The Engineer's Need for a Written Contract

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It is an all-too-often ignored truism that a fair, unambiguous, and mutually signed contract is in the interest of both the owner of a construction project and the assigned engineer. Therefore, it is truly surprising to see how often professional engineers perform services for clients without the most important document of the entire endeavor: a written, signed contract for services.

What many people do not seem to understand—until problems arise on the project and it is too late—is that simply because both parties come to an agreement "now know" the scope of the project and the services, that may not be true months or years later, when the project is, hopefully, nearing completion. Clear, written contracts benefit both parties. Any owner/client that is opposed to being asked to reduce to writing the agreement may not be a client worth having in the long run. And any engineer that is unwilling to reduce to writing the agreement may not be an engineer worth hiring in the first place.

There are various construction industry form contracts that serve as excellent documents to rely on, but it is also important to remember that one size does not fit all. Each project needs a specifically tailored contract. In so doing, there are a few issues that should be addressed in most, if not all, engineers' contracts. Some of the more notable are the following:

- Consistency among all project contracts;
- Specific payment schedule and mechanism;
- Milestone and completion dates;
- Incorporation of prime contracts into subconsultant agreements;
- Clear indication of owner responsibilities;
- Definitive scope of basic professional services to be provided;
- Insurance requirements; and
- Jurisdiction/forum selection.

When entering into a contract negotiation, the engineer needs to know three important items from the project owner: what does the owner want (i.e., the program); when does the owner want it (i.e., the schedule); and how much can the owner pay for it (i.e., the budget). This information should be referenced in some manner in the contract so that the engineer's scope of services can be read and clearly understood in context.

A frequently encountered problem with construction project contracts that can often cause unnecessary litigation is "mismatched" contracts. In our experience, project disputes often arise because the assigned responsibilities among project participants overlap or because those responsibilities leave gaps. This is certainly an issue that should be addressed primarily by the owner, but it's in everyone's interest to also examine it with a keen eye.

Some examples are illustrative. We have seen instances where an architect is responsible for inspecting work and certifying payment applications, but then that same architect fails to require its MEP engineering consultant to perform any such service within its own discipline. In a situation where overlapping responsibilities may cause conflict, the classic instance occurs between the design team and the construction manager.

The law imposes upon professionals a fair obligation when providing services. It is known as the "professional standard of care." Simply stated, an engineer is to be held liable for negligence or for breach of a professional services contract if the services "deviated or departed from generally accepted standards of the profession," and said "deviation" caused damages.

Of course, there is an easy way to disregard this legal obligation. One can implement a different or higher standard of care through a contract. If presented with a contract indicating that the engineering services will be "fit for their intended purpose" or "state of the art," an engineer should never agree to sign it. If an owner insists on such a provision, two things need to be explained to that owner. First, such a provision is at odds with a well-established legal principle that governs construction projects in general. Moreover, in the event of a claim, such a provision may result in the claim not being insured by the professional liability insurance policy. Obviously, that is not in the owner's best interest.

Finally, communication is a key to a successful project for everyone involved. Before signing the contract, both the owner and engineer should discuss the document and take that opportunity to ask any questions. Although the discussions themselves may not be "binding evidence" in the future, they may cause the parties to implement mutually beneficial changes to the contract at that early stage of the project.

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