Every Word Counts!
Contract Mechanisms and Their Review
Module 1

by
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This course is written from the perspective of an Engineer, not an attorney. While it contains information believed to be legally correct by the author, it should not take the place of appropriate legal review of a contract for Professional Services. The intent of this course is to make the professional aware of contract provisions and their implications, so that appropriate legal counsel can be sought.

A Contract

In order to understand the implication of your involvement in a contract you must first know what a contract entails. By its legal definition, a contract is:

- ***an agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration***

This is a contract in its simplest, bare form. It is usually a bit more complicated than this, as we tend to interject a variety of conditions into the contract in an effort to "protect" one side or the other. The law of contracts is at the heart of most business dealings and it can, and usually does, involve numerous variations on circumstances and complexities.

The existence of a contract requires the following factual elements:

- an offer – This is usually in the form of our proposal to provide services, but may also come in the form of a phone call response ("Sure, Bob. We'll help you with this project.") as an implied offer

- an acceptance of that offer which results in a meeting of the minds – Preferably by signature of the client on your contract form, but again, might come in some other form (oral agreement)

- a promise to perform – Usually this is contained in a statement of the scope of services and other proposal statements, but as with other implied or oral statements can be something of significantly less apparent importance such as a casual conversation

- a valuable consideration – This means that you expect to get something in return for your services (preferably cash!), but it can be in the form of another promise

- a time or event when performance must be made (meet commitments) – “We will complete our services for you in three weeks from the date of this agreement”.

- terms and conditions for performance, including fulfilling promises – Preferably, these would be your standard terms and conditions

- performance, if the contract is "unilateral". – You have to do what you say you will do or you will be in breach of the contract. (A unilateral contract is one in which there is a promise to pay or give other consideration in return for actual performance. A bilateral contract is one in which a promise is exchanged for a promise.)

In the professional services of engineering, you have to be careful that you do not create a contract by your actions, modify a contract by your actions, or breach a contract by your actions. Each of these is easy to do. Contracts can be either written or oral, but oral contracts are more difficult to prove from either side, once a dispute is evident. There might also be different statutes of limitation on the time to sue for oral and written contracts. It is important to know the requirements in your locale of practice.

In some cases a contract may consist of several documents, such as a series of letters, orders, offers and counteroffers. The variations are almost limitless. As technical professionals, we like to see our contracts consist of a simple, clear, and concise proposal, with the client accepting the proposal by signature of our firm’s contract. This offers our greatest opportunity to manage our risk. Notice that it only serves to help us better manage our risk; it does not negate our risk.

In the order of preference, the following are mechanisms of contracting for professional services in Engineering:

1. Your firm’s proposal and signed acceptance with your terms and conditions intact
2. Engineers Joint Contract Documents Committee (EJCDC) Standard Form of Agreement for Professional Services or similar professional association standard agreement
3. Client generated contract, appropriately reviewed and modified by you or your attorney
4. Client generated contract, signed, but documented as egregious by you
5. Task Order against a reviewed, agreed master agreement
6. Purchase Order
7. No contract

Some would put forth that having no contract is better than having a bad contract. There is some merit to this consideration; however, its testing is costly as it would ultimately have to be litigated with the risk of principal loss, damages, and expenses. A contract with bad terms can sometimes be moderated through negotiation or mediation, thus lessening its impact.

It is important to us that we have a written contract, and preferably one with such clarity and finality that it falls within the "four corners of the document" interpretation concept. This means that if the language of the contract is unambiguous and all of its factual elements are in place, then only the document itself is necessary for interpretation and those interpreting such a document do not have to venture outside the document for extrinsic evidence as to its intent or the intent of the parties when the agreement was reached. Keep in mind that our intent in all of our contracts is to avoid an invitation to the litigation party, even if we think we can win.

There are eight essential items to consider with regard to our contractual liability. These items are inextricable to the scope of services, yet the scope is irrelevant to their meaning.

The items are:

1. Standard of care
2. Limitation of liability (and mutual or consequential damages)
3. Indemnification
4. Ownership of documents
5. Sample disposal and management
6. Site operations
7. Site safety
8. Dispute resolution

It should also be noted that changes could occur to a contract through seemingly innocent means. A statement on the jobsite, a letter of "clarification", third-party reliance statements (secondary client agreement), purchase orders, or lien releases are all forms of potential change to an established contract. The change might be incidental or overt; innocuous or harmful. You, in your review capacity, are the first line of defense.

