Municipal Excess Liability Joint Insurance Fund

Office of the Fund Attorney
714 Main Street
P.O. Box 228
Boonton, New Jersey 07005
Tel (973) 334-1900
fsemrau@dorseysemrau.com

BULLETIN

TO: **All Members of the MEL**

FROM: **Fred Semrau, MEL General Counsel**

DATED: **March 4, 2020**

RE: **Professional Service Contract Provisions Limiting Liability**

The MEL has become aware of vendors trying to limit their liability to public entities through the use of various contract provisions. For example, vendors have attempted to incorporate language known as "limitation of liability provisions," which state that the vendor's liability is limited to some value, either a set dollar amount (e.g. $10,000), or the value of the contract, or both (e.g., "The vendor's total aggregate liability shall not exceed $25,000 or vendor's total fee for services rendered under the contract, whichever is less."). Vendors have also tried to ensure that legal disputes are handled in jurisdictions more favorable to them by including language stating that the contract is governed by the law of the state in which the vendor is located, or "any court of competent jurisdiction," rather than New Jersey.

We strongly discourage members from approving these types of contract provisions, which are routinely seen in the agreements for financial, computer, and copier services. First, if there is a breach of contract under the agreement, we are waiving certain rights of the public entity so that those rights are no longer available. Second, since we do not know the extent of the claims that could be triggered against the public entity, such as punitive damages or even some type of civil rights claim, limiting vendor liability could be catastrophic for a public entity. Third, New Jersey public entities are created under State authority and there is no legal basis to require them to cede jurisdiction to a court in another state.

A public entity that does not actively prohibit such limiting contract provisions may find itself in an untenable position. For example, in Marlboro Inc. v. Borough of Tinton Falls, 297 N.J. Super. 411 (Law. Div. 1996), a court upheld a liability limitation provision in a contract between the Borough and an engineering firm for construction services to improve a local park. During construction, large amounts of glass were discovered in the soil, rendering the park unusable. The contract capped the firm's liability for professional negligence at $32,500, the total value of the services. The court rejected the Borough's argument that the clause was void and unenforceable as a matter of law, noting that New Jersey courts have traditionally upheld such clauses, except in narrow instances where the limited remedy is "unconscionable or causes the contract to fail its essential purpose." The court reasoned that neither situation applied here,

because the clause did not shield the engineering firm from all potential liability, and the cap was large enough to incentivize the firm to perform. The court also found no evidence that the Borough was disadvantaged during contract negotiations, or that the clause conflicted with a separate indemnification clause. Ultimately, the court granted the engineering firm's motion for summary judgement, limiting the amount of damages that the Borough could recover to the $32,500 limit.

The above case demonstrates why it is critical for public entities to thoroughly review proposed contracts with commercial entities. We urge you to discourage these types of contracts and terms, and to reject such contractual language in future agreements.