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FIRE PROTECTION TECHNOLOGY

Pictured: Ernest D. Yonkers, senior mechanical engineer, Albert Kahn Associates, Inc., Detroit. Inset: Fire codes for buildings.

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Engineers at the Bar

About the author

Kevin R. Sido is a partner in the law firm of Hinshaw & Culbertson, Chicago. He advises engineers and architects regarding contracts and insurance. Sido is Northern Illinois State Chairman of the Defense Research Institute, the nation's largest association of defense trial lawyers.

The importance of written contracts

By KEVIN R. SIDO
Partner
Hinshaw & Culbertson
Chicago

Engineers need good written contracts that define their duties and services to protect themselves in the event of a lawsuit. Defenses that flow from a written agreement can spell the difference between a fast, favorable resolution and drawn-out, expensive litigation. This first article of a two-part series focuses on the legal differences between oral and written contracts.

Oral agreements

In today's age of litigation, "gentlemen's agreements" are far too risky, given the thin profit margins engineers face. Litigation costs from just one job can wipe out profits from many jobs. Clients can have selective memories when an oral contract is at issue. An engineer in litigation may find that the owner/client is not a party to the suit. Thus, the engineer may lose testimony confirming limited duties—testimony that the owner/client could provide. The engineer's word is challenged with no backup.

Oral agreements, almost by definition, do not cover many important terms. Engineers should bear in mind that when a term is not spelled out in the agreement, courts will attempt to supply the definition from prior dealings between the parties, custom and practice, or general contract law. In addition, experts may testify about a term's meaning. Those points translate to greater potential for an unfavorable outcome and more expense with attorney and expert fees and other litigation expenses.

Written agreements

Written agreements can be simple or complex. They range from a one-page letter or proposal to a letter agreement incorporating a standard contract. More complex agreements include preprinted contract forms used previously by the parties or furnished by a professional organization.

While a letter agreement is certainly better than an oral contract, rarely do contracts by correspondence cover the many points arising in construction. A simple proposal might indicate a scope of work and fee schedule—sufficient information to make the contract legally valid. However, other terms relating to insurance, indemnification, payment priorities and other issues often are left unstated.

On the other hand, a written agreement furnished by a professional organization can be useful in most circumstances. For example, the American Institute of Architects (AIA) publishes the *Standard Form of Agreement Between Architect and Engineer*, AIA Document C141 (1979) and *Standard Form of Agreement Between Architect and Consultant for Designated Services*, AIA Document C161 (1979). Those form agreements can be modified by adding or deleting paragraphs.

From a bargaining position, there is much to be said for using a standard agreement

From a bargaining position, there is much to be said for using a standard agreement. Clients may feel, however, that a small job does not require a lengthy preprinted form. Just the opposite is true: Smaller jobs carry smaller profit margins that can be erased when disputes arise.

One advantage of standard forms

is that organizations preparing them devoted considerable time and effort to their improvement. Courts recognize the usefulness of the consistent language. For example, design professionals following the standard language in the AIA forms are likely to be favorably dismissed from worker-injury cases at an early date.

No single written contract is perfect for all jobs. It is wise to keep a contract file, noting interesting or favorable language for future use. Some lawyers have forms that have been used with success. It is important, however, to review past form contracts, making sure they reflect current needs. Professional organizations and periodicals advise engineers of changes in law, and agreements need to reflect those changes.

A written agreement furnished by a professional organization can be useful in most circumstances

Scope of services

The best boilerplate contracts still are not likely to define precisely what engineers offer to their clients. That usually is supplied by the engineer; rarely does the client cite those terms, and never the lawyer.

Engineers should keep in mind that courts today limit engineers' duties to the undertaking they make for their clients. While this may seem evident, it was not always the case. In the throes of litigation, parties often claim the "custom and practice" of certain engineers is to do the task upon which the case is now turning. Often, citing various customs or practices supports almost any conduct—at least after the fact.

One engineer experienced this point first hand. During the landmark case *Ferentchak vs. Village of Frankfort* (475 N.E.2d 822 (Ill. 1985)), the plaintiffs contended the engineer's duty stemmed from his professional responsibility as a registered engineer. The plaintiff's expert witness testified there was "a uniform practice" among engineers in that county requiring performance of the claimed professional service.

In his response, the engineer testified that his contract with the developer did not require him to perform the duty in question. Nonetheless, the jury returned a verdict for the plaintiff. The engineer appealed, but the appellate court affirmed the decision.

Finally, the Illinois Supreme Court heard the case and ruled in the engineer's favor, holding that his contractual agreement—not custom—defined his duty. Because the engineer was not asked by the developer to perform the task, he could not be held liable for failing to do so.

The engineer in this suit incurred substantial litigation expense, including two appeals, to win the case, even with the favorable written agreement. Obviously, the jury was impressed with the assertion of purported custom and practice. This precedent showed how a well-defined scope of duty can be one of the strongest defenses to frivolous assertions of duty.

Litigation is an uncertain process at best. Thus, engineers should improve their odds by writing a careful scope of work that precisely defines the engineer's duties. □

The second half of this series focuses on various issues that well-written contracts can resolve.

Contributions to Engineers at the Bar are encouraged. If you would like to submit an article, contact Roger Nadolny, Staff Editor, **Consulting-Specifying Engineer,** ***1350 East Touhy Ave., Des Plaines, Illinois 60018, 708/635-8800.***