

Success: It's Simple, Just Not Easy: **The Need for Contracts**

Think back to when you decided to start your own firm; no doubt it was a time full of excitement and anxiety. You posed countless questions as you developed a business plan. Questions like: Where will my work come from? When will I need to hire additional employees? How much money should I invest in equipment? For many surveyors there is one question they might not have asked then and are still not sure how to answer today – Should I use a written contract?

Contracts can seem like the necessary evil. All too often, agreements are signed without a careful review of the terms and conditions. As a result, disputes may arise and many surveyors are left in less-than-ideal positions since the contract that was signed contained unfavorable terms. As highly skilled professionals, surveyors need to overcome the myth that they cannot be in the driver's seat when it comes to utilizing written contracts with their clients. Taking the lead on a project starts by having an in-house contract that you can confidently present to your clients.

Presenting your own contract to clients will enable you to establish acceptable terms and conditions in many areas governing your work. This article will support the need to use contracts on every project by briefly touching on the following topics: **Scope of Services, Standard of Care, Approvals, Ownership of Documents, Payment Terms, Indemnification, Limitation of Liability**, and last but not least how it can lead to **Improved Success**.

Scope of Service: A well-defined scope of services will set the expectations for your client. A clear scope explains what you are going to perform (and at what price) and just as important, disclaims responsibility for other project items for which you are not responsible (i.e. project scheduling, construction management, OSHA Compliance and job site safety, environmental site assessments, geotechnical engineering, etc.). While nothing in a contract can prevent a client from naming a surveyor in a suit; a clearly defined scope can expedite the dismissal of a frivolous claim which can cost surveyors significant time, money and frustration.

Standard of Care: Additionally, it is important to complement the Scope section with a short section which outlines for your client the definition of "Standard of Care". According to common law, professionals, including Surveyors, are required to provide their services in a manner consistent with other professionals practicing within similar conditions and in a similar locale. Contract language that extends the standard of care to one of "highest" or "best" should be discussed with clients; and, ultimately, avoided as those terms are not measurable and holds a professional to an unachievable standard.

Approvals As for Approvals, your contract should protect you (while again manage the expectations of your client) by stating that the site plan approval process is inherently out of the surveyor's control. The intent is to eliminate the client's temptation to sue if a project fails to meet the client's particular timeline.

Ownership of Documents: As a project progresses, your client fills its file with your "work product" (commonly referred to as "Instruments of Service") which can include general correspondence, feasibility studies, reports, preliminary designs and (eventually) a sealed plan. A good contract states that the documents produced by you are for the client's benefit and for the specific referenced project only.

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Professional liability claims can blindsides a design professional. Take for instance a project that the surveyor started but never finished since their client “flipped” the project to a different developer. When this occurred the surveyor’s work was handed to the new owner who hired another surveying firm to finish the project. When a claim is presented, too often the original design firm is named as a defendant.

To help protect your firm against such unfortunate circumstances present a contract that requires the indemnity of the client in the event that your work is modified, misused, or reused without your prior written consent. If they want your work make them pay for it!

Payment Terms: A clear definition of Payment Terms can provide a surveyor with necessary leverage to collect fees. During negotiations you and your client should establish payment timeless. In the event that your client does not adhere to the terms, your contract will allow you to stop work and withhold any deliverables.

The timely collection of fees is an element of running a business that no one enjoys but working under a fair and reasonable contract can make this process a little easier. Rather than the “call and scream” approach (or even worse, begging!) you now simply direct your client to the contract provision and advise them that, unfortunately, you’ll be unable to continue until payment is received.

Indemnification: Sophisticated clients always look for a section on indemnification in a contract. Simply put, an indemnification section outlines how the party who suffers damages (i.e. bodily injury, property damage, or economic loss) will be compensated or “held harmless” by the other party whose actions were the proximate cause of the loss.

Rather than have the client deliver to you their contract which contains provisions that may look for indemnification well beyond the scope of your insurance coverage, you take the lead and volunteer equitable indemnity provisions upfront. An acceptable indemnify provision clearly states that the duty to indemnify shall be limited to claims arising “out of” and “in proportion” to the surveyor’s (or the surveyor’s subcontractor’s) negligence.

Limitation of Liability: Limitation of liability is also an important topic (and one that deserves a dedicated article in the future). Limitation of liability clauses are often upheld by courts and are an effective way to manage risk. However, keep in mind two key points: first – limitation of liability clauses are constantly being challenged in court; secondly – limitation of liability applies solely to your client who represent only 60% of the claims filed against surveyors. Unfortunately, you still have to worry about the other 40% of potential claimants for whom the limitation of liability does not apply.

Improved Success: Today, just about every client expects work by a contractor or a consultant to be performed under a written agreement. The use of a well-prepared contract will help promote the professionalism of both the surveying firm and the surveying industry. A professional approach helps establish a strong foundation from which a small operation can graduate to a sophisticated consulting firm able to service clients and projects of all sizes. From the vantage point of an agency that insures more than 700 design firms, performing profitable work under a proper contract adds value to a firm when the time comes for the owners to merge or sell their company.

Unfortunately we live in a litigious society and cannot avoid claims – a reality to all in the industry. The key is limiting the disruption to a firm when the claim arises. Transferring the

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financial liability to an insurance carrier is pivotal to effectively address claims. In the instance of a frivolous suit, a solid contract will diminish the time spent to defend the claim and will help the firm return its focus to producing profitable work. Also, the regular use of an acceptable contract can lower professional liability premiums as many insurance carriers reward surveying firms who actively manage their risks.

I once heard an attorney say, "If it cannot be read, it wasn't said". While we all chuckle when we hear this statement it is true to form when a claim is presented. A good contract does not have to be long to be effective. The key is for surveyors to revisit how they incorporate terms and conditions into their proposals and continue to present their firm in a professional manner.