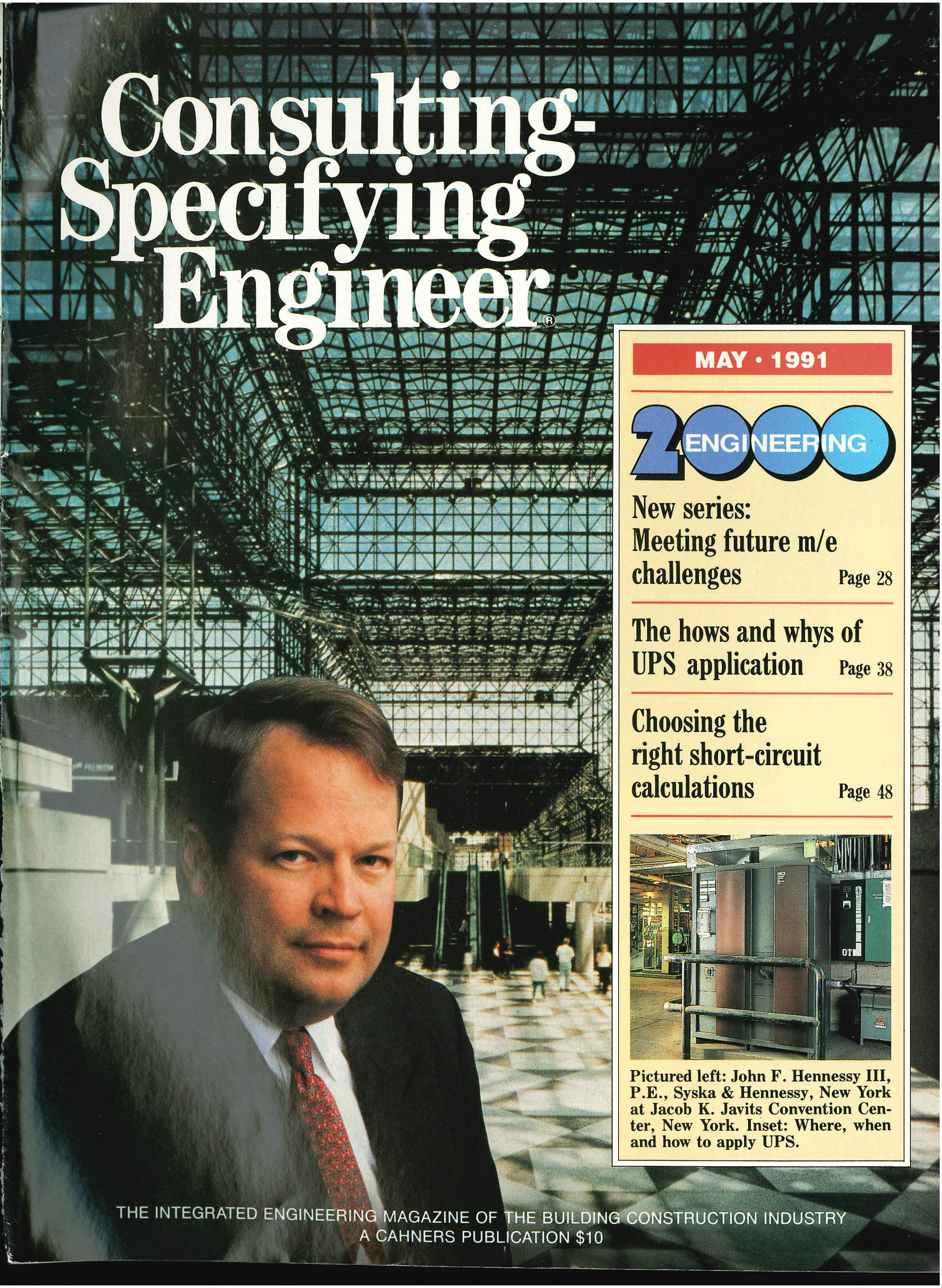

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Pictured left: John F. Hennessy III, P.E., Syska & Hennessy, New York at Jacob K. Javits Convention Center, New York. Inset: Where, when and how to apply UPS.

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Engineers at the Bar

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Written contracts eliminate legal problems

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In the first article of this series, we examined the importance of a strong written contract defining an engineer's duty for a given project. This article lists a number of issues a well-written agreement can address. They are grouped by the general subjects of protection against owner/client, contractors and workers.

Owner/client

Contingencies that may cause increased fees. Such contingencies can be listed in the written agreement, avoiding a debate after the job is completed. Business relationships can thus survive what otherwise could be an angry dispute regarding money. The client has a better expectation of what services the engineer is providing and not providing.

Arbitration clause. Many design professionals believe arbitration is preferable to litigation of disputes. If this is the case, a clause calling for arbitration can be inserted.

One argument in favor of arbitration is the belief that arbitrators are more knowledgeable about construction and, therefore, less likely to be confused or misled. In addition, arbitration procedures often are quicker than trials, require less legal and other expenses, and are less formal.

Arguments against arbitration include the informality of arbitration; the chance of receiving improper evidence; very limited prehearing discovery and depositions; a virtually nonexistent appeals process; the possibility of missed legal defenses, such as statutes of limitations, especially with lay arbitrators; joining all pertinent parties to the dispute in one arbitration; and the belief by respondents/defendants that arbitrators always award something to make both parties happy, regardless of whom is at fault.

