



Watch your language

The power of the written contract

by Brian Dawe

However you choose to enter into a given project, there are a number of fundamentals to keep in mind—basic obligations to your client, best practices for enforcing your client's obligations to you, and safeguards to reduce your financial exposure if disagreements surface.

With any job, the manner in which you position yourself contractually will be critical to your ability to receive proper compensation for your services, to protect yourself from the consequences of unexpected changes in the requirements for the project, and to rely on professional liability insurance, if a dispute arises.

There can't be too much importance placed on putting the terms you and your client have agreed on into a proper written contract. Although you can use an oral contract, and may ultimately have the benefit of implied terms being found by a court as forming part of the agreement with your client, you will always be better off with a written contract that spells out the terms for the project in detail.

In the past, engineers were usually primarily engaged in design activity and completed their services upon delivery of a set of drawings. Then, the courts assisted the engineer by recognizing a right to exercise a lien on the work product—entitling the engineer to withhold

delivery of the completed drawings until payment had been received.

Today, with engineers involved in contract administration, construction management, and even managing the operation of completed projects, the point at which a contract is "complete" may be long into the future. Therefore, dividing the contract into distinct components and defining appropriate payment terms for each is essential. The PEO guidelines specific to your project type (www.peo.on.ca/EngPractice/guidelines.htm) are useful as aids to conceptualizing the different modes and phases of services you may be required to provide. Time invested in determining your cash-flow requirements to supply the necessary services, and making sure your contract specifies appropriate billing procedures and payment requirements, will put you in a better position to perform your role in the project successfully.

Avoiding sticky payment issues

However complex your role, it's important to define the payment schedule in

writing. Whether you bill by lump sum or by the hour, attention should be given to defining when progress billings are to be submitted and how quickly payment must be made by the client. If potential problems are foreseen, you may want to ask for a retainer in the contract, which would be held for your final billing.

What should you do if the client contests final payment by threatening to claim for perceived shortcomings in the overall services performed—putting you in the position of preferring to abandon the final payment, rather than having matters deteriorate into litigation? Provided you have protected yourself with contractual language that defines your rights in the event the client doesn't pay, you may want to withhold services. Through its review of actual cases involving engineering ethics, the U.S. National Society of Professional Engineers' Board of Ethical Review has found that generally an engineer does not have an ethical obligation to continue services in such circumstances. But even so, you should be mindful of the impact this may have on third parties, depending on the stage to which the project has progressed. It is one thing to stand on your rights, but another thing to set off a chain reaction, which may have contractors and sub-contractors joining in with claims for extras based upon things like work delays.

Know your limits

As a project proceeds through start-up to construction, the types of service you provide for it will determine the availability of protection from your professional liability insurance in the event that a dispute arises. As engineers expand the types of services they provide in project management, the boundary lines between the traditional roles for contractor, owner and engineer become less distinct, and greater risks arise that you will face claims from owners and contractors.

That's why you must make it clear to your client through contractual language just what the limits are for the services you have agreed to provide. Also, in handling engineering drawings, you should exercise great care not to lead contractors and owners to believe that you are taking on more than your intended share of responsibility for verifying that construction is being carried out properly.

One area where this may arise is in the manner in which you carry out review of shop drawings submitted by the contrac-

tor. The traditional role of the engineer is to confirm that these drawings comply with the design intent. Make it clear on the documents that you are not validating the construction means and methods that the contractor chooses to follow.

Similarly, you must make it clear to owners and contractors that, in reviewing ongoing construction, you will not provide a verification of every step taken by the contractor. Rather, your role will be limited to providing a periodic confirmation that work appears to be in conformity with the design intent. The language used in your contract and in project documents must always be clear on this, if you want to protect yourself from the wrongs of a contractor who intentionally goes about covering up substandard work.

The need to be precise about the limitations of your review work carries through to as-built drawings, which are based upon representations from others as to how con-

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struction has been carried out. Any verification of as-built drawings that you provide must make it clear that they are only as good as the information received from others.

Permits: what to watch for

At the permit stage, you may be required to take on unexpected extra work to satisfy a municipality's requirements. If this occurs, this will be another area where the adequacy of your contract terms is tested. Finding out ahead of time what the municipality's particular requirements and policies are will help you decide whether to include more detailed provisions in your contract, define what services are included, and determine what will be considered an additional cost item.

Liability insurance: are you covered?

Your professional liability insurers will place great importance on the form of your contractual obligations. In many cases, claim situations arise where clients have unrealistic expectations concerning the scope and nature of the services you have provided.

If a particular contract goes beyond the traditional role of engineering consultant, keep in mind that the scope of your liability insurance coverage may not cover the contractual obligations you have assumed.

Insurers have a genuine interest in making sure that you understand the limits of your insurance, and some offer risk management training to help you recognize problem areas. Some insurers also offer extensive guidance material to assist you in preparing your contracts. Some are even willing to review a proposed contract and advise you on whether you are taking on obligations beyond the scope of your insurance coverage.

Professional liability insurance is intended to provide protection from the financial consequences of claims arising from an unintentional failure to perform professional services up to a reasonable standard—not to protect you from the unhappy consequences of a bad business deal. Insurers often distinguish between the two by evaluating whether your contract terms have imposed absolute obligations of performance, which go beyond professional services.

You may find you have agreed to carry out a function whose success is not dependent on professional competence, but instead is subject to outside factors, such as receiving approvals on time from a municipality. Agreeing to work strictly to an owner's schedule is an example. Guarantees, automatic indemnities and pre-defined penalties are also examples of contract terms that a client may request. These create payment obligations that will not be satisfied under standard professional liability policies.

If your proposed contract includes obligations that go beyond professional liability, your insurance broker may be able to arrange additional forms of protection against the business risks you are assuming. In any event, understanding the extent of that risk is important to deciding what form of compensation you should require from your client in exchange for taking on the risk. ♦

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Note: PEO will soon publish two, new, professional practice guidelines dealing with contracts—one for independent contractors and one for contract employees. Look for them on PEO's website.