Standard of Care

We, as technical professionals, have a duty to provide our services in a manner consistent with the "standard of care" of our profession. Our actions in our daily practice help to define a standard of care for the area, assuming we are competent and non-negligent in our ordinary or routine practice. A good working definition of the standard of care of a technical professional is:

> ***that level of service ordinarily provided by other competent members of our profession, providing similar services in the same locale and under the same or similar circumstances***.

Our services need not be perfect, and that expectation should never be conveyed to a client or potential client. This is a reason we try to remove references to our services as being "the best" or implying that we are "the best" at what we do or that our services are "error free". When we provide our professional services, we are using judgment gained from experience and education, and we are usually providing those services in situations where certain unknown or uncontrollable factors are present. For these reasons, some

level of error in our services is allowed. When our clients hire us, they purchase service, not insurance, so they are not justified in expecting perfection or infallibility, only reasonable care and competence. They must accept some risk and liability that you could make a mistake similar to those that other competent professionals have made while using reasonable diligence and judgment.

The concept of the standard of care may be considered as the line between negligent and non-negligent error. The fact that an Engineer makes a mistake that causes injury or damage, is not necessarily sufficient to lead to professional liability on their part. In order for there to be professional liability, it must be proven that the provided services were *professionally negligent*, meaning that they failed to meet the standard of care of the profession as defined for that area. This is why it is so important to interject a Standard of Care provision in the terms and conditions and also why it is important that indemnification clauses be negligence based.

Keep in mind that the professional standard of care is based on what competent Engineers *have done* when faced with a particular instance, not what an Engineer *should have done* or even what others say they themselves *would have done* in similar circumstances.

Further, it is important to review your statements regarding standard of care from time to time, as there might be changes in the profession, or more likely, changes in your practice that should be reflected in the Standard of Care clause of your contract terms and conditions. One example of this is an engineering firm that starts its business in a specific area of practice, but diversifies its practice with time. If the original Standard of Care clause is too specific to the practice area, it does not sufficiently cover the diversified areas of practice. Here is such an example:

> ***"Services performed by ABC Engineering, Inc. under this Agreement are expected by Client to be conducted in a manner consistent with the level of care and skill ordinarily exercised by members of the structural engineering profession practicing contemporaneously under similar conditions in the locality of the project. Under no circumstance is any warranty, expressed or implied, made in connection with the providing of structural engineering services."***

This Standard of Care encompasses only the practice of structural engineering. As ABC Engineering, Inc. has diversified its practice over the years, it now offers Mechanical Engineering Services and general Civil Engineering Services. The noted standard of care statement is insufficient to encompass these later incorporated services.

A more general statement of the standard of care, such as the following, could be used:

> ***"ABC Engineering, Inc. will perform its services using that degree of skill and care ordinarily exercised under similar conditions by reputable members of its profession practicing in the same or similar locality at the time of performance. No other warranty, express or implied, is made or intended."***

Limitation of Liability (to include mutual or consequential damages)

You should always attempt to limit your liability through quality work practices, but you must also limit your potential contractual liability. This can extend to damages arising out of negligence, breach of contract or any other legal cause of action. It is reasonable to ask your client to limit your liability and assume a larger percentage of the risk for a project particularly because your fees are often small in comparison to the unlimited exposure that you might otherwise assume. A limitation of liability clause in your contracts allows predictability with respect to your potential liability. Avoid contracts where you are not permitted to contractually allocate and quantify these risks. Even increasing the fee for your services in such an instance would not adequately compensate for the uncertainty of exposure from future claims.

A limitation of liability clause that limits the amount of money recoverable in the case of a contractual breach to a stipulated, fixed amount is a necessity for our agreements. For enforceability, the stated amount must be a genuine pre-estimate of the damages that the innocent party may suffer in the event of a breach and should not be capable of being construed as a penalty clause. As an example, suppose you limit your liability to the larger of two amounts, $50,000 or the amount of your fee. This is reasonable in that it is a compensation for a direct consequence. If your client wants further protection, then inclusion of your professional liability insurance amounts should be done. Further, you should attempt to include all damages in your limitation of liability, as indirect, incidental, special, or consequential damages can be significantly greater than the direct damages and are potentially recoverable from you if excluded in the limitation of liability.

