

## Why is a written contract important?

By Colleen M. Palmer, Esq.

We recommend an engineer have a written, executed professional services agreement prior to beginning services on each project. Some engineers and clients are hesitant to have a written agreement and rely on oral agreements, particularly if they have a long working relationship. These engineers argue that a written contract seems like they don't trust the client and they "have always" relied on a handshake to close the deal for a project.

This approach is dangerous. We strongly discourage oral agreements since they do not provide any protections to the engineer. While the parties may be in perfect agreement regarding the expectations at the beginning of a project, memories are certain to fade and change if there are problems during the project. In claims situations, oral agreements quickly deteriorate into a "he said, she said" fight and the engineer has no document upon which to rely. **In short, oral agreements are not worth the paper they are written on.**

An engineer's contract with its client is perhaps the most critical document in a project because it defines the parties' responsibilities and rights in connection with the project. The contract should guide the parties as the project proceeds through completion and, in the event of a dispute, may be the first line of defense for an engineer depending on the negotiated terms and conditions. The contract negotiation phase sets the tone for the engineer's relationship with its client and allows the engineer an opportunity to evaluate its vulnerability in the project. The negotiation is the time to assess and manage the client's expectations and, if the client has unreasonable expectations, educate the client regarding the engineer's customary role and the value of the engineer's services on the type of project contemplated.

## Preliminary issues when the contract first lands on your desk

Before diving into the agreement to evaluate the substantive terms and conditions, it helps to take a quick look at the agreement to assess the following:

### Has the agreement been executed?

If so, it will be much more difficult to negotiate changes that are favorable to the engineer.

### What is the date on the agreement?

The agreement execution date is usually found on the first page and again on the execution page above the signature blocks. If the agreement is not signed by the parties, but the date in the agreement is months, or sometimes even years, prior to the date you are reviewing the agreement, you may want to follow up with the engineer to inquire whether services have been provided. Sometimes a project is well underway, or even completed, but the parties have not executed the contract. In some instances, the engineer may have completed its services and the client demands the engineer sign the contract prior to paying the engineer for services rendered. This scenario puts the engineer in a difficult position if the agreement includes onerous provisions since the client has no incentive to negotiate the agreement once the services have been provided.

## It's time to attack the contract!

Once you have considered the preliminary issues above, you can move on to the

substantive terms and conditions. It's important to remember that reviewing and negotiating contracts is not an exact science and two people may review the same contract and have slightly different, yet still appropriate, recommendations for the engineer. While the reviewers may suggest different modifications to the same provision, as long as the revisions will effectively manage the engineer's risk on the project, both may be "correct" revisions.

The importance of negotiating an appropriate professional services contract cannot be overstated. A well-drafted contract will detail the rights and responsibilities of the parties and may provide valuable protections to the design professional in the event of a claim. Each project, and therefore each contract, presents unique risks and challenges that should be addressed from a business, legal and risk management perspective and there could be specific issues under the applicable law governing interpretation and enforcement of the contract for which the design professional should seek the assistance of a local attorney.

This document is protected by US and International Copyright laws. The reuse, duplication or reproduction in whole or in part, other than distribution for informational purposes, is prohibited without the written approval of Beazley Group. This material is intended for informational purposes on the subject and should not be taken as legal advice. Please consult appropriate advisors for guidance applicable to your individual circumstances and/or state requirements.