



## GUEST ESSAYS

### **Effective Risk Management Involves Reviewing Even the Most "Standard" of Contracts....**

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The most common refrain I hear when talking to clients about contract review and administration is: "I only sign a standard contract".

They feel there is no reason for contracts to be reviewed prior to signing, because they only sign a standard contract. Unfortunately, the only standard contract I ever see is one in which an owner or client uses and wants their consultants and contractors to sign. Ironically, one of the few things that makes it a standard contract is the omnipresent broad hold harmless/indemnity and defense clause.

Contract review and administration is probably one of the most important aspects of a prudent risk management and loss prevention program. A contract that any consultant or contractor signs should identify their rights and responsibilities to the owner and third parties. All of this should be determined at the "request for proposal" stage, allowing the consultant or contractor to identify, evaluate and treat the risks in the owner or client standard contract. Please remember that no one is putting a gun to the consultant's head when he signs the contract; so it's absolutely essential that the consultant knows what he is signing and what his rights and responsibilities are when negotiating for future work.

The prudent consultant or contractor should discuss all contracts with their counsel and agent before signing. Some general practice tips to consider when reviewing contracts are:

- **Scope of services:** Think about whether the contract is exactly what you thought it was going to be in terms of encompassing more or less services, added responsibilities or services outside your area of expertise. It is also wise to describe things you are **not** doing to reduce the potential for misunderstandings.
- **Change orders:** Find out if the owner is allowed to change the scope of work once under way, and, if so, under what conditions. For instance, look at what input or options you have and what time frame you have to consider this.
- **Warranties and guarantees:** First, you have to know if there are any. Try not to assume any, and don't agree to unreasonable ones. Don't forget that all professional liability policies exclude the assumption of liability, which turns out to be a warranty or guarantee.
- **Compliance with all laws, regulations, etc.:** These responsibilities can be difficult to live up to since no one knows what all the laws, regulations, ordinances, rules, etc. are, much less how to comply with them.
- **Permits:** Figure out what type of permit requirements are necessary and if you are qualified to obtain those permits within the time parameters allowed.
- **Safety:** Determine if you are responsible for health and safety on the job sites. If so, this could be a big problem because you assume this responsibility for everyone on the job-site, in addition to your own employees. This little caveat can wreak havoc with anyone who is not careful about assuming job-site safety responsibilities in a contract.
- **Liquidated damages:** Liquidated damages are really a means for the owner to penalize you through the contract. This can create added uninsured risks and costs if you are not able to meet the mandated time requirements. Extreme care should be taken and this requirement should be deleted since, again, they aren't insurable.

- **Termination of the contract:** When looking at the contract termination conditions, find out if they are one-sided or if you have an opportunity to have your contract terminated for only reasonable causes. Also find out how any future payments will be handled. Try and use common sense and make the transition process reasonable.
- **Insurance requirement:** Know what type of coverage will be required and what each one covers or excludes. Some of these different types include: commercial general liability, commercial auto liability, pollution liability, worker's compensation, umbrella coverage and professional liability. Most consultants and contractors either forget or don't realize that most if not all of the standard automobile, general liability and umbrella policies contain an absolute pollution exclusion. Professional liability policies offer far broader pollution coverage, but the "hands-on" exposure may not be covered. Also, liability policies respond to claims, which arise out of your negligent acts, errors or omissions and quite possibly those of your subcontractors. So, find out if your subcontractors have the same coverage and limits that you do and if they have any type of pollution coverage. The answer is usually "no", and it's a hard pill to swallow when you realize that you are responsible for their lack of coverage and limits because of that "standard contract" you signed.
- **Additional Insureds:** Many people think it's the greatest thing since sliced bread to be named as an additional insured, but few remember there is a specific exclusion in the professional liability policy that excludes coverage for suits brought by or on behalf of one insured against another. Unfortunately, the owner or client's motto is often "don't confuse me with the facts, my mind is made-up". Also when dealing with the non-professional coverage, find out if the owner or client has considered how their other insurance clause in their coverage comes into play in the event of a claim. There is always the possibility of conflicts that can arise if this approach is not properly understood.
- **Multiple reviews:** When you get the RFP, please let your agent and attorney review the owner or client's requirements so you can modify the contract or purchase the additional coverage as required, if it's available. As you can see, the phrase "standard contract" is a misnomer. Remember that a contract is the one document that can be devastating to you in the event of a problem or claim while performing services for the owner or client. Don't permit the client's attorney to transfer "any and all risk" to you in order to protect his client. Negotiation should be fair and conducted at the RFP stage. You should not accept the responsibility of a one-sided contract, and if that's all that is available, you should consider not accepting the work.

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