To leave the limitation of liability open ended ("going silent" on the issue), allows direct access to the assets of you, your company, or both. The following is an overly simplified, yet plausible example:

> ***Suppose there is a claim that amounts to $5,000,000 for a project. Your fees on the project were $16,000. Your owner-provided contract has no limitation of liability in the terms and conditions. The client wants to sue you and everyone else on the project for $5,000,000. Let's further suppose you have $10,000,000 in hard assets. Assume the others on the project had limitations of liability in their contracts and their aggregate exposure is $500,000. You now have a $4,500,000 exposure and no limitation against your assets. If the claimant wins, you could lose $4,500,000 out of our assets.***

The mutual liability clause within a limitation of liability is one that should be limited such that you are liable only to the extent of your own negligence, but not for the negligence of others. This helps to define the sharing of liability, such that if one party is at least partly responsible there is some sharing of that liability to the extent of each

party's adjudged negligence. As with the standard of care, this requires a determination of negligence and is known as comparative negligence.

Consequential damages should be included in your limitation, but excluded to you in other contracts in every possible case. Confusing isn't it? The attempt here is to limit your liability and include all potential damages in your limitation, but conversely, you do not want to be the recipient of exclusion on the other side of the contract. Almost anything can be claimed as being consequential to the act. The difficulty is that when it is claimed, you have to refute the claim and that costs you money. Further, almost all warranties and general insurance provisions exclude consequential damages which, again, opens your assets to direct attack.

A "limitation of liability" clause is sometimes termed "Risk Allocation" or given some other designation in a firm's standard Terms and Conditions. The following is one such example of a statement intending to limit a firm's liability:

> ***"Many risks potentially affect ABC ENGINEERING by virtue of entering into this Agreement to perform professional engineering services on behalf of Client. The principal risk is the potential for human error by ABC ENGINEERING. For Client to obtain the benefit of a fee which includes a nominal allowance for dealing with ABC ENGINEERING's liability, Client agrees to limit ABC ENGINEERING's liability to Client and to all other parties for claims arising out of ABC ENGINEERING's performance of the services described in this Agreement. The aggregate liability of ABC ENGINEERING will not exceed $50,000.00 or the amount of our fee, whichever is greater, for negligent professional acts, errors, or omissions. The limit of professional liability can be increased to a maximum of $1,000,000.00 upon client written request provided that client agrees to pay an additional consideration of 10 percent of the total fee or $500.00, whichever is greater. The additional charge is because of the greater risk assumed and is not a charge for additional professional liability insurance. Client agrees to indemnify and hold harmless ABC ENGINEERING from and against all liabilities in excess of the monetary limit established above.***
>
> ***Limitations on liability and indemnities in this Agreement are business understandings between the parties voluntarily and knowingly entered into, and shall apply to all theories of recovery including, but not limited to, breach of contract, warranty, tort (including negligence), strict or statutory liability, or any other cause of action, except for willful misconduct or gross negligence. The parties also agree that Client will not seek damages in excess of the limitations indirectly through suits with other parties who may join ABC ENGINEERING as a third-party defendant. Parties mean Client and ABC ENGINEERING and their officers, employees, agents, affiliates, and subcontractors.***

Both Client and ABC ENGINEERING agree that they will not be liable to each other, under any circumstances, for special, indirect, consequential, or punitive damages arising out of or related to this Agreement."

While this statement is clear and written in plain language, it includes language that will encourage extending the limitation from the stated limits up to a higher limit that implies insurance coverage, though it disclaims it. Why would this firm allow the limits to go to $1,000,000 for a fee increase of $500 if it were not an insurance consideration? It would be better to remove this insurance reference from the clause so as to keep the limitation of liability intact at a set amount. The insurance limits should be separately set and interjected only at the client's request.

Indemnification

Indemnification is a means to transfer liability from one party (usually our client or a third-party) to another party (usually us). This transfer is done by specific contract wording known as an "Indemnification Clause" or a "Hold-Harmless Clause". In general, there are three forms of indemnification; broad form, intermediate form, and narrow form. Since the intermediate form is a semantic variation of the broad and narrow forms, only the broad and narrow forms are discussed herein.

For your risk management, you must strive to get a narrow form indemnification agreement. This puts the responsibility for your negligent acts squarely on you. More importantly, it limits your responsibility to only your negligent acts, not the acts, negligent or otherwise, of others.

A significant key here is the term "negligent". As professionals, we must be willing to accept responsibility for our negligent acts, but we do not have to accept responsibility for all acts. Negligence is a legal term requiring interpretation and proof. "Acts" are just events or actions, including a necessary response to someone else's actions.

Here are some examples of indemnification clauses and what makes them good or bad…

- **Broad Form**

  This form of indemnity requires us to indemnify our client for all damages arising out of the project whether caused by us, a third party, or even our client. This is an attempt to shift all liability of the client and others to us. The following is an example of such a clause:

  Consultant shall indemnify, defend and save harmless the Client, and its officers, directors, employees and agents, from and against all liability, loss, cost or expense (including attorney's fees) by reason of liability imposed upon the Client, arising out of or related to Consultant's services, whether caused by or contributed to by the Client or any other

party indemnified herein, unless caused by the sole negligence of the Client.

