

LOSS CONTROL AND RISK MANAGEMENT CHECKLIST

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I. PRE-CONTRACT

Client Selection

- (a) Investigate the business integrity, financial capacity and litigation history of your potential client. Do not be afraid to contact fellow professionals to ascertain these criteria as well as utilizing your own intuition.
- (b) Assess the opportunity for establishing a good working relationship with your client.
- (c) Be wary when taking over a contractual mandate from a previously engaged design professional on the same project. Exercise caution when utilizing previously prepared plans and specifications, with their inherent unknowns or when picking up contract administration (field services) commenced by others in the midst of the course of construction of a project.

Project Selection

- (a) Consider the unique characteristics and requirements of the project in light of your expertise and firm capabilities and resources.
- (b) Do not oversell the project or guaranty your firm's capabilities to perform to such an extent that your client's expectations for the project are raised to a level which can never be achieved. Never guaranty your firm's ability to achieve a particular result.

II. PROJECT ORGANIZATION

- (a) Consider whether your client has his project financing in place before committing to the job. Ensure that his financing structure includes your professional fee.
- (b) Analyze the need for and assess the availability of subconsultants likely to be required in connection with the design and field services for which you are to be responsible.
- (c) Estimate the input which will be required from both yourself and your subconsultants on the project. Do not render advice outside your expertise relating to the project schedule, budget or design without obtaining necessary source data from subconsultants.

III. CONTRACT FOR SERVICES

Form of Contract

- (a) Verbal contracts with your clients or subconsultants are not acceptable.
- (b) Standard contract forms or customized agreements created or approved by legal counsel familiar with construction practice and its potential liability exposures should be used on all projects so as to adequately detail the rights and obligations of the contracting parties to one another.
- (c) Contracts should be reviewed in order to ascertain that their provisions are appropriate to the unique requirements of individual projects.

- (d) Where possible, suggest your own form of contract before your client suggests his own form with its built-in prejudices in his favour.

Content of Contract

- (a) Your contract should provide for adequate compensation for the required scope of professional services, particularly with respect to field services, and your client should be educated as to the direct benefits accruing to him from such provisions.
- (b) Ensure that the contract provides you with sufficient authority to enable you to act effectively as the client's agent on the project.
- (c) If possible, the contract should include a limitation of your professional liability, preferably to the amount of your professional liability insurance coverage as well as a limitation of the time period within which a claim may be brought against you.
- (d) You should understand the meaning and intent of all of the provisions of your contract. Do not sign any agreement whose terms are not totally understood or containing any terms inappropriate to the project under consideration.
- (e) Be vigilant for client drafted indemnification provisions requiring guarantees or warranties of performance which may operate to obviate the coverage provided by your professional liability insurance.

Subconsultants

- (a) Your client should be encouraged to contract directly with any necessary consultants in order to avoid

vicarious liability accruing to yourself as prime consultant for their errors and omissions. In such circumstances, ensure that the contractual mandate of the consultants provides for overall project coordination by the prime consultant so that project continuity may be maintained in your hands, without subjecting you to liability exposure resulting from the errors or omissions of the consultants on the project.

- (b) If you are required to engage subconsultants, ensure that they are sufficiently insured for professional liability in the event that they are negligent in a situation where you, as prime consultant, will be legally responsible in the first instance for their errors.
- (c) Ensure that all of the members of the design team are aware of the provisions of the design and construction contracts on the project so that they can perform their design and contract administration roles in the most efficient manner possible.
- (d) Establish a procedure at the inception of the project to ensure that each member of the design team understands his responsibilities and roles on the project and as to how these interface with the other members of the team.
- (e) Identify the basic services required for the project and select members of the design team who are experienced and qualified in those particular areas.

IV. CLIENT RELATIONSHIP

- (a) Develop a written project program which is agreed to in writing with your client outlining the scope of the project. This program should be agreed to prior to rendering any professional services, and should be prepared for both large and small projects.
- (b) The project program should define the client's project needs and long-range goals, functional requirements, space requirements, cost limitations and time constraints.
- (c) Establish the clients single-point liaison who will have authority to receive project input from yourself as prime consultant and to expeditiously give required authorizations and approvals as the project proceeds.
- (d) Educate and keep the client informed concerning the nature of your various services and emphasize as to how these operate to protect him as opposed to protecting you from future project problems and claims.
- (e) Establish a schedule of regular project status meetings and an "open door" policy encouraging communication both to and from the client. Prepare and distribute as soon as possible accurate minutes of project meetings to all involved parties and invite corrections thereto.

V. RELATIONSHIP WITH THE GENERAL CONTRACTOR

- (a) Delegate a single individual to act as liaison with the contractor with respect to all contract administration and design clarification functions required of your office.

