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Seven Crucial Client Contract Clauses for Environmental Consultants

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 would like to thank the Design Professional unit of XL Catlin for their contribution of sample contract language which was excerpted from their eGuide resource.

Environmental consultants purchase professional liability insurance to provide financial protection in the event they make an error or omission when delivering their professional services to a client. However, not all of an environmental consultant's acts will be covered by its professional liability (PL) insurance. For instance, your PL policy likely spells out that intentional acts of fraud or other forms of wrongdoing are not covered.

Likewise, the language contained in your contract with your client can dramatically affect your liability and insurability when performing professional services. Your goal when drafting your contract is to:

1) Include contract language that limits your liability to those specific acts for which you are legally liable.
2) Remove contract language that attempts to expand your liability beyond those acts for which you are legally liable and insurable.

Here, we will examine seven critical clauses affecting liability and insurability that you and your attorney should consider when drafting your client contracts.

1) Scope of Services

A Scope of Services clause should specifically spell out all of the professional services you are agreeing to perform for your client. This way you know exactly what your firm is being hired to do, and your client is agreeing to this exact scope -- *in writing*. Without a specific written scope, there can be misunderstandings as to what services you agree to perform, typically resulting in scope creep. Your client may expect you to perform professional services that you had no intention of providing and that you did not charge for. This can lead to claims of service omissions from your client, and the possibility that you have to perform added services for free.

But don't stop with a listing of the services you are agreeing to perform. In addition, it is advisable to list:

1) Those services that you are willing to perform for an additional fee.
2) Those required services that you are specifically excluding because they are being performed for the client by someone else or because you do not provide such services.

Here is sample contract language provided by XL Catlin as part of their *Contract e-Guide for Design Professionals*:

SCOPE OF SERVICES

The Client and the Consultant have agreed to a list of services the Consultant will provide to the Client, set forth on the appended Scope of Services, Exhibit A.
If agreed to in writing by the Client and 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 Scope of Services and shall be paid for by the Client, in addition to payment for the services listed in Exhibit A. Payment for Additional Services will be made by the Client, 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.
Services not set forth above 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.

In addition, beware any client language that attempts to have you guarantee that your scope of services is sufficient to complete the project. You cannot control the actions of the client, the contractor or other parties to the project, so guaranteeing project completion is impossible.

2) Standard of Care

As an environmental consultant, you are required to render your services with the ordinary degree of skill and care that would be used by other reasonably competent practitioners of the same discipline under similar circumstances in a similar geographic location. Nothing more, nothing less.

This standard of care not only establishes the minimum level of quality to which you should perform your professional services, it sets the parameters of your professional liabilities and your insurability. If you perform your services to the prevailing standard

of care, your liability for those services should be at or near zero. If you fail to meet the prevailing standard of care, you will likely be held liable for your errors and omissions.

From an insurability standpoint, how your client's contract addresses your standard of care can have a dramatic effect on your financial protection. Specifically, if you contractually agree to perform services at a level that exceeds the prevailing standard of care, you may not be insured for failing to meet your excessively high standards.

For instance, if you contractually agree to provided the "best" or "highest quality of" services, and then lose a claim because the services you delivered were only adequate, your professional liability insurance may not cover your loss. The insurer bases its premiums and terms of coverage on, among other things, laws that set current industry standards. Your contractual agreement to exceed those standards creates additional exposure and a voluntary assumption of additional liability for which you would not otherwise be responsible. Your insurer has every right to refuse to cover that additional, voluntarily assumed liability.

Speak with your attorney about including a Standard of Care contract clause similar to this one offered up by XL Catlin Design Professional:

STANDARD OF CARE

In providing services under this Agreement, the Consultant shall perform in a manner consistent with and limited to that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances at the same time and in the same or similar locality. The Consultant makes no warranty, express or implied, as to its professional services rendered under this Agreement. Accordingly, the Client should prepare and plan for clarifications and modifications, which may impact both the cost and schedule of the Project.

