



YPG Quarterly Newsletter

(Lessons on Client-Consultant Contracts)
Spring 2015

Many young professionals are not exposed to contracts early on in their careers, leaving them to senior managers and legal departments while focusing more on developing technical skills. However, understanding contracts is essential in the consulting business, as every project needs to start with a signed contract that outlines the responsibilities of each contracting party.



My manager once told me that contracts are only reviewed when projects derail, meaning that clients may not exercise the signed contract to its full extent and that certain items may not be strictly enforced if the relationship is established and project delivery is successful. On the other hand, every contract word becomes critical in the event that project does go sideways, the relationship becomes broken, or one or both contracting parties are unhappy. Because of this one should always review contract terms with the question “What if something goes wrong?” in mind before signing and ensure that everyone’s responsibilities are clearly defined.

In addition to details on project scope and timeline, contracts also allocate risk between contracting parties. For example, Limitation of Liability clauses can serve to distribute a level of risk to the consultant that is appropriate for the work undertaken and fees received. At the risk of losing projects, consultants sometimes enter into agreements that have unfavourable terms with the hope that risk assumed will not be realized. But in some cases it may be better to simply walk away from a project than to sign a contract that could potentially result in a fanatical loss. For this reason it is important to always make sure to understand what you and your company are signing up for and what risks you are assuming.

In this newsletter read about the report from the ACEC-BC Agreement Task Force that summarizes problematic terms in the client-consultant contracts. As well, the newsletter provides some basic information you need to understand about contracts. We hope you enjoy this newsletter. Please feel free to get in contact with us for more information or to get involved! You can find us on Facebook, Twitter, or through email at info@acec-bc.ca.

Tijana Smiljanic, ACEC-BC YPG Provincial Chair

Also in this edition:

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Pay Attention to the Fine Print: Challenges with Professional Services Agreements

Mike V. Currie, M.Eng., P.Eng., FEC, President, Kerr Wood Leidal Associates Ltd.

In October 2014, the Board of Directors of ACEC British Columbia received a report from the Agreement Task Force. The Task Force had been asked to review the worsening trend of problematic terms in client-consultant agreements, and to make appropriate recommendations. This article summarizes the findings of the Task Force in the area of agreement concerns, and explains why consultants should be concerned.

The Problems with Agreements

There are three primary types of problems:

1. Problematic clauses and wording give rise to liability, business and financial concerns;
2. A multitude of different forms of agreement means that excessive management and legal time is required for review and negotiation; and
3. Terms of requests for proposals often discourage or preclude negotiation of unacceptable terms.

Over the years, there have been several attempts to implement standard professional services agreements (MMCD Client-Consultant Agreement in 2000, ACEC Document 31 in 2009, etc.). Overall, efforts to implement standard agreements in the consulting engineering industry in BC have been largely unsuccessful, and the above-noted types of problems remain. This issue remains one of the top business concerns of ACEC BC member firms.

Key Agreement Concerns

Member firms have identified numerous concerns with the many forms of non-standard agreements that are prevalent. Some key concerns are summarized and discussed below for the purpose of highlighting the importance of fair agreement language. This list is not intended to be complete or comprehensive.

Indemnification	Many agreements do not follow reasonable indemnification principles. Professional liability insurance covers errors, omissions and negligent acts. In order to tailor agreements to professional liability insurance policies, indemnification should be limited to errors, omissions and negligent acts. Indemnification should also be mutual between the parties, and be limited “to the extent that” the consultant was responsible.
Duty to Defend	Some agreements include a duty to defend that would require a consultant to pay a client’s legal bills in the event of an alleged problem. This results in an uninsurable risk akin to writing the client a blank cheque to cover legal fees and expert costs.
Limit of Liability	Many agreements do not include reasonable liability limits. Two ways to limit liability are: for a certain time period; and/or to some monetary limit. The new ultimate liability period under BC legislation is 15 years. For some projects this may be excessive, and a shorter liability period should be specified in an agreement. In the absence of a monetary liability limit, liability is unlimited.

