

Managing Risk On Construction Surveying Projects

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Construction surveying has the potential to generate significant revenue for many surveying and engineering companies. Some firms provide these services in order to maintain a presence at the job site and reduce liability exposure while their internally prepared designs are being constructed. Other larger firms, with a group specializing in construction surveying, seek out these opportunities and actually thrive in the "hard bid" world of the general contractor. Working for the general contractor is not for the inexperienced surveyor or the faint of heart as competition is fierce, liability lurks around every corner, and mistakes are costly. In today's roller-coaster economy many surveyors jump at every opportunity to keep busy by working on the few construction projects that present themselves.

Leave their terms intact and add negative-scope items, terms, or conditions that address your "deal-breakers."

Mitigating the risks taken by the professional construction surveyor is not an easy task. While negotiating any contract, you must assess the risks you are about to take and consider the potential rewards of the project. Know your clients and develop a comprehensive go/no-go check list to determine whether or not you should even propose on the project.

Tough Negotiators

General contractors are tough negotiators and will very rarely sign a professional services agreement developed by surveying or engineering associations.

Even more rarely will they accept a limitation of liability clause. Many surveyors acquiesce to the contractor's demands and sign a contract structured for subcontractors who provide materials or products. Many times a majority of the terms of these contracts are not even applicable to the services surveyors provide. Some of the reasons surveyors acquiesce are: timing of the work; ignorance of contract term definitions and their consequences; competitor concessions; fear of client alienation by openly confronting them with the issues; and an attitude of, "I won't get sued if I do a good job." Let's take a look at how some of these issues can be mitigated.

Since surveying fees on a typical construction project are very small - usually less than 1 percent - when compared to the total construction costs, our services are quite often an afterthought for many contractors. As a result, the low bid surveyor may not be called until a day or two before services are required, even though the project proposals were submitted weeks earlier. This leaves the surveyor with just a couple days to research the project, review the construction drawings, prepare a staking plan, get insurance certificates issued, and review and negotiate a multi-page contract along with lengthy reference documents. Worse yet, the client typically feels the surveyor should have to pay for these actions. On top of this, the contractor probably won't let you on the job site without a signed contract and, even if he does, you normally won't get paid without a signed contract.

As professionals, we must become proactive in solving the problem. Make sure your proposals state that you expect to enter into a professional services agreement or at least an agreement that has an insurable indemnity clause. We all have repeat clients. Negotiate a master agreement with these clients, leaving

only the scope of services and special conditions to be negotiated for each project. A lot of contractors appreciate this approach because most of them don't like to do paperwork any more than you do. If this approach doesn't work, at least get a letter of intent while you are working and take the time needed to negotiate an equitable contract. Since most contractors don't want to see their contracts altered, another approach might be to attach an addendum to the agreement.

***"Your competitor down the street signed this contract, why can't you?"
Ignorance is no excuse!***

Leave their terms intact and add negative-scope items, terms, or conditions that address your "deal-breakers," and some of the general conditions you may not even have seen. Make sure they take precedence over other terms. Examples include Standards of Practice (that you will comply with generally accepted standards), Non-Professional Activities, Professional Services and General Conditions. Most contractor-issued contracts do not ask for professional liability insurance and, as a result, tend to lump the indemnity clause into one large catch-all clause that is very onerous and likely not insurable. Try separating the professional services from the non-professional activities as an alternative which your insurance company will likely approve. Some insurance companies will allow you to name the contractor as an additional insured on your general liability insurance, thereby substantially insuring a portion of the indemnity.

By limiting the indemnity for professional services to negligence, this portion of the indemnity is substantially

insurable under a firm's professional liability insurance policy. The general contractor's contract with the owner usually includes "flow-down" clauses which requires the general contractor to include them in contracts with his subcontractors. Most often these conditions are included only by reference. Risks taken by the general contractor differs substantially from that of the professional. As a result, we must go the "extra mile" to review the flow-down clauses, negotiate them out of the agreement, or perhaps even negotiate an agreement with the owner for the services in order to separate the risks.

Competitor Concessions

We have all heard the story that begins: "Your competitor down the street signed this contract, why can't you?" Ignorance is no excuse! Just because we haven't made a mistake recently doesn't mean it can't or won't happen in the future. Many professionals are more concerned about the technical aspects of surveying and mapping or putting wood in the ground rather than the business of surveying. If we are to remain in business by making a fair profit on our services, develop a professional image, and gain the respect we all deserve, we have to start by being good business managers and tough negotiators. Where do you want to be? Closer to the business-centred practice model, or the practice-centred business model?

One way to become better business/contract managers is to educate ourselves. Many of the larger professional associations have contract document committees. This is a great way to learn about the interpretation of contract terms and the techniques of contracting, to develop communication networks with your competitors, and to mutually solve contracting problems. Make contract negotiations a standard agenda item on your yearly surveying association calendar and invite your insurance agent to participate in the program. Brown bag lunch seminars given by your senior managers or your insurance agent are very effective ways of communicating to staff deal-breaker terms and conditions, and how to effectively negotiate them. You

will also be surprised at the respect you get from your clients when you sound like you know what you are talking about.

Know what your deal-breakers are.

Everything Is Negotiable

Most often, the general contractor representative is following specific corporate instructions when he says "sign this agreement as-is or you don't get the job." You have heard it said that "everything is negotiable." All we need to do is ask to negotiate these important areas rather than giving in without a reasonable effort. The contractor has most likely invested time and energy in selecting your firm to do the project and won't drop you without some negotiation. The trick here is to negotiate with the contractor's risk manager and not the project manager or superintendent. Know what your deal-breakers are (usually the guarantee, warranty, indemnity and insurance clauses) and what the "business decisions" are. More often than not, the contractor's risk manager will understand the difference between subcontractor work and professional services and work with you in negotiating the contract. If you are not one of the more polished surveyors with some experience negotiating professional terms you may want to have a letter from your insurance agent - in plain English - on file that you can readily submit to back up your arguments on these deal-breakers. Some agents are willing to talk to the contractor directly. If you or your insurance agent are unsuccessful, you may want to reconsider working for this particular contractor based on your initial evaluation of risks-taken versus rewards-received. At worst, you will know the downside of your decision to sign the contract and whether it's worth the risk you are taking. Educating the contractor is not a fast nor easy solution to the contracting problem. It takes a significant investment of hard and persistent work over a long period of

time to succeed in educating the contractor.

Volunteer to set up informal presentations on the subject of contracting to key executives, project managers and superintendents. Most insurance agents are more than happy to participate in these sessions or help you prepare for them. The rewards of these efforts are an enhanced relationship with your client, a better understanding of his business, a diminished fear of confrontation when negotiating future contracts, and best of all the fact that you'll sleep better knowing that you'll not be "hung out to dry" contractually on your projects.

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Contracting Surveying Services Manual

Available from the
AOLS Office.

Contact the
Association at
416-491-9020
or
1-800-268-0718