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# Keys to Success as an Environmental Consultant: Liability Control, Client Satisfaction, and Growth

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*Environmental consulting is a relatively new and rapidly growing field. It involves traditional engineering and construction risks as well as the specter of potential—and likely uninsured or uninsurable—liability for environmental conditions and professional errors. To succeed in today's litigious society, environmental consultants and contractors need to understand the risks inherent in their work. They must conduct their operations in a manner conducive to quality assurance, risk control, and effective project management. Constant and clear communication with the client is essential to a good working relationship and repeat business. Effective project control, risk management, file documentation, and contract negotiation are critical tools for profitable growth and our professional liability defense.*

Two key determinants of success for an environmental consulting company are client satisfaction and repeat business, with the latter being largely determined by the former. This means meeting the client's reasonable expectations and completing the work in accordance with the contract, on time, and within budget. This can be difficult for environmental consultants because most projects involve numerous technical and scheduling uncertainties. To assure client satisfaction, clients need to understand and appreciate the uncertainties involved in each project, have a good understanding of how the work will proceed, and be kept apprised of progress. Communication and project management attention to client concerns are key.

Effective management of potential liabilities is also a key component of any environmental consulting firm's success. Environmental consultants are exposed to significant professional liability, but the profession is so young that the full impact of problems involving prior work is yet to be felt. Professional liability exposures can be substantial and of long duration. This is particularly true when there has been involvement in real estate transactions, which, in most instances, are the lion's share of an environmental consultant's engagements. As property turns over repeatedly, there

are inevitably multiple investigations of the same property by various consultants with different approaches, agendas, and levels of expertise.

#### **CONSULTANT LIABILITY FOR PROFESSIONAL ERRORS**

An environmental consultant's work is almost sure to be carefully reviewed, eventually, by a competitor. This review is guaranteed to occur if cleanup costs are incurred because the consultant (1) missed something that another qualified consultant would have caught; (2) misinterpreted data; (3) provided a significantly inaccurate estimate of cleanup costs unsupported by the facts; (4) caused or exacerbated contamination; or (5) arguably or actually agreed to protect the owner contractually and/or with insurance.

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If a consultant organization is considering a merger, the uncertainties raised by potential liability for past work should be a significant concern. To the extent that the company under consideration has accepted substantial contractual liability, a comprehensive evaluation should be conducted to determine the potential for significant insured and uninsured liability (for example, liability for site conditions at previous project sites). Other areas of high concern are common-law liability for work performed without a contract, employee exposures, waste disposal, and third-party claims.

Consulting businesses should also recognize that the purchase price and terms of any future acquisition by others can be severely affected by failure to manage day-to-day activities wisely. Poor housekeeping and lack of attention to risk management and liability prevention can result in less than optimum opportunities for the sale of environmental consulting companies. Substantial opportunity cost is involved when a consulting organization is viewed as a higher risk investment than other similar organizations.

#### **MANAGEMENT FOR LIABILITY CONTROL**

An environmental consultant was quoted recently as saying that almost a third of his work involved reviewing the work of other consultants. That percentage will grow, as projects carried out in the early years of the profession's development "come home to roost" from a liability standpoint. Not only are other consultants looking over prior work, however; the dreaded attorneys frequently are, also, when a consultant's opinion has turned out to be wrong or misleading and a client has incurred significant expense as a result.

All consulting companies should take steps to manage their business to avoid liability and preserve facts and backup documentation for an effective defense in the event of a claim of error. In addition to guarding against exposures for professional errors or claims, effective management also includes attention to contract terms and pricing, subcontracts, purchase orders, teaming arrangements, joint ventures, partnerships, real estate documents (including leases and subleases), insurance coverages, permits and licenses, business plan requirements, employee health and safety, and waste disposal practices and policies.

Precautions should be taken to prevent even the appearance of professional errors and inappropriate reliance on or out-of-context use of your work products. Even the appearance of this type of problem can result in substantial costs to extricate yourself from a potential lawsuit and/or restore a client's confidence and trust. The transactional costs associated with managing potential litigation or claims include not only legal fees and litigation costs, but also lost time due to depositions, record production, internal debates, and morale problems. Consultants should be aware of their legal and professional obligations, run their businesses with the goal of both business-oriented client service and liability control, and understand contractual exposures.

Consultants should make decisions concerning acceptable risks and veer from basic philosophy against accepting liability only for good reasons. It may sometimes be necessary or desirable to enter into a contract that contains unusual exposures. In such cases, loss records for the type of risk involved, a project management plan for liability control and risk management, and a budget for quality control and assurance/peer review should be evaluated and implemented as necessary.