Once a dispute arises, parties generally can arbitrate their differences; however, experience indicates the likelihood of agreeing on how to resolve the disagreement is slim. If arbitration truly is preferred, it should be stated in the agreement.

Disclaimers of warranties, either express or implied. The law is not clear as to whether an engineer's work is an express or implied warranty. Many states permit written express disclaimers of warranties. Thus, engineers may be able to protect themselves from claims such as an air conditioning system failing to operate correctly.

> ***Experience indicates that the likelihood of agreeing on how to resolve a dispute is slim***

Accrual dates for applying statutes of limitations and repose. Statutes of limitation and repose have been enacted in several states expressly for design professionals and others in construction; other states have declared them unconstitutional. If a statute does not indicate when a cause of action can first be brought (i.e., accrues), some design professionals expressly provide that the action accrues upon an event (e.g., drawing tendering or the date of substantial completion) rather than the date the plaintiff discovers there is a claim. That discovery could come many years later.

Provisions for a client's payment

of subsequent subpoena fees when the job is closed. Subpoena fees and related expenses can be a thorny issue after the job is finished. Even if the engineer is not a defendant, suits by workers or other parties compel document production or engineer's testimony. A written agreement can protect the engineer from these hidden costs.

Where litigation or arbitration takes place (venue) and what state laws are applicable. Parties generally can choose which state's law applies and where arbitration or litigation takes place, especially if those choices relate to the parties or job site. This provision works as an offensive or defensive negotiating strategy for the engineer and is especially important for out-of-state projects.

Payment priorities (e.g., pay-when-paid clauses). Payment priorities can prove especially important if the engineer is not under a direct contract to the developer or owner. If the engineer serves as a consultant, the owner's failure to pay may be raised as an excuse not to pay the engineer. Pay-when-paid clauses (engineers do not have to be paid until their clients are paid by owners) can be rejected and the reverse inserted.

Providing attorney's fees as an additional remedy for breaching the agreement (e.g., attorney's fees for filing a fee-collection lawsuit). Attorney's fees generally are not recoverable unless a contract or statute provides that recovery. An engineer may insert a requirement for fees (even interest) when efforts have to be made to collect overdue fees.

Contractors' issues

Indemnification. If permitted by law, the contractor could indemnify the engineer, and the client could be required to seek indemnification in the owner/contractor agreement. The courts scrutinize express indemnification agreements; in some states such agreements are invalid by legislation. In states where they survive, the indemnification agreement must be expressed in clear, explicit writing to achieve settlement, judgment, attorney's fees and other cost indemnification.

Insurance. Insurance agreements are seen by many as a better remedy than indemnification agreements. Again, however, the requirement that a contractor provide insurance for the engineer's benefit should be stated in writing at the outset. Indemnification and insurance issues can prove tricky; experienced advice often is required.

No-damages-for-delay clause. The courts, as a rule, uphold no-damages-for-delay clauses. Thus, a contractor suing for delays in the engineer's approval or review processes can be blocked, barring other exceptions. While this clause needs to be in the contractor's contract, engineers also can benefit.

A declaration that the engineer's contract does not benefit the contractor. Contractors sometimes claim that the engineer's contract with the owner or others gives the contractor a right to sue for breach of contract. They argue that they are a third-party beneficiary of the engineer's agreement. That end-run sometimes can be blocked by a declaration that the engineer and client have contracted to benefit solely each other, not other parties working at the job site.

Workers

Virtually all the previously mentioned issues insulate engineers from worker-injury lawsuits (e.g., insurance, indemnification, scope of work). Careful contract drafting regarding scope of duties, indemnification, insurance and so forth can benefit engineers in suits by injured workers. An oral agreement or even a short, nonspecific, written agreement might permit an injured worker to bring in an expert safety engineer to testify that the engineer had a duty for workers' safety.

Payment priorities are important if the engineer is not under a direct contract to the owner

Construction administration duties can be enumerated and limited in a fashion consistent with avoiding liability to injured workers. ("Supervision" can be discarded in favor of "periodic observation of the work.") Construction administration duties can be limited and specified. This helps engineers avoid supervisory or other duties that courts find give them overall control of the job-site or specific phases of the work.

Engineers believe the physical method used to complete their designs is the contractor's choice. The written agreement should follow a specification of duties consistent with favorable case law in a given state. For example, in Illinois, the standard AIA Owner/Architect Agreement generally insulates an architect from worker-injury claims. Periodic observation does not give the architect control or otherwise impose responsibility for safety.

Any responsibility for worker safety can be expressly disclaimed (no duty to monitor safety programs, provide safety meetings, etc.). As a corollary, responsibility for worker's safety should be expressly disclaimed and rejected to avoid later testimony by owners or other workers that they "assumed safety was the engineer's duty."

Conclusion

Imagination suggests still other terms for written agreements. These points cover some of the most important issues: payment of fees, indemnification, insurance, worker-injury claims and statutes of limitation. To the extent that negotiations permit, having a set of standard terms is a solid investment. □

Tear sheets of the first article in this two-part series are available for $3 each. Send check or money order to* Consulting-Specifying Engineer*, Cahners Plaza, 1350 E. Touhy Ave., Des Plaines, Ill. 60018.

***Contributions to Engineers at the Bar are encouraged. If you would like to submit an article, contact Roger Nadolny, Staff Editor,* Consulting-Specifying Engineer, 708/635-8800.**