

EC RISK REVIEW

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Scope of Services Cuts Liabilities, Boosts Bottom Line

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.

Drafting a clear and comprehensive scope of services has long been recognized as an important tool in reducing your professional liability risks. Often overlooked, however, is that a complete and accurate scope of services can also boost your bottom-line profitability. By itemizing all of the valuable services you provide to clients and including a list of additional services you recommend, you increase your chances of getting adequately paid for your contributions to a successful project.

Alternately, the absence of a clear and comprehensive scope of services is a major cause of disputes, claims and counterclaims between environmental firms and their clients. Without a clearly written project scope – negotiated and signed off by both parties – client expectations are rarely understood or met and environmental consultants often find themselves facing client demands for far more services than they thought they agreed to perform.

In the vast majority of cases, an inadequate scope of services is simply the result of a client and environmental firm failing to take the time to itemize all of the services required to meet the client's project objectives. Often, the environmental firm simply accepts the client's standard contract that contains

general language such as “provide any and all services necessary for the completion of the project.”

In some cases, however, clients may intentionally use broad contract language, such as “any and all services.” In this way, they can better hold the environmental firm responsible for achieving project completion and success, regardless of the countless add-on services the client later demands.

Similarly, some clients might purposely specify a bare-bones scope of services, limiting the specified services in the agreement in an attempt to minimize fees. Then, once the project begins, the client attempts to squeeze every service imaginable out of the environmental firm for an inadequate fee.

Before signing any client contract, ensure that a clear and comprehensive scope of services is negotiated and signed by both parties. It is very risky to take on a project 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 services without providing construction-phase services you are prevented from seeing firsthand whether the contractor is acting in general conformance with the design documents. It also denies you the opportunity to clarify ambiguities or correct misunderstandings that arise on the jobsite. And if brought into a claim on such a project, a jury, judge, arbitrator or mediator may conclude that you did not act as a reasonably prudent environmental consultant, even though you were not contracted to perform construction observation as part of your scope of services.

As shown, a clear scope of services can:

1. Minimize misunderstandings between client and consultant and thereby reduce the chances of claims

2. Maximize fees earned by itemizing all services that the environmental firm will provide.

Negotiating Your Scope of Services

Negotiating a clear scope of services is one of the best ways optimize your chances of meeting your client's every expectation. The negotiation process helps your client more clearly define needs, success factors and expectations and gives you the opportunity to explain how those goals 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. Additional services you can perform for an additional fee
3. Recommended services you will not perform per the client's refusal
4. Required services that will be performed by a third party, such as a contractor or subconsultant.

The fourth item – required services performed by others – is often overlooked but can be very important to spell out. As a 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. You can use the basic services listed in standard industry agreements as a starting point and then customize it to fit your own practice. A sample scope of services checklist, listed by project phase, 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/Auger Hole Log Preparation
- Foundation Design Recommendations
- Pavement Design Recommendations
- Retaining Wall Design Recommendations
- Drainage Systems Recommendations
- Sanitary Systems 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 Layouts/Elevations
- Utility Clearance including UFPO and Private Utilities
- Site Health and Safety
- Specific Tasks
- Mobilization/Demobilization of Crews
- Auger and Split-Spoon Sampling
- Rock Coring
- Groundwater Monitoring Wells

- Decommissioning of Wells
- Test Pit Excavations
- Shelby Tube Sampling

Laboratory Programs

- Atterberg Limits
- Natural Moisture
- #200 Wash Gradation
- Gradation/Hydrometer Analysis
- Triaxial Permeability Test
- Consolidation
- Triaxial Shear Strength Test
- Moisture Density Relations
- Soil Resistivity Test
- PH

Customize your checklist to reflect the services that are normal and customary in your discipline and for the project type. The checklist should indicate which items you are to perform as contracted services, which services are to be performed by other parties, such as subconsultants, and which non-basic services are available for an additional fee but not included in the original scope. Reviewing such a checklist with the client is a good planning exercise to ensure that all possible services are considered, and makes a very useful guide in accurately estimating or pricing your proposed services.

Incorporating the Scope Into Your Contract

The same checklist or a derivative thereof should become part of your proposal to your client as well as a part of your contract for services. The easiest way to incorporate the scope into your contract is to formalize the checklist as an addendum or exhibit added to the contract with an appropriate reference.

List the services you are being contracted to perform. Include a list of available additional services as a separate appendix. Make it clear that these additional services are not included as part of your basic scope of services and must be paid for by the client in addition to the payment for basic services in accordance with your prevailing fee schedule.

A separate addendum should be prepared to itemize what you consider critical services you offered to perform but that will be performed by others or will not

be performed at all. Note in your contract that you offered to perform these services but the client declined to utilize your services in these areas.

Try to include an indemnity clause that holds you harmless from any damages, liabilities or costs arising out of or connected to you not providing recommended services. If you are unable to get the client to agree to a formal indemnity agreement, note in your contract that you assume no responsibility to perform any services not specifically listed in your scope of services.

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 names of the individuals or firms who will perform these services.

Specifying a clear scope of services may help avert a serious project upset and dispute with your client. It may also help you increase 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.