- (b) Endeavour to maintain an atmosphere of fairness and objectivity in acting as prime consultant between owner and contractor on the project. Always opt for cooperation rather than confrontation, and advise both the owner and the contractor that your job is to be impartial in administering the construction contract.
- (c) Do not advise or direct the contractor as to his construction means, methods, techniques, sequences, procedures or safety measures relating to the work defined by the contract documents which you or others have prepared for the project.
- (d) Prepare contract documents for the project which are compatible with your own contractual mandate so as to avoid situations where both the owner and the contractor will be expecting you to fulfill functions described by the contract documents which are not included or properly described within your own agreement.
- (e) Set up an agreed procedure for processing project paperwork prior to the commencement of construction, including procedures for dealing with the contractor's payment applications, change orders, design changes or clarifications and for resolving project disputes as expeditiously as possible.
- (f) Be careful to ensure that, as the owner's agent on the project, you do not yourself enter into contracts for the procurement of labour, materials or equipment for incorporation into the project. All contracts must be entered into only as agent for and on behalf of your disclosed principal, your client, the project owner.

- (g) Do not exceed the parameters of your authority to act as prime consultant on the project as defined by both your contract with your client as well as the contract between the owner and the contractor.
- (h) Seek independent legal advice concerning difficult questions of contract interpretation or your insurance broker's advice concerning questions of insurance or suretyship. Seek the advice of consultants with regard to areas of engineering or other expertise which you do not possess.

VI. RECORD KEEPING

- (a) All contracts, subcontracts, change orders, change requests from the owner or the contractor and other significant project generated documents should be committed to writing, categorized and permanently archived for future reference.
- (b) All project meetings should be fully documented, and expeditiously circulated to all participants, with a request for any necessary corrections or clarifications.
- (c) Significant telephone calls and advice to and from the owner and the contractor should be noted in writing.
- (d) Photographs should be taken of important project events during construction and properly dated and labelled as to the photographer's name, the subject-matter of the photo and any other distinguishing characteristic of the photograph which will be

important to its use as evidence at a later Court or arbitration proceeding.

- (e) Daily job site diary reports should be prepared contemporaneously with the occurrence of significant events.
- (f) All events involving any change in the scope of professional services or the contractor's work, compensation or any project problems or disputes should be documented with follow-up correspondence to all affected parties, with detailed memoranda to file as appropriate to describe the matters in question.
- (g) Because the limitation period for bringing lawsuits against you as a design professional may be open-ended, you must retain all of your project documents permanently.
- (h) Prepare your project documentation with the realization that in a future dispute it will all be producible to the scrutiny of all parties on the project and their lawyers. Ultimately, a judge will review both your words and your conduct in deciding upon your fate in a professional liability claim.

VII. FIELD SERVICES

Scope Of Services

- (a) Educate your client to grant you a sole professional discretion field service contractual mandate which will allow you to determine your actual time expenditure necessary on the project site. In this way, you can endeavour to maximize protection to the client by ascertaining that the contractor's work generally

conforms to the design represented by the contract documents which you have prepared for the project.

- (b) If your client decides that he requires no field services to be performed, forward written confirmation of that decision and advise that you will bear no responsibility for matters arising during the course of construction which would, but for the client's decision, be the subject of your field review. In such circumstances, also advise the client that you will not be issuing unqualified project certifications or advice to the client, bonding companies or to financial institutions regarding either the quantitative or the qualitative status of the construction work. Do not certify "site/sight" unseen.
- (c) If you are taking over a project from another design professional, confirm in writing to your client the limitations inherent in your ability to assess the quality or quantity of previously completed work which may have been covered up as well as its conformity with the project contract documents. Also advise the client that you may require to qualify any certifications which you may give on the project to reflect that fact.
- (d) If you are superseding a previous design professional on a project, or if you have been engaged to review his designs, ensure that you so advise the previous professional in writing that you are taking over his design or reviewing same on behalf of the client prior to proceeding with such services.
- (e) Avoid either expressly or impliedly guaranteeing the adequacy of the work of the general contractor or the subcontractors on the project.

- (f) Do not "approve" shop drawings prepared or submitted by others on the project. Review shop drawings only for general conformity with project dimensions or other explicitly defined requirements which you are capable of and are being paid to assess.
- (g) Establish communication continuity between personnel responsible for design and field personnel responsible for ascertaining conformity of that design with project contract documents and good construction practice.
- (h) Utilize the services of specialist subconsultants for those aspects of the work which are beyond your own sphere of expertise and ensure that those subconsultants are carrying sufficient levels of errors and omissions insurance as a pre-condition of working for you.
- (i) Set up a procedure so that all important project correspondence between the owner and the contractor will be required to go through your office so as to enable you to properly monitor and defuse potential problems and sources of conflict on the project.
- (j) Update your client regularly as construction of his project proceeds as to the status of the work.
- (k) Monitor any updated project schedules prepared by the contractor and advise your client of any potential revisions to his anticipated occupancy date.
- (l) Scrupulously follow all notice provisions in the construction contract between the owner and the

contractor in acting as the owner's agent in dealing with the contractor on the project.