This clause makes us responsible for anything anyone on the project does. Do not sign a contract with a clause such as this!

Here's another broad form indemnification that is a sleeper. It appears innocuous at first glance, but upon closer review, you notice something about the sequence of the words…

Consultant shall indemnify the Client for all claims, damages and expenses arising out of acts, omissions, errors or negligence of the Consultant.

If the term "negligence" appears alone, it will likely stand on its own as a separate part of the clause. In this case, it should be used as a modifier of "acts, omissions, errors" in the form:

Consultant shall indemnify the Client for all claims, damages and expenses arising out of the negligent acts, omissions, or errors of the Consultant.

Simple changes can take us from a broad form indemnity to a narrow form indemnity. To further help our cause, add the term "*reasonable*" in front of "*claims, damages, and expenses*".

- **Narrow Form**

  A narrow form indemnity requires us to indemnify our client only for those damages caused by our negligence. This is obviously the most reasonable form of indemnity and one that you should try to get in each of your contracts.

  An example of such a clause is as follows:

  Consultant shall indemnify the client for damages arising out of the performance of professional services to the extent caused by the negligence of the Consultant.

It should be noted that state law might limit indemnification, particularly on public projects. Many states have specific indemnity limits that could make some contractual indemnification clauses illegal and perhaps unenforceable. Be sure to check your state for such laws and determine their affect on your practice.

Your need for care in reviewing an indemnification clause often comes when you are being asked to sign a contract generated by others. Many terms and conditions contain several indemnity references in different locations depending upon the subject at hand in

the clause. While this is acceptable, it would likely be better to state your position on indemnity in a specific clause that covers the other conditions.

One other means of risk transfer is the use of "Additional Insureds" in the contract. Often our clients ask to be named as additional insureds or the Architect, General Contractor or other project parties require through "flow-down" provisions to be named as additional insureds. This is a flag that should be resolved with your insurance carrier, keeping in mind that you might be insuring a third party for their own negligence. Further, in the event of a claim, YOU are the one who will experience the insurance claim loss and the resulting claims experience rating and premium increase. Avoid "additional insureds" provisions when possible.

Ownership of Documents

Why is it necessary that you own the documents you produce? There are several important reasons; some of which are legal requirements, and some of which are practical requirements. A few of these reasons are:

- To prevent a loss of control over how the documents are interpreted or used, and thus loss of control over our potential liability (how will others who did not know our "mindset" when the documents were produced know how to apply them correctly)
- To prevent unauthorized changes to the documents (this is why you should not sign/seal reproducible documents… only sign/seal copies of the original, as required by most state laws)
- To relinquish ownership could prevent you from making subsequent changes to documents you originally produced
- Unless specific indemnification is provided, you could be liable to parties you never engage

The following is one form of a document ownership clause with protection only for the project owner, not for the professional:

> ***"The Construction Documents and any other documents or electronic media prepared by or on behalf of the Professional for the Project are the sole property of the Owner free of any retention rights of the Professional. The Professional hereby unconditionally transfers and assigns to the Owner all copyright claims, trade secrets or other proprietary rights with respect to such documents, and agrees, upon request of the Owner, to turn over to the Owner the originals and all copies of such documents and materials as of the date of such request."***

If a project owner insists on being given ownership rights to the design documents, which commonly occurs in public work, and you decide as a matter of business judgment that you are willing to grant such rights, you should ask your attorney to provide an indemnity

clause to protect you against claims that might arise out of the reuse of the documents. An example of such language is:

> ***"The Owner agrees to hold harmless, indemnify, and defend the design professional against all damages, claims, and losses of any kind (including defense costs), arising out of any use of the plans and specifications without the direct involvement and concurrence of the design professional."***

You must also be careful not to give away your own right to reuse the documents in the course of future services for other clients. The EJCDC Document 1910-1 (clause 6.04) handles this by stating: "Engineer shall retain an ownership and property interest therein (including the right to reuse at the discretion of the Engineer) whether or not the Project is completed."

