

Environmental Law

Be Aware of Your Consultant's Liability Limit

When hiring an environmental consultant, the cost and scope of work are only part of the equation

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When you arrange for your clients to hire an environmental consultant, whether to conduct a Phase I audit or undertake a complex cleanup, you need to do more than just agree to the scope of work and cost. In approving a consultant's proposal you must also approve their professional services agreement. This agreement is a contract, and like all contracts, you need to review it carefully to make sure it fully protects your client. One important element in the agreement is the liability provision addressing the consultant's potential negligence. Specifically, does the liability provision properly protect your client?

Appellate Division Upholds a Consultant's Liability Limit

In a recent Appellate Division case, *66 VMD Associates, LLC v. Melick-Tulley & Associates, PC*, No. A-4008-09T3, 2011 WL 3503160 (App. Div. 2011), the

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plaintiffs learned the hard way that the liability clause in its services agreement with Melick-Tulley was woefully inadequate. The facts in this case are straightforward. In 1998, VMD's predecessor in interest entered into a contract to purchase property in Somerville. The purchase price was \$155,000. The property was known to have environmental contamination, so as part of its pre-acquisition due diligence VMD retained Melick-Tulley to develop a clean-up plan and to estimate the cost of undertaking the cleanup.

Melick-Tulley issued a series of proposals to VMD and its predecessor. Each proposal included Melick-Tulley's professional services agreement with a liability clause capping its liability at \$25,000. While VMD never signed the proposal, both parties performed as if they did. Eventually, Melick-Tulley issued its report with a cleanup cost estimate of between \$13,000 and \$17,000. After reviewing Melick-Tulley's estimate, VMD purchased the property. Melick-Tulley's fee for its work was \$19,826.35.

In 1999, the Melick-Tulley clean-up plan was submitted to the New Jersey Department of Environmental Protection, which approved the plan. VMD never performed the cleanup, and in 2004 the department rescinded the cleanup plan.

During this time period, VMD was unsuccessful in its attempts to obtain development approvals for the property, so it entered into a contract to sell the property in 2003. The prospective purchaser hired another consultant, The Whitman Companies, Inc., which issued an opinion that the cleanup would cost \$94,000. Although that sale eventually fell through because of the environmental issues, VMD retained Whitman to prepare a new report and cost estimate. In this report, the cleanup cost estimate skyrocketed to over \$3 million.

VMD then filed a lawsuit against Melick-Tulley seeking \$2 million in damages based on Melick-Tulley's alleged professional negligence in preparing the original clean-up cost estimate that VMD relied upon in making its decision to purchase the property. Melick-Tulley moved for and obtained summary judgment against VMD based upon its contractual liability limit of \$25,000. In granting Melick-Tulley's summary judgment motion and capping its liability at \$25,000, the judge found that: (1) the liability limit was enforceable because it was negotiated between knowledgeable parties; (2) "public policy does not disfavor limitations of liability in professional service contracts"; (3) the \$25,000 in potential liability provided sufficient incentive for Melick-Tulley to perform its work diligently; (4) the liability limit was not unenforceable under state policy

favoring the cleanup of contaminated sites; and (5) the fact that VMD never signed the proposal was not significant given the subsequent dealings between Melick-Tulley and VMD.

The Appellate Division upheld the summary judgment. The court made several general findings. First, a liability limit clause will be held unenforceable “where it is unconscionable or violates public policy.” The court rejected VMD’s position that when assessing whether the agreement violated public policy, the appropriate comparison is between the agreement’s liability limit and the scope of the possible damages from the professional’s negligence (e.g., \$25,000 compared with \$2 million in damages). Instead, the court looked at the agreement’s liability limit in comparison to the fees charged by the professional. In this case, Melick-Tulley’s \$25,000 liability limit was 25 percent greater than the fee Melick-Tulley charged (\$19,800). Since the liability limit exceeded the consultant’s fee, it was not held to be invalid. The court contrasted this decision with another New Jersey case, *Lucier v. Williams*, 366 N.J. Super. 485 (App. Div. 2004), where a home inspector’s liability cap of 50 percent of the contract price (\$385) was deemed too low to provide incentive for the professional to perform diligently.

The court also agreed with the trial judge and rejected VMD’s argument that the liability limit should be unenforceable given New Jersey public policy favoring the remediation of contaminated proper-

ties. The court held that this position was inapplicable because Melick-Tulley did not cause the contamination. “[T]he Melick-Tulley contract will not advance or hinder New Jersey’s public policy of remediation.” Finally, the appellate division found that the parties were of equal bargaining position and the fact that VMD did not sign the proposal was irrelevant given that both parties performed in accordance with the Melick-Tulley proposal.

Negotiate a Consultant’s Contract To Protect Your Client

From a consultant’s point of view, the easy lesson from this case would be to make sure the liability limit is reasonable, and that a reasonable limit would be at least equal to, or “some” amount greater than, the contract price. But, of course, the real lesson is to never allow a consultant to include such a paltry liability limit in their professional services agreement.

One common approach to dealing with liability limits is to tie the liability limit to the insurance requirements in a consultant’s agreement. The consultant should be required to maintain certain limits of insurance, including general liability coverage, professional errors and omissions coverage and contractor’s pollution liability coverage. The less involved the project, the less coverage would be required, although \$1 million should really be viewed as the bare minimum necessary. The liability limit of the agreement would then cap the consultant’s liability at the required insurance

limits. If the consultant balks at having to carry such insurance limits, then you and your client need to look for a new consultant that will carry sufficient insurance.

Additionally, with the recent creation of Licensed Site Remediation Professionals (LSRPs), and the looming May 2012 deadline for transferring existing cleanups into LSRP oversight, parties must now also pay attention to the LSRP’s professional services agreement. While the issue of liability limits remains, the LSRP involvement raises new issues, one of which is the survival periods for the liability provisions of the agreement related to the work once final cleanup approvals are issued by the LSRP. An LSRP’s Response Action Outcome (RAO) (which replaces the “no further action” letter) can be audited for three years. The agreement should make clear that the LSRP will stand behind its RAO for at least the three-year audit period and remedy any deficiencies in its work, with the LSRP’s liability limits and insurance obligations surviving during that three-year audit period.

In short, as with any other contract, it is important to review the terms and conditions of a professional services agreement to make sure that it meets your client’s needs. Like any other contract, an environmental consultant’s agreement is fully negotiable. If you can’t get the consultant to provide terms that fully protect you or your client, then you need to look for another consultant. ■