VIII. CLAIMS

Procedures

- (a) Set up in-house quality control procedures such as re-checking of design work and peer review of contract administration procedures.
- (b) Utilize legal counsel in the preparation and review of tender and other project contract documents as well as for general contractual and claims advice during the course of the project.
- (c) Apply pre-set claims procedures, including:
 - (1) early identification and assessment of potential claims against you originating with your client or with others;
 - (2) immediate provision of notice of potential claims to professional liability insurer and insurance broker;
 - (3) personnel and document control in preparation for the defence of any claims brought against you;
 - (4) avoiding any admissions of liability or waivers of legal rights until you have obtained the input of legal counsel and your professional liability insurer.

(d) Content of Reports

- (1) give complete descriptions and full details of the circumstances giving rise to the claim;
- (2) if one or more claims have been made against you because of an alleged act, omission or personal injury, and if further claims from the same act etc., or arising out of a series of related acts, etc., are expected, state this in the report;
- (3) if more than one transaction or set of services is involved, describe each;
- (4) if more than one client or potential claimant exists, identify, if possible by name, those persons or entities whom you expect may make a claim against you;
- (5) if you are unable to clearly identify all potential claimants, your report should indicate that there could be a number of claimants, some of whom are presently unknown.

(e) Verification of Your Records

- (1) keep a copy of all reports and correspondence concerning claims and potential claims. These will be important if the timeliness or sufficiency of a report is challenged later by your insurer.
- (2) Check your firm's records to be sure that you have received acknowledgment by or on behalf of

the insurer for all reports made to date. If you have not received such an acknowledgment, follow up immediately.

(f) Office Systems for Reporting Claims

If your firm has not already done so, now is a good time to develop your own system for reporting. We suggest that you make one person in the firm responsible for reporting all claims and potential claims. That person should:

- (1) interview each member of the firm to identify every matter to be reported;
- (2) submit and monitor the reports and provide the cooperation required by the insurance policy;
- (3) keep the firm informed of the progress of claims made against it;
- (4) educate the firm about the causes of claims and develop methods for preventing a repetition of similar claims in the future.

Such a person can generally keep the firm apprised of changes in the insurance program and dangers created by new exclusions or conditions of coverage.

Insurance

- (a) Maintain adequate professional liability insurance coverage with appropriate policy deductible and limits. Ensure that you have an insurance broker who is both knowledgeable in professional liability matters and has the ability to communicate with you and with your

insurer with regard to ongoing liability and insurance coverage concerns.

(b) Be aware of problems concerning common errors and omissions insurance exclusions, such as:

- (1) performance of services not customary to your profession;
- (2) failure to complete drawings, specifications or other contract documents on time;
- (3) the giving of warranties or guarantees which will operate to increase your normal professional liability exposure;
- (4) the giving of estimates of profit or return on capital;
- (5) becoming involved with the client to the point where you either directly or indirectly have an interest in the client or where the client has such an interest in you;
- (6) advising or failing to advise your client concerning any form of insurance, suretyship or bond;
- (7) participating in a joint venture, partnership or any other entity which has not been endorsed on your errors and omissions insurance policy.

(c) Obtain and maintain separate personal coverage if your former firm goes out of business, fails to renew its liability insurance or if you retire and your former

firm is guilty of either of the two aforementioned activities.

Professional Fee Claims

- (a) Objectively consider, with the benefit of independent legal counsel, the potential net fee recovery in any claim you may bring against your client relative to the amount involved and the legal and time expenditures necessary to proceed by way of litigation. Also consider the likelihood of provoking a counterclaim by your client for professional negligence which will involve your professional liability insurer and likely considerable reputation impugment for yourself.

- (b) Consider the pros and cons of filing a builder's lien against the project property for the full amount of unpaid fees for design and field services, but only if field services have been performed. Be advised that a professional's builders' lien claims also frequently result in counterclaims against the design professional by your client.

- (c) Endeavour to set up alternative security mechanisms with the client to facilitate payment of your future accounts for professional services, especially after a dispute has arisen on the project.

- (d) Ensure that your contract with your client stipulates that unless and until you have been paid your professional fee on the project, the client will not have the right to employ any plans, specifications or other contract documents which you have prepared for any purpose in connection with his project.

- (e) Endeavour to structure your contracts so that you are paid based upon an hourly or per diem rate rather than have your fee based upon a lump sum or percentage of the cost of the work, particularly in the critical field service phase of your services.