Sample Public Entity Negotiation Playbook: Limitation of Liability Clauses

Objective: Ensure vendor contracts maintain balanced risk allocation and protect public funds while complying with statutory obligations.

Key Principles:

1. Public Interest First

- **Explain legal/policy constraints:** public entities cannot accept excessive liability caps or waive essential rights. Statutory and regulatory obligations often require full accountability for contractors and vendors.
- **Emphasize accountability for taxpayer resources:** public funds and taxpayer interests must be protected. Limiting recovery could leave the entity paying for damages caused by the vendor.
- **Risk of large-scale impact:** Public projects affect communities, so losses from delays or failures can be significant.
- **Transparency and fairness:** Caps may conflict with procurement laws or public policy that demand vendors bear full responsibility for their performance.

2. Mutuality Matters

- If a limitation of liability clause is permitted, suggest make it mutual to allow both parties to share similar caps and exclusions.

3. Carve-Out Critical Risks

- Exclude from liability caps:
    - Indemnity obligations
    - Insurance (to ensure insurance limits are not capped)
    - Gross negligence and willful misconduct
    - Breach of confidentiality
    - Data security breaches
    - IP infringement

4. Tie Caps to Contract Value

- Negotiate caps as:
    - Ideally an amount per claim (not an aggregate cap)
    - or a multiple of annual fees (e.g., 2x to 4x)
    - or a fixed amount reflecting realistic exposure.

5. Insurance as a Safety Net

- Require vendors to maintain appropriate insurance coverage and add a carve out for insurance to any limitation of liability clause to avoid capping insurance limits.

- Require all vendors to have their insurance agents/brokers issue evidence of insurance via current Acord form certificates of insurance plus copies of required endorsements with option to require full copies of policies.
- For construction projects, require and verify that all vendors maintain appropriate insurance throughout project and during full statute of repose.

6. Indemnification Integrity

- Ensure indemnity obligations (e.g., third-party claims, IP issues) are not limited by liability caps.

7. Consider Vendor Strength

- Push for higher caps from large vendors with strong financial capacity.

8. Offer Alternatives

- Suggest risk-sharing tools:
  - Performance bonds
  - Escrow for critical deliverables
  - Joint risk assessments

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