

New Year Risk Management Refresher

By Colleen M. Palmer, Esq.

Happy New Year! It's time to get your risk management house in order and ensure your firm is embracing sound risk management practices. With that in mind, we offer some key tips to help you manage risk on projects.

Stress the importance of risk management in your firm culture: successful Engineering firms that consistently have superior claims history as compared to their peers have robust risk management programs that are embraced by all employees. An effective program is embedded into corporate culture and emphasizes risk management as a priority. Successful firms are not necessarily completely risk averse, but they carefully assess the risk vs. reward balance for each project and client.

Evaluate clients and projects carefully: Despite the excitement and potential fee associated with a new project, it is critical to objectively assess the client and project. Some project types (e.g., residential and, specifically, condominiums) and some clients (e.g., developers, private owners and public entities that often refuse to modify their contracts) are inherently risky or difficult. Use a formalized "go/no-go" process to evaluate the potential risk and reward for each project.

Assure your firm is prepared: Before you proceed with any project, confirm you have the proper skill set and necessary manpower. Problems may arise if your staff is stretched too thin to devote the appropriate resources or if inexperienced staff takes on services without the necessary knowledge and experience. Insufficient time to dedicate to a project and/or lack of knowledge increases the chance of technical errors, which in turn, increases the chance of claims. If you anticipate the need to retain consultants, discuss the plan with your client and ensure your contract allows you to retain them as necessary.

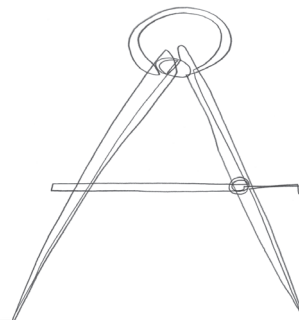
State your scope of services with detail and clarity: Your scope of services should be well defined and clearly detail what services constitute basic, additional, and (to the extent known) excluded services. Do not incorporate the client's request for proposal, or your proposal, to avoid the possibility of conflicting language which could lead to disagreement regarding your required scope.

Offer and seek mentoring opportunities: Have a formalized process to ensure junior staff is receiving guidance from senior practitioners. The best mentoring is a two way street: junior staff take the initiative to seek input from senior staff when necessary and senior staff carve out time to regularly consult and discuss issues. Mentoring reinforces firm processes and culture, and helps new professionals develop the "soft skills" necessary to communicate with clients, design team, and construction team members.

Negotiate your contract: Have a written, executed agreement prior to performing services on every project. In addition to defining the parties' responsibilities and rights, the negotiation process lets you assess and manage the client's expectations and educate the client regarding your customary role and value of services.

Scrutinize lender documents: With greater frequency, design professionals are being asked to sign lender documents, such as consent to assign your contract and certifications. These vary widely, but the key point is you should not give the lending institution greater rights than your client had, or assume obligations that you did not have, in your contract. Pay particular attention to language granting broad rights to the lender to own and use your work product, and requests for you to certify your services comply with all laws or guarantee the work of the contractor.

Give news to the client timely: Keep the client informed of the progress of the project and, at a minimum, comply with contractual obligations to provide status reports. If you must deliver a disappointing update, offer recommendations and discuss client concerns. A proactive design professional armed with a possible solution can help avoid client disappointment and manage client expectations going forward.



Report claims: Contact your professional liability insurance broker as soon as you are aware of a claim or issues that may lead to a claim. Failing to timely report a claim or circumstance could impact available coverage under your policy, so err on the side of caution if there is any doubt as to whether an issue should be reported.

Establish and follow a document retention policy: Have a formal, written policy that addresses how long to keep each type of document, including electronic documents. A well-documented project file may help avoid claims and provide legal defenses in the event of a claim situation. Generally, documents not kept permanently should be retained for the longer of 10 years after substantial completion of the project or the applicable Statute of Repose, or any longer period specified in your professional services agreement.

Examine your insurance policy: Have the types and limits of insurance required by law and your professional services agreement. Pay careful attention to how long your contract requires you to maintain the policies and if you are required to maintain the full limits of insurance, even if a claim impacts the amount of insurance available. Professional liability insurance is a depleting limits policy; therefore, if a claim unrelated to the project diminishes the available insurance, but your contract requires you to maintain full limits, you would be required to purchase additional insurance to satisfy your contract. Require any consultants you retain to have appropriate insurance policies in place, including professional liability insurance.

Trust your instincts: Far too often, design professionals involved in a claim “knew they shouldn’t have taken the project,” but they decided to proceed despite their reservations. Don’t ignore your instincts: if your research of a potential project or client gives you a bad “gut feeling,” carefully consider whether to proceed or walk away. If you take the project, ensure your contract is appropriately negotiated with protections (such as limitation of liability and waiver of consequential damages provisions) and that you vigorously document the project.

Investigate your jurisdiction: Have an understanding of the jurisdictions in which you practice since states vary as to how they treat various contract provisions (e.g., the enforceability of limitation of liability provisions and indemnity obligations). In addition to contractual issues, the location may present unique issues with respect to sub-surface conditions or climate that may be regulated by applicable codes and regulations of which you must be aware.

Never admit liability to your client: Even if it’s obvious you made a mistake on a project, do not admit liability since mistakes do not necessarily equate to legal liability and admissions may resurface in litigation as evidence against you. Under common law (and hopefully in an appropriately drafted standard of care provision in your contract), you are required only to perform in a manner consistent with the generally accepted professional standard of care ordinarily exercised by reasonably prudent professionals. Since you are not required to perform perfectly, the existence of an error or omission in your services does not necessarily mean you breached the standard of care. Rather than conceding liability, tell the client you will investigate the issue, report the matter to the appropriate person in your firm, and contact your professional liability insurance broker to develop a plan to further handle the matter.

Give back, but do wisely: If your firm provides pro-bono services, employ the same client and project selection evaluation as you would when considering for-profit projects. Have a written, executed contract that clearly details your scope of services and includes appropriate standard of care language and protections such as a broad indemnity in your favor, limitation of liability, and waiver of consequential damages.

Stay out of jobsite safety issues: Design professionals are not responsible for jobsite safety and should delete any contract language suggesting otherwise, and add language explicitly disclaiming responsibility for jobsite safety programs and precautions since such responsibility lies solely with the contractor. If you see an obvious and dangerous condition that threatens life safety, alert the person in charge of the jobsite of the condition, but stick to the facts and do not provide any recommendation regarding remedying the condition. Follow up with written communication reporting your observation, but do not make any recommendations and do not check to see if the condition has been corrected.

We wish you and your families a safe, healthy and happy New Year. We look forward to managing risk together in 2021.

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