Instruments of service produced by the design professional or other project consultant, including plans, specifications, drawings, opinions, reports and calculations are generally considered intellectual property belonging to the professional firm that created them. This has been plainly stated in standard form contracts such as those published by the American Institute of Architects and the Engineers Joint Contract Documents Committee (EJCDC). A sample contract clause, similar to that recommended by the EJCDC, that would protect our ownership rights is:

> ***"Drawings, specifications and other documents, prepared by the Design Professional (DP) and the DP's consultants are Instruments of Service for use solely with respect to this Project. This includes documents in electronic form. The DP and the DP's consultants shall be deemed the authors and owners of their respective Instruments of Service and shall retain all common law, statutory and other reserved rights, including copyrights. The Instruments of Service shall not be used by the owner for future additions or alterations to this Project or for other projects, without the prior written agreement of the DP. Any unauthorized use of the Instruments of Service shall be at the Owner's sole risk and without liability to the DP and the DP's consultants."***

A clause such as this clearly sets forth our rights as one of the project professionals and it protects against the risk of liability that might otherwise arise out of reuse of the documents by an unauthorized person, including the project owner. The protection provided by this clause considers that if the documents are used on other projects without your knowledge and input, you will be unable to assess and revise the design for the new circumstances or new project on which they are being utilized. This means you would not be able to manage the risks that would naturally arise when the documents are used on a project. As a further point of clarity, you should modify the standard language so that you are clearly identified as to your project involvement rather than being called the "Design Professional" which, in some cases, would not appropriately describe an engineer's project involvement.

When we consider "documents" in the sense of engineering services, we most often mean the product of our engineering effort. It should be noted that in a contract for services, the "documents" might include all documents having to do with services to that particular client or project for which the contract was engaged. This means that you do not own your timesheets, your financial documents, your notes to file, your internal correspondence, or any other document produced in relation to that client or project. This can offer the client an opportunity, particularly in the event of a claim, to circumvent the typical legal discovery procedure, thus denying the engineer appropriate due process. This should not be interpreted that engineers or others should maintain their documents so that they may avoid claims or issues associated with them, but should maintain their documents so that when asked for supporting data, may present such in the proper context.

Sample Disposal and Management

For those engineering firms providing consulting and testing services for which specimens or samples must be obtained in the normal course of business, there can be significant implication for more than just the obvious use of those samples. When contention arises, such samples can provide the dividing line between a claim and a "non-event". Further, the management of samples might have implication in the control and disposal of hazardous materials or waste, and is a matter of importance in the exposure of your own employees to notifiable materials or hazards for compliance with occupational safety and health requirements such as OSHA.

While samples may be removed from project sites for internal evaluation, observation, testing, and assessment; the firm retrieving such samples does not "own" those samples. They are, in essence, using those samples for their purposes and become caretakers of the samples once they are in possession. As a practical matter, many firms offer to maintain the samples or specimens for some period of time and then offer to destroy or dispose of such samples on behalf of the owner. As a default position on this matter it should be stated that the samples will be destroyed or disposed, and without further agreement, will not be maintained by the firm without specific authorization, indemnification, and compensation.

When should the samples be disposed? The simple answer is as soon as they are no longer needed by the engineering firm. The complicated answer is that you will not always know when that time occurs, so it is reasonable to cover most eventualities by a set period of time such as 30 days, 60 days or some other time period. The importance is not necessarily the time period, but moreso the notification that you are going to dispose at the end of that period. This gives the owner notice that you will no longer take the responsibility for those samples and without further direction, will appropriately dispose of them.

Samples may be generally characterized in three forms. These are:

- Non-hazardous samples

- Hazardous samples
- Legal samples

Most samples are non-hazardous and require no special treatment. As a matter of routine, such samples are disposed after use. Remember; however, that you do not take ownership of these samples, but serve as their custodian. An offer could be made to the client in the sample disposal clause that, as a convenience to the owner, disposal of such samples will be done at the end of a stated period of time. In most cases, non-hazardous samples are treated with a cavalier attitude and little consideration is given to their demise. This usually does not present a problem as long as this attitude does not prevail in the treatment of the other classes of samples.

For hazardous samples two clear distinctions must be made. The first is that you or your firm NEVER accepts ownership of such samples. The second is that they will be returned to the owner for disposal unless you are specifically directed to dispose, that you are indemnified for your custody and disposal, and that you are appropriately compensated for such disposal. You would then only have a duty to serve as appropriate custodian of the samples and must not allow them to be compromised, either in custody or disposal. Absent other legal consideration, that becomes the only obligation regarding the samples.

If your firm engages in materials testing, you might utilize samples or portions of samples that can result in hazardous waste. This is a slightly gray area as to whom would have responsibility for such waste. While it could be argued that you must accept responsibility for such a material as you helped create it, it must be considered that you would not have created such a material had you not been asked by the owner to test or evaluate, thus the original sample material and its generative hazardous material remain the owner's property.