#### **Avoid Unrealistic Estimates of Any Type**

Unrealistic time and cost estimates are a serious problem for consultants, whether the estimate is for the consultant's own services or is an estimate of anticipated cleanup costs. Depending on the type of contract, the consultant may not incur substantial monetary liability when its own services cost more than previously indicated; however, excessive cost overruns and schedule slips create unhappy clients that don't come back, give poor references, and sometimes don't pay. Of course, to prepare adequate estimates, it is necessary to know what the actual costs of doing business are—which is one of the first steps in effective project and business management.

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#### **Other Actions To Avoid Liability**

To help extricate yourself from liability before a claim becomes an expensive experience, and to provide effective defenses to claims, follow sound document retention practices and pay close attention to recordkeeping and document due care. In-house liability control training is a good business investment. Sales and project management training for professional liability control is simply essential.

Valuable records include:

- Your proposals
- Documents relating to development of the scope of work
- Records relating to changes in scope or restrictions imposed by the client
- Subcontracts and insurance certificates
- Documentation of records received and current regulatory guidelines
- Field notebooks and telephone discussion records

- Correspondence files
- Photographs of sites before and after a project
- Invoice and payment records
- Insurance policies and reports supplied to the client

Copies of draft reports reviewed (and perhaps changed) by the client should also be retained.

Limit your liability by documenting currently applicable standards and by eliminating your responsibility for services, products, techniques, or processes of others. Increasingly stringent action levels and cleanup standards may require or suggest the use of experimental approaches and largely unproven or at least marginally tested techniques that may not perform as well as expected, or at least not up to the client's expectations. Do not guarantee a process over which you have no control; make the client aware of the uncertainties. Never indemnify others, such as software suppliers, unless they are also protected by the contract with the client. If the client can successfully sue a supplier and not the consultant, the consultant will be liable anyway, if it has indemnified the supplier.

***Do not guarantee a process over which you have no control; make the client aware of the uncertainties.***

Problems can also arise when you are asked to rely on previous studies for background and factual support to your work. Reliance on previous work can expose you to substantial risk without protection in the contract and the client to substantial liability if previous work contains errors or misleading information. Your contracts should document your right to rely on information furnished by others. Your files should contain record copies of those documents. If you believe that verification of data is necessary, inform the client and document the fact that you did so and that the client elected to allow you to rely on the data as supplied. Even arguably self-serving contemporaneous records have evidentiary value.

Write your proposals and reports carefully. Avoid "puffing" and conclusory statements when variability or uncertainty is possible. Review all work products with care, as if you were hired to find faults.

Do not engage in cutthroat pricing unless you know your potential losses and have some business reason for taking the work. Clients may minimize scope and cost without appreciating that minimal scope means limited information. Consultants are sometimes anxious to keep costs down to get assignments, but taking on work with inadequate budgets and trying to cut corners or obtain change orders to "get well" irritates clients and results in frustration and distrust.

It is critical to a long business life and a firm's professional reputation to recognize and plan work to provide helpful answers to the questions that will arise if there is ever alleged liability based on reliance on services performed. Some of those questions are outlined below.

- What was the consultant's scope of work?
- Who set the scope, the consultant or the client?
- Was the scope of work intended to achieve a particular goal?
- What was that goal?
- Was the plan to achieve it reasonable from a technical standpoint?

- Was the goal achieved? If not, why not?
- What caused the problem?
- Did the consultant make a professional error?
- Did the consultant's advice cause or contribute to the client's losses or costs?
- Did the consultant employ qualified persons?
- Were the analytical methods appropriate?
- Were the samples taken according to good practice?
- Were they taken from appropriate places?
- Was the laboratory qualified?
- Was there a laboratory error?
- Were the results properly evaluated?
- Did the consultant's work products mislead the client?
- Perhaps most importantly, was any estimate of cleanup costs so off-the-wall that it shocks the conscience?
- What are the remedies under the contract (if there is one) or as a matter of law or both?
- What are the chances of collecting from the consultant?
- Does the consultant's insurance cover the matter in question?
- If the consultant's insurance doesn't cover the matter, can we reach other assets of the consultant, or its parent company, partners, shareholders, bondsmen, guarantors, subcontractors, vendors, or the laboratory?
- If we sue, can we recover our attorneys fees?
- What is the consultant willing to do to make things right?

***What is the consultant willing to do to make things right?***

The last question is a critical one; it is centrally important to client satisfaction. Honoring one's contractual obligations, and even, in appropriate circumstances, going beyond the exact terms of the contract in the interest of client satisfaction, is good business. However, sometimes the cost of client satisfaction is extremely high, or even impossible to achieve. First, let's look at the circumstance in which the consultant has no way to fix the problem caused by his or her error except by paying devastating levels of damages.