Consequential Damages	Some project problems may lead to a loss in revenue or some other indirect damage. Where this is a possibility, liability from consequential or indirect damages should be negated in agreement language.
Claims Against Individuals	It is appropriate and reasonable for agreements to specify that the financial implications related to claims, suits or damages are corporate, not personal.
Standard of Care	Agreements should not require a professional engineer to meet a higher standard of care than that required under the Engineers and Geoscientists Act. This is defined as the standard that would be met by another qualified engineer acting reasonably under similar circumstances. Some agreements require an extraordinary standard of care (state-of-the-art, etc.) that exceeds professional responsibilities, and may give rise to unreasonable liability.
Warranty	Agreements should not stipulate that consultants provide a guarantee or warranty for their work. Consultants do not carry insurance that would cover warranty issues in the same way as a contractor would.
Site Safety	Safety regulations now often specify that some party take the prime responsibility for site safety. Consultants are seldom in a position to reasonably take this on. In most cases, agreements should not burden consultants with prime responsibility for site safety.
Intellectual Property and Ownership of Documents	Many agreements include provisions that overly vest intellectual property rights and ownership of documents with the client. ACEC BC, APEGBC and AIBC have adopted Intellectual Property Guidelines that, if followed, reasonably protect a consultant's intellectual property and ownership of documents. It is important that agreements have reasonable provisions, including provision that the client only acquires rights that have been paid for.
Disclaimers and Limitations	Some agreements restrict or prohibit a consultant's ability to incorporate appropriate disclaimers or limitations on work products. One particular concern is refusal to limit consultant liability in the event that the work is used in an unintended manner, such as on a different project or site.
Payment Terms	Some agreements provide wide scope for a client to hold back funds due to a consultant for specified time or until a final deliverable is approved. This may financially penalize the consultant for things beyond its control.
Termination	Some agreements provide for immediate termination by the client without fair compensation for a consultant's work to that point. Agreements are often silent on a consultant's right to terminate an agreement.
Dispute Resolution	Agreements provide for many different dispute resolution mechanisms, including negotiation, mediation, arbitration, court action. These are not always appropriate to the situation. Arbitration is generally not favoured by the providers of professional liability insurance.
Material Change in Insurance	Agreements often seek to have the consultant provide advance notice of material change in the amount of insurance available in the event of a claim. For conventional professional liability insurance policies, one type of material change may be erosion of insurance available to one client by claims against the policy by other parties. The consultant has no way of providing advance notice of this situation, and therefore should not agree to provide advance notice.

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A Recent Example

The agreement problem is illustrated by a recent local government example:

- a client issues a request for proposals;
- the RFP includes the client's standard agreement;
- several member firms contact ACEC BC to express concerns about the proposed terms of agreement, the procurement process, and the 30% weight on price in proposal evaluation;
- several well-qualified member firms decline to submit proposals for the project as a result of the concerns, primarily the proposed terms of agreement;
- ACEC BC submits a letter to the client expressing concerns and suggesting solutions;
- the client responds with a letter thanking ACEC BC for its comments and concerns, and advising that proposals were received from 7 qualified firms.

This example highlights the fact that improvement in agreement terms is being hampered by unwillingness of clients to change, but also the willingness of member firms to sign.

Need for Action

The Task Force concluded that multiple actions are needed in order to improve agreement language in British Columbia. It was suggested that ACEC BC develop an action plan that includes the following components:

- educate clients and member firms;
- consider policy and governance initiatives through the charter of membership and otherwise;
- continue to develop and implement standard agreements;
- work directly with key clients for whom custom agreements are justified;
- provide support for member firms during proposal calls and agreement negotiation; and
- get non-member firms to join ACEC so they don't undermine industry efforts through lack of awareness.

ACEC BC was very receptive to the Task Force report, and continues to advance this initiative for the benefit of the industry.

