLUDED, IS EXCLUDED FROM OPERATION WITH RESPECT TO ANY DISPUTE, CLAIM OR ACTION BROUGHT BY ONE PARTY AGAINST THE OTHER PARTY ARISING OUT OF OR IN CONNECTION WITH THE CONTRACT AND ANY OF THE CONTRACTOR'S SUB-CONTRACTORS OR SUCH SUB-CONTRACTORS' PERSONNEL."

However, your contractor may push back as they will not want to be responsible for all liabilities where there may be other parties (e.g. subcontractors) involved. This will then be a matter for your local government to determine on a case-by-case basis using a risk-based approach to assess who is best placed to control the risks that have been identified. Note, that proportionate liability does not apply to situations involving personal injury.

7. **Insurance:**
The contract will usually insist that the parties maintain insurances that are suited to the particular project or service. It is therefore important that you ensure that the insurances are appropriate so that in the event of claim the policy will respond as anticipated. Of course, the type of insurances required will depend on the type of work to be undertaken. If the project is construction related then it will likely be that public liability and contracts work will be required. For design and consultancy work professional indemnity insurance will be required. Where there are any doubts you should consult your account manager at LGISWA.

Typical insurances local government members will encounter

The dollar amount of a particular contract will not provide guidance as to the appropriate limit you should request or agree to. Items to consider:

- What are the potential damages if something goes wrong?
- Is the contractor providing a mission critical service?
- Who is the contractor? Are they a small business or a large global entity – limits should be realistic, proportional, and commercially feasible.
- Will they have access to your confidential information? (including personally identifiable information).
- Carefully consider the application of the Indemnity and contractual caps in relation to setting out insurance requirements.
- How long should they carry the policy after the delivery of the contract?

Insurance type	Insured amount	Aims to cover
Public and Products Liability	• $20M any one occurrence • $20M any one occurrence and in the aggregate	In most circumstances it is suggested that other parties entering into an agreement with the member, or undertaking activities on local government controlled land that are regulated by a member, have a current public and products liability policy for a limit of liability of $20,000,000 any one occurrence and in the aggregate for Products Liability. This may need to be significantly higher depending on the specific circumstances and level of risk associated with the individual issue, but it is suggested a lower amount should be clearly justified by an appropriate and documented scenario-based risk assessment.
Workers' Compensation or Personal Accident Insurance (whichever may apply)	The contractor shall insure against liability for death of or injury to persons employed by the Contractor including liability by statute and at common law to a limit of not less than $50,000,000. Cover extended to include Principals Indemnity Clause for Act and common law including waiver of subrogation.	All contractors, consultants or suppliers of services should be required to demonstrate that they have a current workers' compensation policy covering their legal liability to their workers under workers' compensation legislation.
Comprehensive Motor Vehicle and third party	Comprehensive Motor Vehicle and Third Party Liability for no less than $30,000,000 any one occurrence.	All contractors, consultants or suppliers of services who have registered vehicles which they intend to use in fulfilment of the contract, must have motor vehicle liability insurance for liability, death or personal injury to any person and for loss, destruction or damage arising out of the other contracting party's ownership and/or use of any motor vehicles in connection with the work or services performed under the contract.
IT Consultants Liability (including Cyber)	$5 M on any one occurrence	To protect against cyber liabilities including network security breaches, privacy liabilities, fine and penalties, incident response and cost of data remediation.

