
PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 09/02: "Retaining an Adequate Scope of Services"

September, 2002



Retaining an Adequate Scope of Services

Cost-conscious clients continually look for ways to cut expenses and bring in their projects within or even under budget. A likely target for these cost-cutting efforts is the design professional.

Clients, for example, may attempt to limit the services performed and paid for to what they perceive as the bare-bones minimum. Others may attempt to use vague language in their agreements, such as *"provide any and all design services necessary for the completion of the project,"* and then try to squeeze every service imaginable out of the design firm for an inadequate fee.

Keep in mind that it is risky to take on any type of assignment that is unclear or reduces the scope of services below that which is prudent and usual for your profession.

For example, agreeing to perform design without construction-phase services prevents you 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 inevitably arise in the field during construction. And if brought into a claim, a court or arbitrator may decide that you did not act as a reasonably prudent design professional should have, even though you were not contracted to perform con-

struction observation as part of a full scope of services.

One of the best ways to make sure you are paid adequately for your work and avoid misunderstandings about a project is for you and your client to have agreement on a clear scope of services. Importantly, a client who agrees up-front on which services you will and won't provide is a client who is less likely to be confused about your responsibilities – and liabilities – should a problem develop later.

Work with your client to develop a well-defined scope of services. Help the client define needs and expectations, and explain how those expectations can best be met. This will give the client a better un-

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derstanding of your role in the construction process and the full range of services that are available. 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 must be performed, but will be carried out by a third party

The fourth type of service is often overlooked, yet very important to spell out. You can be liable for failing to perform a service you knew was required for successful project completion – even if you were not contracted to provide that service. Therefore, design firms need to talk to their clients about required services they will *not* be performing under the scope of services, and identify the third parties who will be providing them. This discussion not only avoids potential liabilities, it offers an opportunity to market additional services for an additional fee.

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 the standard AIA or EJCDC agreement as a starting point and then customize it to fit your own practice. A sample scope of services checklist, adapted from Case Document 2-1993, is shown on pages 3 and 4.

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 services are included and not included as basic services, as well as remarks noting whether non-basic services are available for an additional fee, or are to be performed by a third party. 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 could then become 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 agree-

ment, consider this sample contract language provided by the professional liability insurer DPIC Companies:

Scope of Services

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 (e.g., surveying) and tasks (e.g., detailed cost estimates) that will not be performed. If possible, these should be included as part of the work agreement. Here is a sample of contract language from DPIC Companies 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 from another source or to forgo these services. The recommended services excluded from this Agreement are listed in Excluded Service, Exhibit B.

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 sub-consultants (collectively, Consultant) from

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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.

Lacking a separate contract provision on excluded services, 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 re-

sponsibility 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.✕

Disclaimer: This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.

Scope of Services Checklist

Project Development Phase

- Define scope of structural services
- Assist in development of schedule
- Assist in determining channels of communication
- Assist in determining responsibility for dimensions
- Assist in determining drawing standards and specifications format
- Assist in determining number of meetings and number of site visits
- Negotiate fees and payment schedule
- Execute contract

Schematic Design Plans

- Attend meetings
- Establish structural design criteria
- Prepare studies of alternative structural systems
- Assist in selection of structural system
- Provide structural criteria for geographical consultant
- Assist in determining need for special studies

Design Development Phase

- Attend meetings
- Prepare preliminary foundation drawings
- Prepare preliminary structural design calculations
- Prepare preliminary framing layout drawings
- Prepare typical detail sheets
- Identify pre-engineered structural elements
- Prepare or edit outline specifications for structural items
- Assist preparing preliminary opinion of cost of construction
- Review results of special studies
- Coordinate structural design with special design criteria
- Submit design development documentation for approval

Scope of Svcs Checklist (Continued on page 4)

Contract Document Phase

- Prepare structural design of preliminary structural system
- Designate elements to be designed by specialty engineers, and specify structural criteria for specialty engineers' design of pre-engineered structural elements
- Review effect of secondary or non-structural elements attached to primary structural system
- Attend meetings
- Assist in coordination with building code officials
- Complete structural calculations
- Complete structural drawings
- Prepare or edit specifications for the primary structural system
- Assist in establishing testing and inspection requirements
- Perform checking and coordination of the structural documents

Construction Administration Phase

Bidding and Award

- Assist in evaluating bidder's qualifications
- Provide structural addenda and clarifications
- Assist in bid evaluations

Pre-Construction Services

- Attend meetings
- Assist in establishing communications procedures
- Assist in establishing testing and inspection procedures
- Assist in confirming submittal agency
- Assist in selection of testing procedures
- Advise client and contractor regarding which structural elements require construction observation by SER
- Respond to building department and peer review comments

Submittal Review

- Review special submittals for items designed by SER
- Review submittals for pre-engineered structural elements

Site Visits

- Make site visits at intervals appropriate to the stage of construction
- Prepare visit reports

Materials Testing & Inspections

- Review testing and inspection reports
- Initiate appropriate action to those reports, if required ✕

The Sixth Commandment of Loss Prevention: Never Begin Services Until the Agreement Is Completed

*Excerpted from "Ten Commandments of Loss Prevention"
by Gunther O. Carrle, Esq.
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All too often the parties begin to discuss the terms of the agreement just before the services are to begin. It is much more difficult after the work has started to negotiate the terms of the agreement.

Frequently, where there has been no dispute during performance, many of the typical safeguards are ignored. Remember your agreement can come back to haunt you many years after the project is completed. ✕

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