Legal samples can be either hazardous or non-hazardous in nature. As engineers, our term of custodial care is often very long for such samples and as professionals, we have several considerations to make in the agreement to acquire, maintain, and manage such samples. First and foremost is the character of the sample and how it might change with time. For most physical samples such as soil, concrete, metals, and the like, this is not a significant issue, provided the samples are afforded reasonable care and protective storage. For chemical samples or samples that have been contaminated in some manner, the character of the sample with respect to its assessment or evaluation can change significantly. If this is anticipated, you must let your client know that all testing and evaluation should be done in a specified time period before compromise is expected or that you cannot be accountable for changes that might occur in the material character with time.

Failure to maintain legal samples can significantly compromise a client's case and can expose you to a secondary liability if the client cannot offer such samples in support of its position.

Site Operations

On the surface, Engineers simply do not accept responsibility for ANY site operations. You need to clearly distinguish between "site operations", the purview of others, and your "operations" on a site. They are different and you must not confuse them.

We are consultants. We do not control sites. We are there to offer advice or opinion, to remove samples, to observe and document, to assess observable conditions, or to supervise OUR employees in their professional duties. We are not there to control the activities of others. We are not there to supervise the employees of others or the activities of other companies.

Our "operations" on a site are better characterized as our professional activities. This point of semantics is important to prevent confusion as to site responsibilities of those who have the right and obligation to exercise CONTROL over the site, something that we do not typically want or accept.

When reviewing contracts in this context, be careful of the word "monitor", relative to site operations or contractor activities. One who monitors is one who might also have a duty to warn or instruct. Since you do not want to assume the position or duty to warn, you should not use the term monitor. One synonym for "monitor" is to "supervise", a function you do not wish to accept on a jobsite.

Site Safety

Similar to site operations, Engineers should not accept the responsibility for site safety, as we have no control over the activities of others. You may agree to abide by the safety practices of the entity controlling site safety and agree to use safe practices in the conduct of your services. For construction sites, if you agree to abide by the safety practices of the general contractor you might be obligated to attend periodic safety meetings held by the contractor. If this is a requirement, make sure it is met. Further, you will incur addition cost in attending these meetings, which could represent an unrecoverable cost if you have not anticipated it in your fee estimate.

In the event that we, as Engineers having a limited on-site presence, observe an unsafe practice by others or observe an unsafe condition, what responsibilities do we have? We are on a jobsite to affect our services, not as the safety police for the job. If we see an imminent danger, we should bring that to the controlling party's immediate attention. Further, we should document that we have done so, disclaiming our responsibility or duty to find or report other safety issues. This is any area in which your legal counsel may provide additional guidance, as there are often state requirements in addition to national requirements.

Assuming you have an internal safety program in your firm, you should follow your own safety procedures in the conduct of all your services.

Look Out for Purchase Orders!

A purchase order is a form of contract that often carries some standard terms and conditions that we, as licensed professionals, do not want to accept. Most often, a purchase order has terms and conditions prepared for the delivery of ordered goods and some non-professional services. While most of those terms and conditions do not apply to our services and do not necessarily obligate us adversely, they do not give us an opportunity to interject our necessary terms and conditions in the manner we would like.

A few things to remember about purchase orders:

- The terms and conditions of purchase orders are usually from the Uniform Commercial Code (UCC) and do not apply well to professional services. Avoid Purchase Orders if you can. Note that if you do not respond to an issued Purchase Order under UCC provisions within 10 days of receipt, you are stuck with those terms and conditions as a contract. This is noted in the UCC, Article 2-Sales, Part 2-"FORM, FORMATION AND READJUSTMENT OF CONTRACT", clause (2).
- If you must work on a Purchase Order basis, make sure it references your proposal and its terms and conditions. Refrain from sending a fee schedule only to clients for them to just attach to Purchase Orders without further specificity of your preferred terms and conditions.
- Try to negotiate with the client, a master services agreement and use the Purchase Order as a task order, referencing the master agreement, and negating the P.O. terms and conditions.
- If stuck with a purchase order and no other recourse, mark it up, paying close attention to indemnification, guarantees, insurance, safety, scheduling, standby, and other conflict –riddled points that often appear.

Third-Party Reliance Letters (Secondary Client Agreements)

If you practice in the areas of Environmental Assessments, Property Condition Assessments, or other "due diligence" activities, a concept of "Reasonable Reliance" is sometimes necessary to let third party beneficiaries rely on your work product. In basic form this means that a prudent person should be able to believe and act upon information you have given them. If you have done your job appropriately, met your standard of care, and reported your information accurately, this should not be an issue, provided you limit the use of your document to a stated purpose, for a stated time period, and not allow extrapolation of the document beyond your original scope and intent.