Contracts Works	Contract value and no less than $20,000,000 public and product liability arising from the contract.	Construction sites are laden with risks – with damage to equipment and bodily injury being most prevalent. A typical contract works policy can cover physical loss or damage to buildings, materials, temporary works and construction-related equipment. This might be due to: fire, theft, vandalism, Construction collapse, storm and flood damage, natural catastrophes – earthquakes and cyclones. In some instances you may need to extend the policies to cover design and workmanship defects.
Contractors' Environmental Liability	$10M any one claim and in the aggregate.	The potential for causing pollution or damage to the environment during construction works is generally elevated compared to the everyday running of a facility. Contractors' pollution liability insurance can be used to insure against the eventuality of having an environmental liability for pollution, caused by a spill or leak or through the exacerbation of an existing land contamination situation. This form of insurance provides cover for • Statutory first and third party clean-up costs. • Third party claims for bodily injury and property damage. • Biodiversity damage. • Legal defence expenses. • Third party loss of use, including diminution in value.
Professional Indemnity	$5M any one claim and in the aggregate.	All consultants or contracting parties rendering professional advice or services for a fee must have Professional Indemnity Insurance for an amount of cover (as determined by the member in the circumstances of the contract) covering any civil liabilities specifically including dishonesty of employees and misleading and deceptive conduct claims. The consultant or other contracting party should maintain ongoing professional indemnity. Insurance for a period of not less than 7 years (sunset clause) after the term of the contract expires to cover any Professional Indemnity claims which may occur or manifest themselves after the termination or completion of the contract.

Insurance: 5 points to make

1. Insurance clauses are provisions inserted into contracts that commonly require one or more parties to hold specific types of insurance on specific terms (including who is insured under the policy).

2. The benefits of insurance clauses include that they can provide all parties with a risk management mechanism. It is not uncommon for an insurance clause to require a party to have cover in place for an amount equal to the limit of liability under a contract. However, it is important to note that this might not be adequate to cover liability exposures.

3. The nature and drafting of an insurance clause can vary widely, including from contract to contract and across industries. Care is required with insurance clauses and if a contractor hasn't got the correct insurance it can be catastrophic for council!

4. Insurance clauses or provisions in the contract on their own are insufficient to protect the Member. Providing the original policy or a certified copy including all endorsements is the best way of ensuring the appropriate cover is in place.

   As a minimum the following details should be included:

   - Name of all relevant contracting parties;
   - Insurer(s)' name;
   - Type of policy;
   - Policy period;
   - Policy number;
   - Sum insured or limit of liability.

5. In the context of negotiating an insurance clause, the parties may discuss a waiver of subrogation. A waiver of subrogation is a contractual provision where the insured party waives their insurance provider's right to seek compensation for civil damages from a negligent third party. These clauses preclude one insurer from bringing civil damages to claim against the other to recover funds paid by the insurance company to the insured or a third party to resolve a covered claim.

Interest noted clause

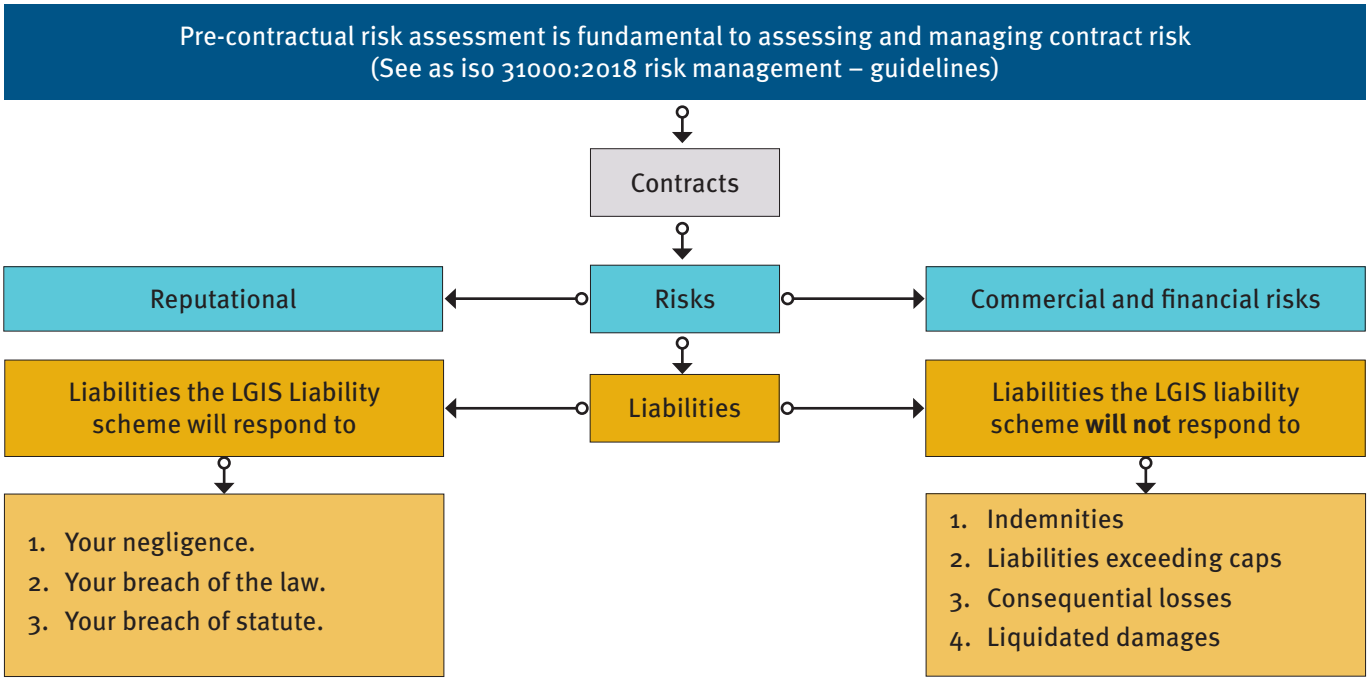
An interest noted on an insurance policy, subject to the terms of the policy, might entitle that interested party to enjoy some benefits of being covered but not share all of the rights and obligations that a named insured would have. In this way, an interest noted is a person or entity other than the contracting insured, who may be entitled to take the benefit of the insurance cover and may have a right to recover their loss in accordance with the policy terms. Interest noted clauses in a local government context, would typically appear in contracts regarding the provision of services or hire agreements, which require a third party to obtain a policy of insurance. An example of such a clause is as follows:

