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THE SIX MOST COMMON MISTAKES MADE BY ENVIRONMENTAL PROFESSIONALS IN CONTRACTING WITH CLIENTS

“Contract aversion” is defined as “tendency to skim or ignore contract documents; also applicable to reluctance to review and update forms used in business”. In the world of environmental professional (EP) services, contract aversion can be found on both sides of the contract, resulting in soured business relations and/or actual legal disputes over the scope and price of work. A related and common dynamic (which I call “tunnel contracting”) is the tendency for EPs to derive false security from the act of signing a contract without considering whether the document needs to be customized for the project, without assuring that other documents such as proposals, cost estimates and work orders operate in concert with the contract. Tunnel contracting in conjunction with contract aversion can cause the following situations which set the stage for an unnecessary legal dispute:

- 1) Clients who don't read or understand your service agreement, and are later surprised and angry over what they signed;
- 2) EP service agreements that are overly generic, difficult to understand for laymen, and/or do not clearly address foreseeable points of controversy for the particular project ; and
- 3) Misunderstandings about the extent to which the original and/or modified project scope and costs have been approved by the client.

The six most common mistakes that cause these problems are:

6. Addressing third-party site access issues by simply making it the Client's responsibility to “obtain access” if necessary for project work.

Third-party site access is a potential delay and/or liability issue for EPs. Many service agreements simply make it the Client's responsibility to “obtain access”. This risks scenarios where third-parties seek to impose unfair terms and seek to have the EP be a signatory to such terms. Most consultants would benefit from having a standard form

access agreement to which any agreement obtained by Client must conform. To avoid protracted negotiations, the agreement should reasonably balance the rights and obligations of third-party site owners and the consultant and/or client, and should be easily customized for a particular site. The agreement must account for the fact that most neighboring property owners do not want you on their property in the first place, while also considering that in many cases, the grantor is actually Client's landlord, or the party selling property to Client.

5. **Using an overly simple service agreement that does not address a number of important potential sources of future dispute; [Usually small firms and contractors]**
4. **Using a lengthy generic agreement that is not properly customized for the specific project.**

Whether a service agreement is too short or too generic, curing the problem begins with a simple objective evaluation—Make a list of the most likely legal/payment issues that could arise, and see how many are clearly and appropriately addressed. Then ask whether a reasonably prudent client, having actually read the provision, would likely agree to it. You may be surprised to find how many generic agreement terms are potentially inadequate for specific projects, or are so one-sided as to risk client rejection and/or non-enforceability. Examples that come to mind are provisions that warn clients not to rely on cost estimates and prohibit any other party from relying on reports.

There are also several types of useful provisions that are often missing, even from legally reviewed contracts. An example that come to mind is an effective warranty provision covering remediation equipment installed by the EP (I define “effective” as something more than just saying no warranties are made). Another example is a workable procedure for dealing with delays and short pays by a client's insurer—whether private or public (e.g., the Underground Storage Tank Indemnity Fund) (I define “workable” as something other than just saying that client is responsible no matter what).

3. Failing to assure that the client understands basic legal terms of the agreement and the limitations of the scope of work;

2. Submitting a scope of work and cost estimate that does not clearly identify reasonably possible contingencies for expansion of scope and increased costs, based on field conditions or future data.

1. Modifying the scope of work and project costs, while work is ongoing, without detailed documentation, written client approval, and client discussion to assure comprehension;

Inadequate client communication, both up front and during project implementation is the major cause of clients withholding payment, and the legal disputes which follow. Inadequate communication often starts with the mechanical creation of a scope of work without considering the likely evolution of the project and its costs over time. Whether it be failure of vision or of communication, the result may be a client who thinks he or she is signing on to a specific set of tasks and cost estimate, and does not really understand that some of the stated caveats and assumptions will become the basis for change orders. This type of problem transcends contract length or quality issues, and relates primarily to the daily work practices of project managers and any senior manager reviewing their proposals or work progress.

The classic situation illustrating the above, is a consultant who proposes a \$25,000 site investigation to confirm that a property “meets standards”, without fully laying out the possible contingencies in the event contamination is found. Consultant eventually proposes a UST removal and corrective action for another \$25,000, and ends up spending \$60,000 instead. Client is furious and does not want to pay. USTIF thinks some of the soils should have been left in place and only wants to pay half of the costs.

The way to avoid this scenario is to ask yourself the same question about the scope of work and costs, that you should ask about the service contract: “How might this project actually play out, and does this document chart a reasonable path for handling contingencies? For a scope of work/cost estimate, this means expressing estimated costs as a range, if actual costs depend upon unknown facts A or B. It also means identifying up front, the contingent costs of expanded or new project work items that may potentially become necessary. This enables you to present the estimated costs for a project as \$20,000-40,000 (depending on specific facts that play out) with contingent costs of \$50,000-75,000 if the rumored UST is located, and the damp vegetated area turns out to be a wetland requiring a permit application, etc. Communicating contingencies up front may scare the client, but it will also help avoid “sticker shock” later on, when it is time for the client to pay.

Learning to take this approach with clients may require unlearning old habits; but the reward of reducing legal and business disputes is well worth the effort.