With this in mind, you have to approach a third-party reliance letter in the same manner you would approach any contract issue. You must clearly solicit a "meeting of the minds" in this case. You ask that the third party understand and ascribe to YOUR terms and conditions. You then limit the use of the document to the third party and their immediate contractual users. You do not want to allow the indiscriminate use of your document by multiple parties beyond those who sign your agreement, such as would

happen if our document were referenced in a prospectus for the property or other such broadly cast dissemination of your document.

Using such a document allows the third-party an opportunity for reasonable reliance without undue exposure to your firm for the use of such documents. If a third-party agreement is not obtained, you may risk an exposure greater than just to your client as reliance on an issued document is sometimes assumed as a default, and could be deemed a reasonable reliance without your involvement.

Releases of Liens

In the construction industry, liens or the threat of such are commonplace. This is the protection afforded by statute for the payment of wages to workers on the project, followed by the payment for goods used in the project, and then to services provided for the project. As professionals providing services to the project or for a client in contemplation of developing a project, you generally have certain lien rights.

In some states these are called "Mechanic's Liens". In other states, construction liens have been separated from the other forms of "mechanic's liens", thus having their own statutory features. For professional services, you have to be careful with whom you contract on a project and at what stage of the project you provide your services in order to properly affect a lien. For example, if you are engaged on the "front end" of a project, say providing a Geotechnical Investigation, a Property Condition Assessment, or a Phase I ESA for a real estate transaction and you are working for the potential buyer, it is possible that you will have no lien rights unless the property is improved, since you have no contract with the owner. If you have a contract with the owner for your services, you generally have certain lien rights whether the property is improved or not.

Once you have lien rights on a property, you are willing to exchange those rights for payment of your services. This is where a "release of lien" enters the fray. Most clients, particularly contractors, want you to promise not to place a lien on the property if they promise to pay the amount owed. This is, in effect, a bilateral contract. The problem comes in when the client wants to also throw in a few extra terms releasing them from all claims for everything. This is not appropriate and you must carefully review these for such craftiness.

One such example of a lien release that incorporates additional indemnification language is:

> ***"Now, therefore, the undersigned, in consideration of partial payment in the sum of $_____ receipt of which is hereby acknowledged, and other valuable considerations and benefits to the undersigned accruing, do hereby waive, release and quit claim all liens, lien rights, claims or demands of every kind whatsoever which the undersigned now has, or may hereafter have on this project known as _____."***

This is a broad form indemnification of any and all claims, slipped in as a partial waiver of lien. Note that since this is a partial waiver of lien, the client will take at least one more opportunity to get indemnification in a final waiver of lien. While the client might not have the intent of creating additional indemnification, that is the effect of the language and could be pursued as necessary against you.

You can mitigate your exposure in these releases of lien by providing your own form which states the limitations of the partial or final waiver of lien and makes the indemnification for PAYMENT RELATED claims only, or you can mark up the client's form making it clear that you are indemnifying only for payment related claims.

Dispute Resolution

As much as we try to practice in a consistent, clear manner, disputes are inevitable. It is how we handle these disputes that will allow us to continue to practice.

There are three common ways to handle a dispute once it has exceeded the individual party's capacity to resolve. These are:

- Litigation
    - Trial by jury
    - Bench Trial
- Arbitration
    - American Arbitration Association Rules
    - Other rules
- Mediation
    - Court ordered
    - Agreed mediation

Each of these means has advantages and disadvantages, and you should know these before you agree to them in contracts. The default mechanism for dispute resolution of a contract is litigation. Either harmed or damaged party may sue the other for a variety of reasons, whether a result of contract breach, negligence or other legal action. Since litigation offers little in terms of predictable result, is expensive, and time consuming, other methods of dispute resolution are often preferred. Sometimes those methods are no better than litigation as many different variables can come into play.

Litigation offers some advantages over the other methods. It is done under distinct rules of evidence discovery, so as to afford to both sides an opportunity to understand the nature of the claim and its basis. It gives insight as to "where the other party is going" with its premise. This process alone sometimes leads to settlement of the dispute.