Incorporated organisations that hire local government facilities including sporting clubs, educational religious organisations and commercial enterprises must provide the local government with evidence, in the form of a certificate of currency, that they hold public liability insurance cover. The certificate of currency must note:

- The interest of the local government as the owner of the facility,
- Be signed by or on behalf of the hirer's insurer,
- Be issued by an insurer listed on the Australian Prudential Regulation Authority's 'Register of Authorised Insurers' and
- Be renewed within 7 days and local government supplied with a new certificate of currency.

If it expires during the period of hire, Interest noted clauses are significant as Section 48 of the *Insurance Contracts Act 1984 (Cth)* entitles an interest noted to make a claim on the policy for a loss where a party is specified as being covered by the policy. This provides local governments, who have their interest noted on an insurance policy (such as that referred to above) to make a claim on the policy they suffer a loss. This is particularly useful in circumstances where a named insured, being the incorporated organisation in the above example, might become insolvent and the local government would otherwise have no alternative method to recoup any losses or damage suffered resulting from the hire.

Fig 2: Illustrating the relationship between contracts, risks, liabilities & LGISWA protections



How to negotiate carve-outs

Most contractors will want to have everything that could result in loss or damage to your local government benefit from a cap so that they can limit their potential liability exposure to you should you suffer a loss or damage. It is very important that you ensure that certain conduct(s) by the contractor are not subject to a cap (in other words it is 'carved-out' from the caps agreed during the negotiation).

It is also important that you do not insist on a contractor having a high level of insurance cover and then agree to a low cap on liability. For example, it makes little sense to insist on $5M of professional indemnity insurance and then subsequently agree to cap liability to $1M.

As a general rule, members can start with the following approach to negotiating caps on liability:

Negotiating caps on liability

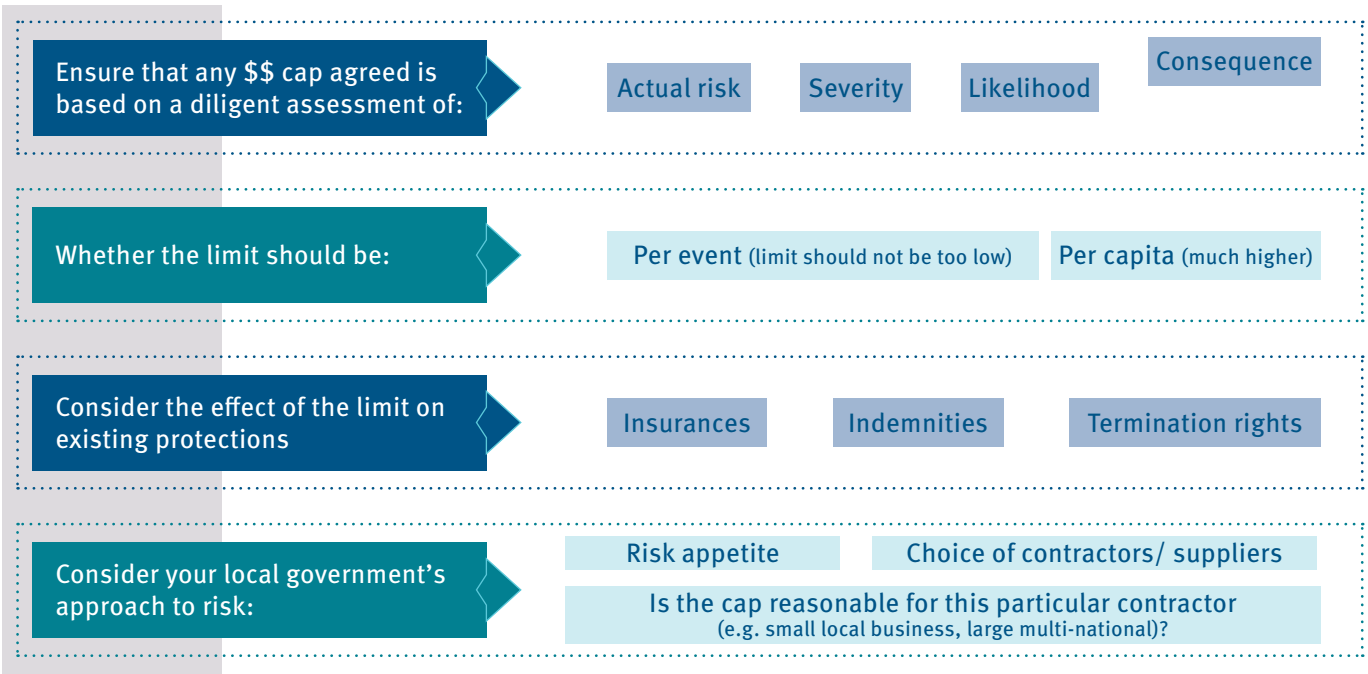
MUST BE 'CARVED-OUT' OF CAPS (do not agree to caps on liability for these)

1. Any criminal conduct.
2. Fraud.
3. Wilful misconduct.
4. Gross negligence.
5. Personal injury and death.
6. Liabilities that cannot be excluded by law (e.g. Breach of Australian Consumer Law).
7. Liabilities covered under an insurance policy or liabilities recovered from an insurer.

THINGS THAT MAY BE NEGOTIABLE WHEN IT COMES TO CAPS ON LIABILITY:

1. Breach of contract.
2. Property damage.
3. Breach of IP (although be careful with this, IT and software providers should stand by the integrity of their product and know that their products do not breach third party IP).
4. Consider whether it is appropriate to align caps to amounts recovered or recoverable through an insurance policy.

Fig 3: How to assess an appropriate $$ liability cap?



Types of contracts

Many local government contracts, entered into for the supply of goods and services, pass by uneventfully. Members will often use standard form contracts (e.g. WALGA member contracts, Australian standard contracts); or they may prepare their own unique contract for specific purposes; or they may be subject to contract terms set by another party. WALGAs' preferred supplier contracts recognise the need to provide greater agility, ease of access, and broader market reach. The contract terms and conditions have been simplified to focus on the core elements of the Preferred Supplier relationship and deliver a more equitable framework. They represent a fair balance of risk.

Irrespective most contracts that members' will be accustomed to will be bilateral in nature. That means that the agreement binds the parties to mutual obligations. However, there may be situations where there are more than two parties involved and these can often present as a more complex risk arrangement. Whatever the situation, it is important that the local government member puts contract risk front and centre of their thinking throughout the contract lifecycle. This means thinking about risk when the contract is drafted, as it is performed, how it is managed and how it is monitored.