3) Certifications, Guarantees and Warranties

Clients often feel they have the right to demand certifications, guarantees or warranties regarding the professional services they are paying you to perform. After all, many of the vendors who provide systems, equipment, appliances and other goods that are part of their project offer guarantees or warrantees. Why not the environmental consultant? Because, a certification, guarantee or warranty demands virtual perfection by the environmental firm. And as we know, there is no such thing as a perfect project.

You cannot certify that there are no hazardous materials on or beneath a building site. You cannot warrant that a contractor has followed your design documents exactly, or that a facility will perform to a high level. You can't guarantee that all codes and ordinances will be met. Nor can you guarantee perfection in the work of your subconsultants, the contractor and its subcontractors. Indeed, certifying, guaranteeing or warranting someone else's work can result in a huge, uninsured liability.

Again, it comes back to a matter of the standard of care. You are not expected to be perfect, and certifying, guaranteeing or warranting that your services are error-free creates uninsured liabilities. Here is XL Catlin's recommended contract language to combat this risk:

CERTIFICATIONS, GUARANTEES AND WARRANTIES

The Consultant shall not be required to sign any documents, no matter by whom requested, that would result in the Consultant's having to certify, guarantee or warrant the existence of conditions whose existence the Consultant cannot ascertain. The Client also agrees not to make resolution of any dispute with the Consultant or payment of any amount due to the Consultant in any way contingent upon the Consultant's signing any such certification.

In addition to eliminating specific certifications, guarantees and warranties, avoid absolute terms such as "every," "all," or "none" when they could be interpreted as a guarantee. Finally, it is OK to certify known facts, such as that you are a licensed environmental consultant, or that you conducted a site visit on a particular day. Just don't certify, guarantee or warrant things you cannot be absolutely certain about.

4) Third-Party Beneficiaries

There is no doubt that an environmental firm owes a legal obligation to its clients to perform its contracted services up to the prevailing standard of care. However, there is plenty of doubt when it comes to what obligation an environmental consultant owes to third parties who have an economic interest in the project but who do not have a contractual relationship with the consultant. If the consultant is negligent in performing its services for a new building, can tenants successfully sue for damages? If a third party suffers a loss of profit because a consultant's negligence caused a delay in a facility opening, can it file a claim against the consultant?

Under a strict interpretation of the theory of "privity of contract," there would be no liability. Environmental firms would only be liable for economic losses to those with which they had entered into legally binding contracts. However, privity of contract has been eroded as a legal theory. Some jurisdictions have ruled that a contract between parties is not necessary in order for one party to claim damages for economic loss due to the negligence of another party.

Have your attorney examine the prevailing laws in your jurisdiction regarding privity of contract and third-party beneficiaries. (If you perform work in other jurisdictions, have their prevailing laws checked as well.) Then work with your attorney to draft a Third-Party Beneficiaries clause in all of your contracts. XL Catlin provides the following language for you and your attorney to consider:

THIRD-PARTY BENEFICIARIES

Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Client or the Consultant. The Consultant's services under this Agreement are being performed solely for the Client's benefit, and no other party or entity shall have any claim against the Consultant because of this Agreement or the performance or nonperformance of services hereunder. The Client and Consultant agree to require a similar provision in all contracts with contractors, subcontractors, subconsultants, vendors and other entities involved in this Project to carry out the intent of this provision.

Your client should have no objection to this clause since it protects its interests as well. However, if you include the last sentence, requiring you both to include Third-Part Beneficiaries clauses in contracts with all parties to the project, you are now obligated to do so.

5) Indemnities

Perhaps no contract clause is more troublesome and confusing for environmental firms than indemnity agreements. Put simply, an indemnity agreement is a contract clause that takes liability that traditionally belongs to one party to the project and transfers it to another party. For instance, a project owner may ask for an indemnity that makes the environmental consultant responsible for the owner's negligence. Or, an indemnity may seek to make the consultant at least partially responsible for a project's construction means and methods.