For example, if a consultant has done poor fieldwork or missed or mischaracterized a major environmental problem, which has resulted in contamination of drinking water and a massive toxic tort class action suit against the client, redoing the work won't help. Millions of dollars in damages will make everyone (except the consultant) feel better. This is the type of problem that points out the importance of management attention to contract terms and insurance coverages. Many significant liability risks can be covered by one party or another through insurance, or through self-insurance (setting aside reserves). However, liability for those exposures that cannot be insured against, or for which coverage may not be high enough, should be limited by the contract, unless the work can be managed so as to avoid losses (unless, of course, the consultant enjoys high-risk experiences).

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### **The Scope of Work: A Critical Starting Point**

A definitive scope of work, based on a shared understanding of objectives and the limitations imposed by technical, budgetary, or time constraints, is the first step in liability control. Start laying the foundations in your proposal. Allowances for uncertain elements should be discussed and included in the proposal and the scope of work, and the client should be kept informed of potential additional requirements as they become apparent. The scope should also include assumptions, detailed descriptions of services to be performed, a time schedule, any special restrictions, requirements, or limitations, and a pricing breakdown, as appropriate. Unduly optimistic estimates of cost or time requirements are among the most frequent causes of economic disasters, client dissatisfaction, and consultant losses. Keep the scope of work realistic and clear.

### **CHOOSING THE TYPE OF CONTRACT**

There are basically two forms of contracts (though each form has numerous variations): those in which the consultant agrees to perform a set scope for a fixed or not-to-exceed price, to be adjusted only when the scope of work changes, and those in which the client agrees to pay the cost of performance on a time-and-materials basis. The second is usually used when the scope of work cannot be definitively stated at the outset of the project. Even in a time-and-materials arrangement, there is usually a level-of-effort or cost ceiling, which cannot be exceeded without client approval.

The type of contract entered into can have significant impact on client satisfaction. Many clients have a predisposition for not-to-exceed contracts, even when ultimate costs are entirely unknown. To the extent that the not-to-exceed price *is* exceeded, the consultant is perceived as not having met representations or obligations. The consultant cannot win with a not-to-exceed contract. Either money gets "left on the table," or cost overruns must be absorbed.

Client communication can help resolve this problem to some extent by establishing the possibility (or probability) of requirements for additional time or costs early on. In such an arrangement, the client's approval of additional costs must be obtained when ceilings are reached. This makes the dreaded not-to-exceed arrangement more realistic and flexible, though it still requires project management attention to avoid inadvertent overruns. When the contract provides for a not-to-exceed-without-approval arrangement, it is very important to understand that the client does not intend a time-and-materials arrangement with "incremental funding." The client expects, and is entitled to, a specific scope of work for the ceiling price, subject to possible impacts of uncertainties.

A fixed-price contract is often appealing to clients because it at least appears to provide price certainty. Unfortunately, fixed-price arrangements with unrealistic pricing cause problems for both parties. Consultants do not like contractual losses and frequently discover the need for extras or changes in the scope of the work, and the client may be the recipient of substantial change-order requests. Change orders may not only slow the project, but may also lead to disputes.

If properly priced and managed, fixed-price work can be exceptionally profitable—but only when the pricing contingencies do not exceed the consultant's expectations. Profitability is enhanced on fixed-price work when performance expectations are exceeded. Wise consultants include a contingency for errors, as well as a profit factor. If fewer than expected errors (or none at all) are made, the consultant's profit factor is increased by the amount of the incremental contingency included in the price.

Unfortunately for clients who prefer fixed-price work, the client pays for the consultant's estimate of errors, even if none occurs, because the contingency is in the fixed price. Change-order administration is critical and project management attention of great importance in fixed-price assignments.

Frequently a time-and-material or similar arrangement is the only approach that makes sense. If so, project management and client communication are critically important to avoid even the appearance of "blank-check" contracting. In a reimbursable cost arrangement, the client does not pay a premium for the comfort of a fixed price, but many clients are uneasy without cost certainty. A detailed, well-thought-out estimate, followed by performance within budget on incremental elements of the scope of work, is a good way to build client trust and confidence. It may be advisable to agree to convert a time-and-material arrangement to a fixed-price one when a given level of certainty is achieved.

Consultants should not enter into arrangements that they know are impossible and then expect to improve the situation later on with change orders. Clients who may be unrealistic at first become unreasonable when they are frustrated. Sometimes a project you decline turns out to be the best job you ever lost—even if you are hurting for work.

### **Areas of Particular Concern in Contracts**

It is always necessary to take into account market conditions and client requirements, but successful consultants will not accept poor contracts even when business conditions are less than optimal. The following list provides some of the major areas of concern, other than scope and pricing, to which you should pay particular attention.