Standard contracts

Liability risk in standard contracts can emerge whenever a supplier proposes a departure or variation to the risk clauses and they are accepted, without challenge, by the local government member. Local government members can also be subject to a service agreement set by the service provider. In this instance, the service provider will typically draft the contract to minimise their own liability risk exposure, which can mean that they have transferred some of that risk to the local government

Take, a contract for the supply of IT services, including software, as represented below, and consider whether the terms set by the IT provider are acceptable in the context of liability risk.

1. The service providers' limit of liability is capped to fees received in the preceding 12- month period irrespective of how that liability arises. Is this sufficient?

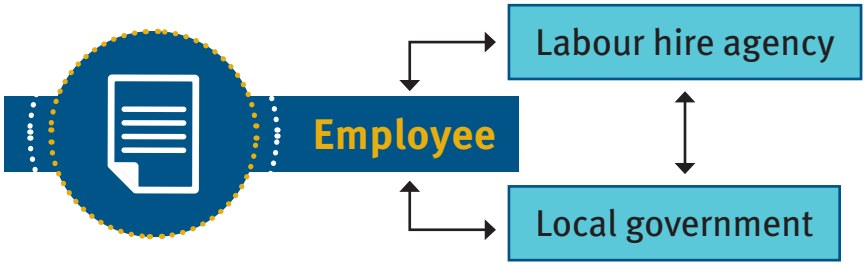
2. Personal injury is carved-out of the cap on liability, but a breach of third party Intellectual property rights is not. Is this acceptable or should the IT provider stand by the veracity of their service supplies?

3. The indemnity obligations are significant and onerous, and operate in one way. That is, they require the local government to indemnify the IT service provider for losses, but not the other way around. Is this acceptable? It will mean that the member will not be able to recover for sums due on the indemnity unless the liability arises because the local government member has been negligent, and this negligence has caused the loss suffered by the service provider. Remember that the indemnity can be framed in such a way that it will trigger on the IT service provider suffering a loss and it may not be necessary to show that the loss was negligently caused.

4. The contract excludes "consequential loss", which has an extensive definition and covers a range of potential losses. Looking at what is captured by consequential loss; does the local government consider any of these heads of loss to be direct losses, rather than indirect, given the nature of the services provided? If so, they should be deleted from the definition of consequential loss (noting that "loss" itself may not be defined).

Complex contracts

Local government members will often encounter complex multiparty agreements where it can be difficult to ascertain precisely how liability risk is shared between the parties. One example of this is a labour hire agreement. In the context of WA local governments, a labour hire agreement refers to a contract between the local government and a labour hire agency for the provision of employee(s) of that agency for a specific period of time and specific purpose.



A common feature of labour hire arrangement is the bifurcation of the (1) contractual and (2) control relationship:

Two contracts exist:

1. A contract of employment, that is, the contract between the employee and the labour hire agency;

2. A contract for the provision of labour or hire, that is, the contract between the labour hire agency and the local government.

Local governments should ensure that they review labour hire contracts carefully to determine how liability risk, in respect of the employee, is allocated.

If not explicitly stated, the manner in which liability will be allocated can be determined by identifying and considering the effect of indemnity and 'hold harmless' clauses, proportionate liability clauses and/or limitation of liability clauses.

Examples of some of these clauses in a contract for the provision of labour are listed below:

1. Without limiting (the labour hire agency)'s liability at law or in tort, the LGA agrees to indemnify, and keep indemnified, (labour hire agency) and its directors, officers, agents and assigns against any liability for claims made against (labour hire agency) or employees, arising out of or in connection with:

    - Any breach by the LGA of this labour hire agreement; or

    - Any loss, damage or injury suffered by a third party, caused by any negligence, or deliberate act, by an employee in the course of performing work during an assignment.

    - Any liability under this clause will be a debt due by council to (labour hire agency.)

2. The LGA is responsible for the care and supervision of all employees whilst on hire to council. The labour hire agency is not liable for any loss or damage to any property or for death or personal injury (to Council's personnel or another person) caused or contributed to by an employee (whether by negligence or otherwise) during any assignment to council.

The above clauses clearly operate to allocate liability to the local government.

