

# PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 09/2004: "Details, Details — Drafting Your Scope of Services"

September, 2004

## Details, Details – Drafting Your Scope of Services

Article courtesy of Professional Liability Agents Network (PLAN)

### **"The devil is in the details"**

It's an old axiom design firms are very familiar with. When it comes to drawings and specifications, quality is indelibly tied to the proper execution of each and every design detail. Leave that one critical detail out, and it seems that the omission inevitably leads to expensive trouble – a leaky roof, a cracked wall, or an HVAC systems failure, for example.



Yet, while architects and engineers spend countless hours ensuring their design specifications are detailed to the nth degree, they are often not as meticulous with an equally important document: the scope of services within their contract with the owner. With the scope of services, the devil is in the *lack* of details.

The absence of a clear and comprehensive scope of services is a major cause of disputes, claims and counter-claims between a design firm and its cli-

ent. Without a clear project scope, negotiated and agreed to by both parties, client expectations are rarely met and design firms often find themselves facing demands for delivering far more services than they intended to perform.

**Drafting Scope** (Continued on page 2)

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## It's Your Responsibility

In many cases, problems regarding a vague or inadequate scope of services are simply the result of a lack of knowledge of the design and construction process on the part of the client. A client-drafted contract may simply include vague, comprehensive language, such as “*provide any and all design services necessary for the completion of the project.*” In other cases, however, clients may purposely specify a bare-bones scope as a cost-cutting effort. They may limit the specified services in the agreement in an attempt to control fees. Then, once the project begins, the client may attempt to squeeze every service imaginable out of the design firm for the inadequate fee.

It is the designer's responsibility, therefore, to ensure that a clear and complete scope of services is negotiated prior to signing any client agreement. It is far too risky to take on any type of assignment 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 design services without providing construction-phase services you are prevented 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 arise at the jobsite. And if brought into a claim on such a project, a court or arbitrator may decide that you did not act as a reasonably prudent design professional, even though you were not contracted to perform construction observation as part of your scope of services.

## Negotiating Your Scope

Negotiating a clear scope of services is one of the best ways to make sure you are paid adequately for your work and to optimize your chances of meeting your client's every expectation. The negotiating process helps your client more clearly define needs and expectations and gives you the opportunity to explain how those expectations can best be met. It will also give your client a better under-

standing of your role in the design and construction process 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. Services you can perform for an additional fee
3. Services you will not perform
4. Services that will be performed by a third party

The fourth item – required services performed by others – is often overlooked but very important to spell out. As the 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.

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 items are included as required services, which of these basic services are to be performed by third parties, and which non-basic services are available for an additional fee. 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 should become a 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 agreement, consider this sample contract language provided by professional liability insurer XL Professional Liability:

### *Scope of Service*

*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 Ex-*

hibit 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 and tasks that will not be performed. These should be included as part of the work agreement. Here is sample 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 in this Agreement and has decided to obtain those services from another source or to forgo those services. The following recommended services are therefore excluded from this Agreement:*

#### **{Listing or annotated listing of Excluded Services}**

*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 subconsultants (collectively, Consultant) from 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.*

If you are unable to get the client to agree to such an indemnity agreement, 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 responsibility 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. ✂

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**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.

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# Scope of Services Checklist

*Article courtesy of Professional Liability Agents Network (PLAN)*

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 the Coalition of American Structural Engineers, is shown here:

## **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

**Sample Scope** (Continued on page 5)

**Sample Scope** (Continued from page 4)

## **Contract Document Phase**

- Prepare structural design of primary 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 evaluation

### **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 site visit reports

### **Materials testing and inspections**

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