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1. Causing or contributing to the spread of contamination is a major uninsurable problem for most consultants and contractors. Liability for waste disposal is a related issue, but is more easily resolved, once a definitive decision is made concerning liability.

2. Consequential damages can be of such magnitude that insurance limits are exhausted, or they may not be covered at all. Consequential damages include such elements as business interruption, loss of product, loss of profit, or loss of interest. Much of a consultant's exposure is consequential in nature; that is, it does not result directly from acts of the consultant, but rather as a consequence thereof.

3. Indemnities can impose liability far beyond insurance coverage. An indemnity may also impose liability on the consultant for losses caused by others, such as subcontractors and vendors, or even by the client. Even when the consultant's liability is limited to those matters arising from the

consultant's own activities, accepting liability for all costs or damages resulting from a professional error exposes the consultant to unlimited liability for even uninsurable occurrences. This is acceptable to many consultants under some circumstances, but unacceptable in others.

4. Similarly, insurance provisions can deflate the value of a well-drafted, limited indemnity by exposing the consultant's policies to the liability of the client or others. Whenever the consultant's insurance carrier is forced to defend the consultant or others, or pay claims, it is inevitable that the consultant's insurance premiums will go up. Insurance companies do not like to lose money.

5. Unlimited warranty (rework) exposure can be very unprofitable, particularly when the scope includes only consulting/engineering and the contract includes unlimited and uncontrolled liability for correcting work done in reliance on the consulting/engineering effort. It is important to have access to fieldwork resulting from alleged engineering or consulting errors to avoid liability more fairly attributable to field error. This is a particularly difficult problem when a competitor is performing in the field and may have an interest in unfairly attributing errors in field performance to the engineering or consulting services of others. It also opens the door to the possibility that errors in the engineering or consulting documents will be executed in the field, even when they are known to the field contractor and a change order is requested to reperform according to revised engineering or consulting documentation. At a minimum, all warranties should have three parts: a standard of care, a remedy if the standard is not met, and a time limit on warranty liability.

6. Guaranteed completion dates and performance guarantees are related concerns. Consulting companies often underestimate the time that will be involved in environmental projects because of the number of parties. Consequently, they either lose money on fixed-price contracts (and generally alienate everyone in the process) or lose clients due to poor performance when labor hours are exhausted but work remains to be done. Careful drafting of the scope and selection of a contract form, as discussed above, can ease this problem. Performance guarantees are treacherous if the process is unproven, has not been "scaled up" before, or is not within the consultant's control. At a minimum, performance guarantees should be reviewed by qualified persons and the possibility of a stop-loss liquidated damages provision inserted in the contract. Further, the party with control over the process should stand behind any guarantee.

7. Unknown or differing site conditions are an area of legitimate concern to consultants, particularly because analytical results reflect only conditions in the area of the actual sampling program. Also, underground conditions can pose risks to workers and involve additional exposure to third-party claims. The scope of work or contract should reflect an equitable agreement relating to uncertain conditions, and project management should be alert to its responsibilities for diligent and effective field supervision and for advising the client of newly discovered conditions. If conditions warrant additional health and safety precautions, a change order should be sought. If the client refuses, the consultant should have

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the right to discontinue performing in areas where hazardous conditions exist, as a matter of force majeure. Consulting contracts should set out unarguable facts about the work and include protective statements (for instance, that the findings are based on limited numbers of samples and analyses because of budget constraints).

8. Remedies clauses and limitations should be made enforceable, regardless of the theory of law relied on for recovery. Consultants should recognize that contracts are heavily litigated documents and should be drafted in a way to assure that they are enforceable with respect to their limitations, regardless of how a potential suit may be styled. Unless a contract specifically says otherwise, limitations on liability set by contract do not apply if the client elects to waive the contract and sue based on an allegation of negligence.

### **Client Expectations**

Clients do have unreasonable expectations on occasion. Their change-order administration may be worse than the consultant's. They are shocked at the cost and time requirements of environmental projects and are unfamiliar and frustrated with the morass of expensive and time-consuming regulatory requirements, which ignore the facts of their daily business (lengthy delays in approvals of work plans, for instance).

Clients do not always understand why they need a consultant and a lawyer, and when they elect to rely on just one or the other, they often end up with second-class results and a mess to clean up. They often do not believe that what they have done or bought is a problem, even though it may be excruciatingly obvious that a regulatory agency considers it so. It is the job of the environmental consultant and attorney to assist the client in achieving the client's objectives in the most efficient, cost-effective manner possible, which requires cooperation and coordination among the professionals and the client's representatives. The key, again, is communication and clarity. ☒

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