Therefore, local governments should be cautious in agreeing to clauses similar to the example above because it transfers the liability risk. In other words, for the labour hire agreement, the liability would have been apportioned between the local government and the labour hire agency.

Whilst it is common for labour hire agencies to retain liability for the employee in respect to workers' compensation, public liability and professional indemnity insurance; local governments should ensure that they have adequate insurance cover to protect them from liability arising from incidents involving the employee given that the employee is under the direct supervision and control of the local government. These may manifest as third party injury claims (i.e. where a member of the public or another worker is injured by the employee), common law claims for compensation arising from an injury suffered by the employee and/or a subrogated recovery action by the labour hire agency's workers compensation insurer. Local government liability in respect of these claims is entirely dependent on its role as a supervisor and the measures it takes to ensure provision of a safe place and/or system of work.

Insurance implications

Local governments members should carefully consider all labour hire agreements in place, or proposed to be executed, to determine how liabilities in respect of the employee are to be distributed between the local government member and the labour hire agency. A failure to determine the allocation of liability may result in the assumption of contractual liabilities which otherwise would not exist. These liabilities would be unlikely to be recovered through the LGISWA Liability Protection Scheme.

Recommended practice for contracts

This guide builds on the proposition that risk in a contract should be borne by the party best able to control and manage that risk.

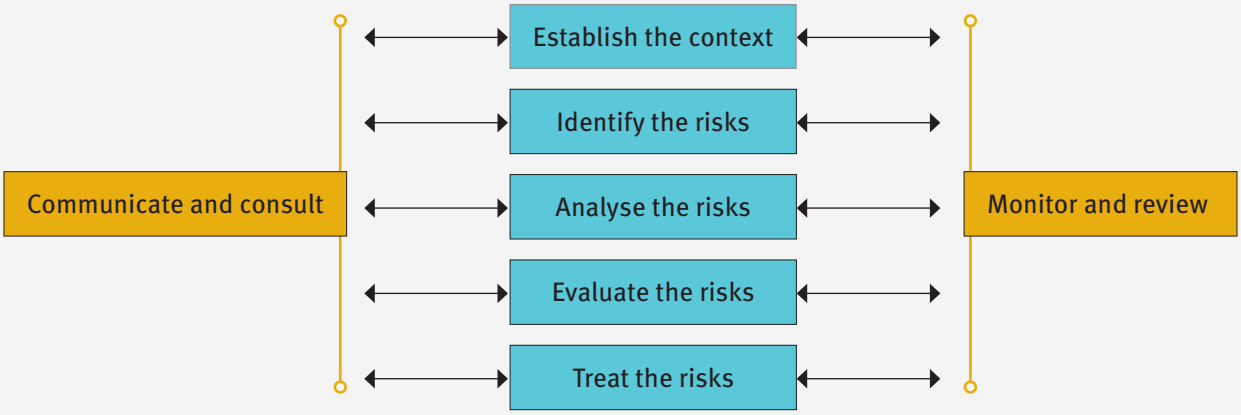
It is important to note that the management of risk associated with contracts is not something that can be solely achieved in the construction, drafting and execution of the contract documentation. A proactive risk management approach is fundamental, it involves the process of identifying issues that could have a negative impact on the contract, then assessing and evaluating these impacts to identify ways to minimise their effect.

Effective risk management can only be achieved if it is applied throughout the entire contract lifecycle (if/where applicable and dependent upon the value of the contract and nature of services or goods exchanged or procured) and can include:

- Preliminary planning and approval stages, including in the development of documentation and specifications;
- When developing grant or tender submission documents;
- When assessing and evaluating offer or tender submissions and documents;
- When developing, exchanging and evaluating draft contract documents prior to execution and considering the proposed terms of the contract;
- Ensuring contract is executed by a properly authorised person, in possession of necessary delegations, authorities;
- In monitoring contract delivery, maintaining appropriate communication with contracting parties and ensuring contractual obligations are satisfied (for example including delivery/acceptance, certification payment milestones etc.); and
- When accepting delivery or discharge (such as determining that contractual obligations have been satisfied and any warranty or maintenance periods have expired).

This means thinking about risk when the contract is drafted, as it is performed, how it is managed and how it is monitored.