The obvious disadvantage of these indemnities is that they increase the consultant's liability. Making matters worse, these contractually-assumed liabilities are likely *not* insurable under the consultant's professional liability (PL) policy. When an insurance company sets its premium rates, it does so based on the prevailing laws and practices regarding the distribution of liabilities. The insurer does not agree to provide coverage for any additional liabilities a consulting firm might voluntarily assume -- a liability that traditionally and rightfully belongs to another. In fact, the policy may specifically state that contractually assumed liabilities that the consultant would not be liable for absent the contract are not covered by the PL policy.

Your primary objective is to get your client to remove any onerous indemnities from your contract. Often, a discussion of traditional liability assignments, where the party with the greatest control over the liability assumes that risk, is enough to change an owner's mind. Bringing up the fact that any liability you assume via an indemnity agreement will be uninsured may also sway the owner to drop the contract clause.

Still, some owners and their attorneys will press for indemnity language in all of their contracts, believing it is a reasonable way to limit their liabilities. They may argue that since a contractor will accept indemnity language that frees the owner of responsibility for jobsite safety (a common practice), the environmental consultant should likewise accept an indemnity agreement.

Know that it is acceptable to include an indemnity agreement in the client contract, as long as the indemnity is mutual and does not transfer uninsurable liabilities that rightfully belong with the owner or others. Here is a sample mutual indemnity agreement provided by XL Catlin you should discuss with your attorney:

INDEMNIFICATION

The Consultant agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Client, its officers, directors and employees (collectively, Client) against all damages, liabilities and costs, including reasonable attorneys' fees and defense costs, to the extend caused by the Consultant's negligent performance of professional services under this Agreement and that of its subconsultants or anyone for whom the Consultant is legally liable.

The Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant, its officers, directors, employees and subconsultants (collectively Consultant) against all damages, liabilities and costs, including reasonable attorneys' fees and defense costs, to the extent caused by the Client's negligent acts in connection with the Project and the acts of its contractors, subcontractors or consultants or anyone for whom the Client is legally liable.

Neither the Client nor the Consultant shall be obligated to indemnify the other party in any manner whatsoever for the other party's own negligence or for the negligence of others.

Note that, in some jurisdictions, the contractually-assumed obligation to pay attorneys fees and defense costs may not be covered by your PL policy. Also realize that in some jurisdictions the contractual duty to indemnify includes the duty to defend the client, even when no negligence on your part is shown. In these instances, you and your attorney should consider the following revised language:

The Consultant agrees to indemnify and hold harmless the Client, it's officers, directors and employees against all damages arising directly from the Consultant's negligent performance of the services under this Agreement. Notwithstanding the foregoing agreement to indemnify and hold harmless, the parties expressly agree that the Consultant has no duty to defend the Client from and against any claims, causes of action, or proceedings of any kind.

Finally, if your client refuses to enter into a mutual indemnity agreement, you may find a unilateral clause acceptable if it ties your liability to your own negligence and includes the concept of "comparative negligence"; that is, you are only liable for that portion of the damages for which you were personally responsible. Review this language with your attorney:

The Consultant agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Client against damages, liabilities and costs arising from the negligent acts of the Consultant in the performance of professional services under this Agreement, to the extent that the Consultant is responsible for such damages, liabilities and costs on a comparative basis of fault between the Consultant and the Client. The Consultant shall not be obligated to indemnify the Client for the Client's own negligence or for the negligence of others.

6) Insurance Requirements

The sixth contract clause we'll examine is that which sets the insurance requirements for the project. A client asking that its contractors, subcontractors, consultants and subconsultants carry adequate insurance is not only acceptable, it's preferable for all parties involved. However, the amount of insurance a client may require and the stipulations on that coverage cannot only be unreasonable, they can be unattainable.

Let's look at the one type of insurance most owners ask their consultants to carry: professional liability (PL) insurance. First, realize that you cannot guarantee to a client you can obtain or maintain PL coverage now or in the future. Therefore, you should only commit to making a reasonable effort to obtain such coverage.