Each party is then allowed to put on its respective "show" in an effort to convince a "jury of peers" as to the validity of its claim or the refutation of such a claim by the defendant. Unfortunately, this is where the process begins to break down in two respects. First, a "jury of peers" doesn't really exist for a corporate entity. The jury pool is composed of

local people, from a variety of backgrounds, who are expected to evaluate the minutia of technical details and decide on the "winner". This is asking a lot of the jury pool. This concept is better suited to criminal cases and domestic disputes, but falls short in the professional realm. While the capabilities of jurors should not be underestimated, it is common to see them lose interest in technical cases and become quite bored. When this happens, it is usually the charisma of one side or the other that helps to "carry the day" as compared to the issues, events, and facts. "Bench" trials, where the case is heard and decided by a judge without the "benefit" of a jury, are only slightly better in that the judge is more likely to be attentive and understand the nuances of the technical case better than a jury.

Looking at the two remaining options, the more popular of the two in the past has been arbitration. Over the past few years, mediation has risen in popularity and several forms of it have emerged to gain prominence in professional dispute resolution.

What is arbitration? In some respects, arbitration is a mini-trial, held in an attempt to avoid a court trial and conducted by a person or a panel of people who are not judges in the legal sense. Arbitration may be agreed to by the parties, may be required by a provision in a contract as a means for settling disputes, or may be provided for under statute if requested. One advantage of arbitration is that it can occur within a relatively short time period, usually at the discretion of the parties involved.

Arbitration of professional matters is usually done by a panel such as one provided by the American Arbitration Association (AAA). The AAA has a specific set of rules for the proceedings, and the panel must meet certain minimum standards. It is not necessary that the panel have legal experience, but should have experience in the professional field that is the subject or close to the subject of the arbitration. The panel selection is often done such that the plaintiff selects one member, the defendant selects one member, then the selected panel picks the third arbitrator. Occasionally, a retired judge, some other respected lawyer, or some organization that provides these services will hear arbitration singly. Contract-required arbitration may be converted into a legal judgment on petition to the court, unless some party has protested that there has been a gross injustice, collusion or fraud. According to the Uniform Arbitration Act, the only reasons to set aside or vacate an arbitration award are:

- The award was procured by corruption, fraud or other undue means;
- There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
- The arbitrators exceeded their powers;
- The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5 , as to prejudice

substantially the rights of a party; or

- There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award

This is binding arbitration and barring one of the noted conditions, it is usually hard to escape the decision. Many states provide for mandatory arbitration of cases on a non-binding basis in the hope that these proceedings conducted by experienced attorneys will give the parties a clearer picture of the probable result and lead to acceptance of the arbitrator's decision. It should be noted that an arbitration panel's decision might vary significantly from a lay jury's decision, given the same evidence.

Arbitration might or might not follow the rules of civil procedure used in court cases. This depends upon the rules under which the arbitration is done and agreement by the parties. When attorneys are involved on the arbitration panel, it is more likely that some semblance of the civil procedure rules will be followed, though concessions are likely on both sides of the table as far as evidentiary processes. When other professionals are involved, there is a lower likelihood of such rules being followed, as there is a greater likelihood that the panel members are not familiar with the rules. This can be dangerous to one party or the other as sometimes erroneous or "pseudo-factual" evidence such as hearsay might be allowed into evidence.

What about mediation? This popular form of dispute resolution is gaining momentum as a viable means to affect a settlement between parties. The formal mediation is usually court-ordered. In this form, the mediator must be a licensed attorney and acts as a third-party, actively participating with both parties as a group and with each of the parties individually in an effort to find points of agreement between the disputing parties. Mediation differs from arbitration, in which the third party (arbitrator) acts much like a judge in an out-of-court, less formal setting but does not actively participate in the discussion as is done in the mediation process. There are professional mediators or lawyers who do mediation for substantial fees, but the financial cost is less than fighting the matter out in court and may help to achieve early settlement.

Mediation does not always result in a settlement. In many cases; however, the discussions at mediation are privileged and cannot be used in subsequent legal action.

Which of the three is better? None. Whether we win or lose the "war", we always lose in the battle. The better process is to communicate with clients and meet the standard of care, attempting at every turn in a project to mitigate the opportunity for a dispute to erupt.

Closing

The information contained in this booklet is based on experience and an attempted application of common sense to the review and overview of contract issues as they affect those in the engineering profession. It is by no means a legal treatise on all the potential pitfalls of contract law, as there are volumes dedicated to the subject in legalese and jargon most of us as non-lawyers will never understand. The salient points of this exercise were to point out the complexities of contracts, the ease with which we can get into trouble with their provisions, and the need to be careful in the conduct of our professional activities from contract engagement through contract performance.

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General Statement of Reference and Citation

Through the years, the author has read and negotiated many contracts, and has read numerous articles regarding contracts and their parts. Since many of those items are not available, but have collectively added to the subject knowledge of the author, appreciation is greatly acknowledged to those who have authored such before this writing and cannot be directly cited for their contribution.