Risk Management Process



Source: AS/NZS 3100:2009 (Risk Management – Principles and Guidelines)

Risk clause checklist, 10 points to note:

1. Consider whether your local government is **'Principal'** and therefore responsible for setting the terms and conditions of contract.

2. If the local government is **not 'Principal'**, but is subject to terms and conditions set by another party (e.g. as Lessee in a Lease), assess whether these terms and conditions are acceptable.

3. If the contract is a **template contract** (e.g. WALGA contract, Australian Standards) and the contractor has proposed variations, consider whether these variations are acceptable.

4. Consider the **insurance** requirements for both parties and check whether they are relevant and appropriate.

5. Consider whether the contract **excludes** any liability risks and whether the exclusions are appropriate and acceptable.

6. Consider the effect and appropriateness of any **caps** on liability. Remember if you cap liability, you will not be able to recover losses in excess of the cap.

7. Consider the effect of any **indemnities**; small changes in wording can make a big difference.

8. Consider the definition of **Consequential Loss**; is there anything that you feel should not fall within that definition.

9. If the local government is Principal and contract refers to excluding **proportionate liability;** be alert to any changes to this clause proposed by the contractor.

10. Make sure that you document the basis of **liquidated damages** calculations so that it is clear how you have calculated the losses, should a dispute arise as to whether they are a penalty.

Glossary of key terms

Breach of contract: The failure of a party to satisfy the terms or conditions of a contract.

Carve out: A carve-out is simply an exclusion to a limitation of liability clause. They are the events or types of loss that parties to a contract agree to exclude from the limit of liability. They may be written so that each carve-out has its own limit of liability or there will be no limit of liability that applies to that carve-out.

Consequential Loss: Typically will mean loss of revenue; loss of profits; loss of opportunity to make profits; loss of business; loss of business opportunity; loss of use or amenity, or loss of anticipated savings

Contract: Agreement between two or more parties that requires Consideration to be legally binding and enforceable. Although the term contract is often used to refer to the document that outlines the rights and obligations of the Parties, a Contract is not always in writing and can also be made verbally, by conduct or a combination of writing, conversations and conduct

Duty of care: A duty of care is the legal responsibility of a person or organisation to avoid any acts or omissions that could reasonably be foreseen to cause harm to others.

Force Majeure: A clause that excuses a party when they fail to do their contractual duties owing to circumstances beyond their control.

Frustration: To render a contract null and void by showing that performance has been factually or legally impossible or there has been some change of events so serious as to undermine the foundation of the contract such that to perform it would require a different contract.

Intellectual property rights: The exclusive, legal rights of the originators of intellectual properties (e.g. trade marks, copyright, patents) including ownership of inventions, designs, processes, techniques, drawings, specifications, technical information and 'know-how'.

'Loss': Means liability, loss, damage (of any nature, including aggravated and punitive), cost (including all litigation costs on a full indemnity basis), claim, suit, charge, diminution in value, action, statutory or equitable compensation, demand, expense or proceeding or loss of any nature and of any kind whatsoever whether present or future, actual, contingent or prospective and whether known or unknown, and howsoever arising including under any Legal Requirement or any Authority.

Misleading conduct: Conduct that leads, or is likely to lead, a person or persons into error. Generally, there is no requirement for the conduct to be intentional.

Negligence: Refers to a failure of a person or entity to exercise a level of care necessary to protect others, whether in interest, or from physical harm, from actions or conditions that may cause them harm.

Party: Any participant to an Agreement or Litigation. "Parties" has a corresponding meaning.

Principal: Typically the local government but is the party who the party to the contract that engages the other party (the contractor) to perform work or provide goods or services.

Rights: Entitlements made available by law or under an Agreement.

Warranties: less vital clauses in a contract breach of which do not entitle either party to repudiate the contract. The contract must be continued but the party suffering from a breach of warranty may claim damages. An example of a warranty could be a guarantee of the quality of the goods or services sold.

Wilful Default: means any act or failure to act which was a deliberate and wrongful act or omission, or involved reckless disregard or wanton indifference to the likely consequences, including an intentional breach of this Contract.

MUTUAL SERVICES

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