

EC RISK REVIEW

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Project Selection: A Risk Assessment

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.

An environmental consultant in a small Midwest town was happy about his new project. It was a quick \$1,500 for a limited investigation of a piece of commercial property his new client, a local developer, wanted to buy. Sure, our consultant had heard that the client had a history of being litigious, but he was so nice and so enthused with this property purchase. This developer wasn't looking for a full-blown Phase I report, just a limited investigation of a portion of the property where a service station had been located. A half-hour look at some public records, a quick phone call to the current property owner and a cursory walk-through of the property – probably no more than a half day's work!

It sounded like a slam-dunk project with an important mover and shaker in the local business community. The consultant thought it was the perfect project to get his new environmental firm some sizable future assignments. Ideal entry point, right? Wrong!

Obviously the above scenario is far from ideal. Still, in the real world, it isn't always easy to pick and choose among potential projects. Sometimes, any project can look good. Yet careful project selection is essential because accepting the wrong project almost guarantees professional liability claims.

Let's look at several factors that must be weighed when selecting projects.

Type of Project

Some projects are so litigation-prone that only the most qualified – or most foolhardy – environmental consultant would accept them. A Phase I inspection of a former gas station being converted to a day-care center would be one most environmental consultants would want to stay away from, for example.

According to insurance industry studies, project types that can present higher than average risks include Phase I & II property assessments, facility compliance audits, industrial hygiene surveys, site investigations and samplings, feasibility studies and remedial design, implementation of remediation systems, environmental permitting and reporting, and wastewater/sewage plants.

This is not to say that no environmental firm should take on higher-risk projects. However, you should approach these types of projects cautiously, make sure you are qualified to do them, set your fees to reflect the higher risk and insist on protective contract language.

Project Delivery Method

These days, more and more design and construction projects vary from the traditional design-bid-build delivery method. It is important to realize that each alternative delivery project involves specific risks and requires a different allocation of responsibilities for those risks. For example, if you lead a design-build project, you become responsible for risks traditionally associated with contractors and not normally assumed by an environmental consultant.

Project delivery methods also include fast-track projects. These "ready, shoot, aim" projects often involve substantial modifications to plans and thus big change-order expenses. Unsophisticated clients won't

expect change orders and, most likely, will not understand the need to have sufficient contingency reserves set aside in their project budgets.

Other Parties Involved

Even the most plain-vanilla, mundane type of project can be high risk if the other parties involved in the project are litigious or prone to errors and omissions. Indeed, the client may be the greatest risk factor associated with a project. A client with a history of litigation against consulting firms, contractors and others should be a huge red flag when considering a project. So is a client who does not recognize the value of an environmental firm's construction-phase services for a remediation project.

Likewise, the contractor assigned to a project is a significant risk factor. This is particularly the case when a contractor has been selected on a low-bid basis. It is always wise to investigate the history of the contractor as part of the project selection process. Subcontractors and subconsultants (or the prime if you are a subconsultant) should be scrutinized as well.

Level of Experience and Knowledge

Take a hard look at the capabilities of your own firm when selecting projects. How much experience do you have with this type of project? Who on your staff has the necessary expertise? Have you worked with the owner or contractor before?

Consider your projected workload and the mix of other projects you will be working on concurrently. If you will need additional personnel to take on a new project, are those professionals available? Taking on a project that stretches your available staff and skills can be a recipe for trouble.

Project Funding

An underfunded project is a high-risk project. Clients with insufficient capital will look to skimp on quality and will encourage their environmental firm and contractor to do the same. They may even delay payment for services or file trumped-up claims as a ploy to avoid payment altogether.

If a project appears to be underfunded, be sure to conduct a financial check of your client. Don't let the client reduce your scope of services to the point you can't adequately control your risks. Also make sure you

have a suspension of services clause in your contract that gives you a way to pull out of the project in the event funding problems result in project delays, slow payment or other breaches of your contract.

Scope of Services and Fees

Even when overall project funding seems adequate, avoid projects for which you are offered a severely limited scope of services and/or inadequate fees. Remediation projects that omit your construction observation services, for example, are more prone to errors since you are not available to provide guidance in the execution of your plans.

Contractual Provisions

Beware of the "contractually hazardous" project. This could be any type of project – even a simple, single-story commercial building – for which the client issues a contract containing such unfair or onerous provisions that you could wind up accepting most or all of the client's liability.

Sometimes, an unsophisticated client may attempt to issue a purchase order or similar contract form, which is thoroughly inappropriate for engaging an environmental consultant's professional services. Some might argue that such a project is among the riskiest of all because you have none of the standard contractual provisions professionals need for protection.

Alternately, strong contractual language can make an otherwise risky project palatable. Contractual limitations on your liabilities could be a make-or-break negotiating point.

A Project Selection Checklist

Project selection is rarely a cut-and-dried, yes-or-no decision. Projects usually contain a number of risk factors that, considered separately, might be acceptable. But together, these risks could add up to a big liability headache.

Take for example, a well-financed client who asks you to perform a Phase I assessment on a piece of undeveloped property currently under three feet of snow. You might be able to negotiate a solid contract. But can you protect yourself from a subsequent purchaser of the property? What could you do to mitigate risks if the property sells, the snow melts and a buried tank becomes visible?

Your best course during project selection is to strive to identify all of the potential risks on a prospective project and then make a calculated decision based on a combination of factors. Some environmental consultants use a Project Evaluation Checklist to evaluate projects *before* submitting a proposal or negotiating an agreement. This can save a lot of time and money spent chasing projects you really shouldn't accept.

A Project Evaluation Checklist should cover issues such as:

- Is the project type one that is inherently risky?
- Does the project team, including the client, the prime consultant, subconsultants and the contractor, have experience with this type of project?
- Is the project adequately financed?
- Does the project owner or contractor have a litigious history?
- Does the project include an adequate scope of services?
- Are you receiving an adequate fee?
- Is the project schedule realistic?
- Are there any unusual features, such as unfamiliar code requirements, new technologies, hazardous waste or unstable geological conditions?
- Can mitigating factors be offset with contractual protection, such as a limitation of liability clause or indemnity provisions?

Add your own checklist items based on the unique characteristics of your firm.

Once you've analyzed the risks of a potential project, determine how the risks you've identified might be managed. You can minimize some risk by educating your clients, providing more comprehensive services and insisting on qualification-based selection of a competent contractor. You can also reduce your risk by developing a contract that is fair and precise, that accurately defines the intent of both parties – and that includes reasonable indemnities and a limitation of liability clause. And, of course, you can limit your risks by purchasing adequate professional liability insurance.

It is in everyone's best interest for you and your client to take a good, hard look at the risks you cannot prevent or control. Understand that on a high-risk project, the

risk should be borne by the party best able to control it. If no one can control the risk, then it rightly remains with the project or property owner, who has the most to gain from the project. If the owner refuses to shoulder his or her share of the risk, you should probably decline the project.

The risks that remain on your plate – those that rightly belong to you and cannot be otherwise transferred or managed – will require a hard-nosed business decision. Is the fee or other incentive so attractive that you can afford to accept the risk? Making that determination may be the toughest decision you make on the project.

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.