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Drafting Your Scope of Services

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances. We'd like to thank professional liability insurer DPIC Companies for their contributions to this article.

The devil is in the details. It's an old axiom environmental firms are very familiar with. When it comes to environmental projects, quality is indelibly tied to the proper execution of each and every detail. Leave that one critical detail out, and it seems that the omission inevitably leads to expensive trouble -- a leaky storage tank, a cracked foundation, or a damaged underground utility, for example.

Yet, while environmental consultants may spend countless hours ensuring their specifications are detailed to the nth degree, they are often not as meticulous with an equally important document: the scope of services within their contract with the owner. With the scope of services, the devil is in the *lack* of details.

The absence of a clear and comprehensive scope of services is a major cause of disputes, claims and counter-claims between an environmental firm and its client. Without a clear project scope, negotiated and agreed to by both parties, client expectations are rarely met and environmental firms often find themselves facing demands for delivering far more services than they intended to perform.

It's Your Responsibility

In many cases, problems regarding a vague or inadequate scope of services are simply the result of a client's lack of knowledge of the role of the environmental consultant. A client-drafted contract may simply include vague, comprehensive language, such as "provide any and all services necessary for the completion of the project." In other cases, however, clients may purposely specify a bare-bones scope as a cost-cutting effort. They may limit the specified services in the agreement in an attempt to control fees. Then, once the project begins, the client may attempt to squeeze every service imaginable out of the environmental firm for the inadequate fee.

It is the environmental consultant's responsibility, therefore, to ensure that a clear and complete scope of services is negotiated prior to signing any client agreement. It is far too risky to take on any type of assignment in which the scope of services is either unclear or inadequate and therefore imprudent and unusual for your profession.

For example, by agreeing to perform design services without providing construction-phase services you are prevented from seeing firsthand whether or not the integrity of your design is being maintained. It also denies you the opportunity to clarify ambiguities or correct misunderstandings that arise at the jobsite. And if brought into a claim on such a project, a court or arbitrator may decide that you did not act as a reasonably prudent professional, even though you were not contracted to perform construction observation as part of your scope of services.

Negotiating Your Scope

Negotiating a clear scope of services is one of the best ways to make sure you are paid adequately for your

work and to optimize your chances of meeting your client's every expectation. The negotiating process helps your client more clearly define needs and expectations and gives you the opportunity to explain how those expectations can best be met. It will also give your client a better understanding of your role in the project and the full range of services you can provide. Your goal is to develop a final scope of services that clearly sets forth:

1. Services that you will perform for the agreed-to fee
2. Services you can perform for an additional fee
3. Services you will not perform
4. Services that will be performed by a third party.

The fourth item – required services performed by others – is often overlooked but very important to spell out. If you are hired as the prime consultant on a project, you can be liable for failing to ensure a required service was performed up to standard even if you were not contracted to provide that service directly. This is true even if the third party performing the services enters into a contract directly with the client.

Sample Scope of Services

A useful tool to reach agreement on a reasonable scope of services is a scope of services checklist. A sample scope of services checklist is shown here:

Pre-Design Services

- Site Reconnaissance
- Planning Subsurface Investigation
- Planning Instrumentation/Data Collection Program
- Research for Specific Projects
- Project Meetings
- Administrative Services

Site Services

- Supervise Boring Layout/Surveying/Utility Clearance
- Supervise Field Sampling
- Classifying Soils/Rock Samplings
- Progress Reports on Field Activities

Design/Consulting Services

- Data Reduction
- Analyses and Calculations

- Supervise Laboratory Program
- Supervise Drafting/Boring and Test Pit Log Preparation
- Foundation Design Recommendations
- Pavement Design Recommendations
- Retaining Structures Design Recommendations
- Drainage Systems Recommendations
- Sanitary Systems Design Recommendations
- Evaluate Construction Considerations
- Report Preparation
- Report Review
- Telephone Consultation
- Project Meetings
- Administrative Duties

Services Following Report Submission

- Project Coordination
- Review of Construction Drawings
- Pre-Construction Meetings
- Construction Monitoring and Testing Services
- Administration

Field Activities

- Subsurface Investigations
 - Boring Layout / Elevations
 - Utility Clearance including UFPO and Private Utilities
 - Site Health and Safety
- Specific Tasks
 - Mobilization/Demobilization of Crews
 - Auger and Split-Spoon Sampling
 - NX Rock Coring
 - Groundwater Monitoring Wells
 - Decommissioning of Wells
 - Test Pit Excavations
 - Roller-biting
 - Decontamination and Deon Pad Construction
 - Shelby Tube Sampling

Laboratory Programs

- Atterberg Limits
- Natural Moisture
- #200 Wash Gradation
- Gradation w/ Hydrometer
- Triaxial Permeability
- Consolidation
- Triaxial Shear Strength

- Moisture Density Relationship Curves
- Soil Resistivity
- PH

Your checklist should be specific to all of the services that are normal and customary in your discipline and for the type of project being constructed. The checklist should indicate which items are included as required services, which of these basic services are to be performed by third parties, and which non-basic services are available for an additional fee. Reviewing such a checklist with the client is a good planning exercise to ensure that all possible services are considered, and makes a useful guide in estimating or pricing your proposed services.

The same checklist or a derivative thereof should become a part of your proposal to your client as well as a part of the contract by either reference or incorporation. To append a checklist to your agreement, consider this sample contract language provided by professional liability insurer XL Design Professional, formerly DPIC Companies:

SCOPE OF SERVICE

The Client and the Consultant have agreed to a list of Basic Services the Consultant will provide to the Client, listed on the appended Scope of Services, Exhibit A.

If agreed to in writing by the Client and the Consultant, the Consultant shall provide Additional Services, which shall be labeled as Exhibit B, appended hereto. Additional Services are not included as part of the Basic Scope of Services and shall be paid for by the Client in addition to payment for Basic Services, in accordance with the consultant's prevailing fee schedule, as provided for in Section __, Compensation, or as agreed to by the Client and the Consultant.

Excluded Services

Once agreement is reached on the final scope of services, separate checklists can be prepared to itemize the required services that will be performed by others, and services and tasks that will not be performed. These should be included as part of the work agreement. Here is sample contract language from XL Design Professional that your attorney can adapt to your situation:

EXCLUDED SERVICES

In addition to the Basic Services to be provided under this Agreement, the Consultant has offered and recommended to the Client certain other services, which the Consultant deems necessary or advisable for the Project. The Client has declined to include such services in this Agreement and has decided to obtain those services from another source or to forgo those services. The following recommended services are therefore excluded from this Agreement:

{Listing or annotated listing of Excluded Services}

In consideration of the risks to the Consultant as a result of the Client's decision to exclude these recommended services from this Agreement, the Client hereby agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant, its officers, directors, employees and subconsultants (collectively, Consultant) from any damages, liabilities or costs, including reasonable attorney's fees and defense costs, arising out of or in any way connected with the Consultant's not providing these Excluded Services.

If you are unable to get the client to agree to such an indemnity agreement, you could add the following paragraph to the Scope of Services clause presented earlier:

Services not set forth above as Basic Services and not listed in Exhibit A of this agreement are specifically excluded from the scope of the Consultant's services. The Consultant assumes no responsibility to perform any services not specifically listed in Exhibit A.

Finally, if your client chooses to exclude a service that you consider critical to the success of the project or to public safety, you should call special attention to this. Write a letter reminding the client of the necessity of obtaining these services from other sources and asking the client to provide you with the results of these services.

Specifying a clear scope of services may help avert a serious problem with your client. It may also help you

expand your scope of services on your next project
thereby increasing your fee while reducing liabilities.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.