Boiler Plate is Not Always the Answer

Matthew G. Swanson & Bill M. Woodhead, Borden Ladner Gervais LLP

In their most basic form, construction and engineering contracts detail what, when and how something will be built; but construction and engineering contracts also allocate risk between the contracting parties. The most cautious parties will not simply rely on boilerplate, but instead will carefully negotiate their contracts to ensure that they understand and are comfortable with the degree of risk undertaken. That said, the perfect contract - the one that perfectly fits every aspect of the project and each of the parties' needs - has yet to be negotiated. This is because there is always a divergence of interest between contracting parties and this divergence of interest is always at play when the issues of limitation of liability and termination are raised.

Limitation of Liability

Limitation of liability clauses are one way that parties can attempt to put express limits on the types of risk or damages that they may be liable for should they encounter problems on a project. Limitation of liability clauses may impose monetary caps on liability, such that one party will only be liable to the other for a specific maximum amount, or they may exclude liability for certain losses, such as loss of profits. The goal in all of this is to ensure that a single "bad" contract does not destroy a company.

Termination Clauses

A termination clause, which gives one party the right to terminate the contract for certain reasons, can have a significant impact on the allocation of risk in a contract. An owner will often seek the right to terminate a contract for convenience while restricting the contractor's right to terminate to the occurrence of specific events such as an owner bankruptcy. The consulting engineer may want the right to terminate on any breach of contract by the owner, particularly defaults in payment. Careful consideration must be given to what triggers a right of termination and what consequences flow from such termination. It is also important to identify the contractual rights that will survive termination of the contract, if any, and what compensation the parties are entitled to should a termination event occur.

General Considerations

The appropriate way to deal with a proposal to include limitation of liability and termination clauses may not be solved with boilerplate terms and conditions, particularly if those terms and conditions are to be used for different projects and contracts. Each project and each contract will have specific issues, and prevailing market conditions may dictate what advantages the parties can secure. It is paramount that all parties be aware of the implications of all contractual terms and their respective importance in assessing the risks and ramifications of entering into a contract. Failure to be aware of such implications may result in unexpected losses and can increase the risk of disputes.

This article is provided for general information only and may not be relied upon as legal advice.

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Contract Primer - Six Things You Need to Know

Jeff McLellan, Practice Leader for Architects and Engineers - Western Canada
BFL CANADA Insurance Services Inc.

The difference between a successful project and an unsuccessful project could come down to the relationship between you and your client. An important part of any relationship is the foundation upon which it is based. A properly drafted and clear contract is what defines your relationship and therefore it is paramount that the contract be given proper consideration prior to signing. It is an unfortunate fact but 40% of all claims advanced against engineering firms in Canada are still on projects where there is no signed contract. No matter how often people preach and praise the importance of a contract in seminars, articles and newsletters this statistic is unchanged from 15 years ago. As each of you moves forward in your careers you will likely become more exposed to this topic and therefore I thought I would take this opportunity to dust off my soap box and share with you six things that I believe you need to understand about contracts.

1. **Don't re-invent the wheel.** Engineers are thinkers and problem solvers, that being said standard association contracts exist for a reason, someone has already solved the problem for you. Contrary to the popular belief of your clients and their legal advisors standard contracts are not one sided but in fact are balanced and have been drafted by committees which include or sought input from client groups, lawyers and insurance companies to insure that all appropriate issues were addressed. If your client is insisting on their own agreement, find out why and take the time to compare the language with one of the standard association ones.
2. **You are engineers and not lawyers** (Unless you happen to have also completed law school in which case you are possibly both, but even then are you a lawyer who is experienced with contracts?). Any significant deviations from the agreed standard contract language should be reviewed by a lawyer. Over the years we have seen many proposed changes that had significant implications to the risks being assumed by the engineer, some of these contractual changes could result in the engineer's professional liability insurance not responding to a claim that would have otherwise been covered or even voiding the engineer's policy.
3. **LOL - Limitation of Liability clauses** are one of the most important parts of any agreement between an engineer and their client. They can be agreed in various forms to address the length of time a claim can be brought against the engineer, the value of the claim that can be advanced and also deal with specific types of claims (i.e. consequential losses). A properly drafted Limitation of Liability clause serves to allocate an appropriate level of risk to the engineer for the type of work being undertaken and the level of fees being received. Unlimited liability only makes sense for your firm if you are receiving unlimited fees and based on my past experience that doesn't happen. Below is a link to the ACEC-BC's Position Paper on Limitation of Liability clauses:

<http://www.acec-bc.ca/media/5798/acecbcPositionPaper-1006.pdf>

4. **If you don't know what you are doing how will your client?** Scope of Services is another very important part of any contract. It should clearly outline the services you will be providing, those that you can provide for an additional fee and those that you will not be providing. Ambiguity in your scope is something that should be avoided. I normally recommend that firms encourage internal peer reviews of draft scope language, it is a good exercise to undertake and can sometimes catch items that may have otherwise been overlooked.
5. **Not all risks are insurable.** It is important that you understand what risks are insured and which are business risks. Business risks can easily erode any and all profit on a project if not properly addressed in your contract. Examples of this would be fines and penalties for project delays which would not be insured by an engineer's professional liability insurance.
6. **You are not paperclips!** Simply put Purchase Orders for the procurement of engineering services are not good business. Purchase orders are normally pushed on firms by large clients and they will not be deterred from this practice as long as engineers are willing to accept this practice. If you are not able to get away from a PO it is recommended that your proposal specifically reference that the agreement to work with that client will be subject to a standard association agreement.

I am happy to answer any questions on this topic or others so feel free to contact me.

SciTech Camp - Volunteers Needed

Telus World of Science is running a Science and Technology summer camp for kids ages 10-12 between June 29 and August 28, 2015. Part of the camp will include an introduction to engineering, where the camp attendees will have the opportunity to meet professionals in the engineering field. If you are interested in volunteering to help introduce young students to the world of engineering, or would like more information, email us at yppg@acec-bc.ca.

ACEC BC Young Professional Award



Congratulation to our very own **Mark Byram** for winning the ACEC BC Young Professional Award.

The ACEC-British Columbia Young Professional Award recognizes an individual young professional who has demonstrated excellence in consulting business practices, outstanding achievements in their applicable fields, and leadership in the community.

Mark Byram, a Professional Engineer in Levelton's Materials Division. As the Group Leader of the Vancouver Island Region, Mark is responsible for the business development and overall operation of the group, which includes overseeing and mentoring staff at the offices in Victoria and Nanaimo.

He has more than 9 years of experience in the fields of construction materials engineering, testing, inspection, and evaluation of engineering materials. His experience includes concrete, masonry and coatings technology. Much of Mark's experience relates to the assessment and rehabilitation of corrosion damaged structures.

He has developed recognized expertise in several related fields, including: quality assurance and quality control of materials used in construction, heritage construction materials, selection and application of coating systems for concrete / steel, and structural health monitoring of infrastructure.

His professional experience has been gained working for a broad range of clients including federal and provincial authorities, private developers/owners, general contractors, Canadian and International universities, cities, municipalities as well as other consulting engineering firms. The sectors in which he has worked include power generation, transportation, water, wastewater, building services, marine and national defense.

Mark has served as Regional and Provincial Chair of ACEC-BC's Young Professionals' Group, and as an ex officio member of the ACEC-BC Board of Directors. He is currently acting as Chair of the ACEC-BC Professional Development Committee.

2015 Breakfast Seminars

Below is a partial list of upcoming Breakfast Seminars for the ACEC BC YPG. Please note that this information could change in the future, so please visit the [Events Calendar](#) for updates!

Okanagan Group - Kelowna

21-May-2015	Speaker: Daryl Schwarz, B.Sc., P.Ag., and Ingrid Gordon, B.Sc. Topic: Glenmore Landfill in Kelowna: Planning and Upcoming Projects
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Check out our webpage: <http://www.acec-bc.ca/young-professionals>.