Also, you may not be able to obtain (or reasonably afford to maintain) a practice PL policy at the levels of coverage your client wants. For instance, a new client who wants you to provide services on a simple commercial warehouse building might request

$5 million in PL coverage when you only currently have a $1 million practice policy. As your insurance partner, we might be able to help convince your client that $5 million limits are excessive for the type of project being completed. Or, if your client is insistent, we might be able to help you obtain a project-specific or client-specific excess policy rider that will be less expensive than raising your limits on your practice policy.

Here is sample language regarding PL insurance, provided by XL Catlin, that you and your attorney might propose to your client.

PROFESSIONAL LIABILITY INSURANCE

The Consultant agrees to attempt to maintain professional liability coverage in the amount of $____ per claim and $____ in the annual aggregate for the period of design and construction of the Project and for a period of ___ years following substantial completion, if such coverage is reasonably available at commercially affordable premiums. For the purpose of this Agreement, "reasonably available" shall mean that the Consultant can secure at least three premium quotes for comparable coverage by admitted, A.M. Best Co. A-rated carriers. "Commercially affordable" shall mean the rate per $1,000 of fees is no more than a multiple of three times the rate being paid for comparable coverage in place when this agreement is executed.

Chances are, your client will require additional types of coverage, including commercial general liability, workers compensation, employers liability, and commercial automobile liability. We are here to help you obtain such insurance and assist your legal counsel by suggesting appropriate contract language regarding these coverages.

6) Dispute Resolution

When a dispute with the project owner arises, the most important question becomes: How do we resolve it?" In most cases, environmental consultants face one of three forms of dispute resolution.

The first is a claim that is taken to litigation. The two parties duke it out in public court, with the whole world watching. A judge or jury of varying degrees or knowledge about the environmental consulting process, makes its determination and you live with it, fair or not.

The second option is to take the dispute to arbitration. Here, a third-party is selected to listen to both sides of the dispute and renders a binding decision. The selected arbitrator is likely somewhat knowledgeable of environmental consulting, but has his or her own read on liability issues.

The third and our preferred dispute resolution technique is mediation. Here, a third-party mediator experienced in resolving disputes involving environmental consulting services works with both parties to find a mutually acceptable solution. The mediator does not impose a binding decision. Instead it helps both parties examine the situation and seek common ground and an agreeable compromise. Major advantages include:

- It is nonbinding and consensual. Both parties must agree to any settlement reached.
- It facilitates communication. Dialogue and negotiation is the key, not fault-finding and blame-laying.
- It is private and confidential. All information discovered and exchanged remains behind closed doors.
- It's controllable. The two parties to the dispute make all decisions. You are not at the mercy of an arbiter, judge or jury.
- It seeks consensus. The objective is to reach a win-win resolution, not find a winner and a loser.
- It is forward-looking. The focus is to solve the problem and get the project on track, not place blame for past mistakes.

Mediation has proven to be the most amicable and least costly form of dispute resolution. It has been so successful that many insurance companies provide monetary incentives to their insureds if their contracts with their clients stipulate that mediation will be the first dispute resolution method used to try to resolve project problems.

The time to establish mediation as your choice of dispute resolution is upfront when drafting your contract, not after a dispute has risen and one or both parties are upset and feeling wronged. Here is some sample language from XL Catlin to establish mediation as your dispute resolution of choice:

MEDIATION

In an effort to resolve any conflicts that arise during the design and construction of the Project or following the completion of the Project, the Client and the Consultant agree that all disputes between them arising out of or relating to this Agreement or the Project shall be submitted to nonbinding mediation.

The Client and the Consultant further agree to include a similar mediation provision in all agreements with independent contractors and consultants retained on the Project and to require all independent contractors and consultants also to include a similar mediation provision in all agreements with subcontractors, subconsultants, suppliers and fabricators, thereby providing for mediation as the primary method for dispute resolution among the parties to all those agreements.

These seven crucial contract clauses can go a long way toward limiting your liability and providing legal protection should a project upset occur.

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.