



PROFESSIONAL LIABILITY

Risk Management for the Design Consultant

By: **Roger A.H. Brett**, Executive Vice President Jardine Lloyd Thompson Canada Inc.

Like every other business, being a Consulting Engineer is a risk business and to be a successful engineering firm, some risks have to be identified, evaluated and then correctly managed. Consulting engineers are often sued for services that are claimed to be lacking in the "duty of care" or do not meet their client's expectations, albeit that

they may be unrealistic. This article has been written with the view of allowing the Canadian Consulting Engineer to have at his disposal a checklist to address some of the issues that should be considered when taking on a contract.

Checklist: Items to Review When Taking on a Contract

During the proposal stage

1. Is your client known to you? YES NO

If not, check the client out. Identify who will pay you.

2. Is your client financially sound? YES NO

Run a credit check. Talk to past suppliers.

3. Does your client have a history of litigation? YES NO

Check this out. If Yes, Decide if you want the project. Thoroughly review your proposal and qualify it. Discuss it with your legal counsel.

4. Does the client settle his receivables on time? YES NO

Ask for an upfront retainer. Spell out the payment schedule.

5. Will this client place constraints on the project? YES NO

Ensure that your proposal has hold points in it.

6. Is any client supplied information clearly identified? YES NO

Qualify all client supplied information.

Regarding the Project itself

7. Has the client obtained all the approvals required for the project? YES NO

Check that all bills have been paid to date. Specify all hold points in the proposal.

8. Does the client own the land? YES NO

Find out who owns the land.

9. Is the project a speculative project? YES NO

If it is, limit the proposal for use for this project only. Review all the risks involved.

10. Have you ever visited the proposed site? YES NO

If not, pay the site a visit, and ensure your proposal is suitable.

Who else has been invited to tender this project

11. Do you know who else is tendering on this project? YES NO

You have a right to know, so ask.

12. Do you know the basis for selection? YES NO

Ask the client, on what basis will the contract be awarded.

13. Has this contract been designed to be applicable to a specific competitor? YES NO

Decide now whether it is worth your time to prepare your proposal

Proposal Preparation for the Project

14. Is the scope of work adequately defined to allow you to prepare your proposal? YES NO

If not, discuss and clarify with your client. Review what is being asked of you.

15. Are the deliverables defined at each stage? YES NO

Qualify the proposal.

16. Is there any co-ordination with other parties required and is it adequately defined? YES NO

If so, nominate a Coordinator and properly define your responsibilities for co-ordination in the proposal. Identify and document what the responsibilities are for each of the parties.

17. Is the scope of work within your expertise? YES NO

Don't try to do a project where you do not have the expertise on staff. If necessary use a sub-consultant for work outside of your expertise.

18. Is the set program achievable? YES NO

Review your proposal and ensure it is achievable.

19. Is there a proposal validity period? YES NO

Again, review your proposal and qualify it.

20. Does any third party have any influence on the project? YES NO

If the answer is Yes, ensure your proposal takes this into account.

21. Do you have the staff availability to take on this project? YES NO

If not, is there staff available if you are awarded the project.

If the Proposed project is a Joint Venture / Partnership

22. Have you worked with the other firm before? YES NO

Check the references and financial stability of the other party.

23. Do the other party have any external constraints that might affect the venture? YES NO

Check this out.

24. Do they carry appropriate insurance and are their limits adequate? YES NO

Ask for certificates of insurance and check them out with your broker.

25. Have you used this type of Joint Venture agreement before? YES NO

Have the agreement checked out by your Legal Counsel and Insurance Broker.

26. Does the agreement define the various responsibilities of each party? YES NO

If not, make sure it is in the agreement.

27. Are you liable for the non-performance of any of the other JV partners? YES NO

Make sure there is a division of liability spelt out in the agreement.

28. Is there a suitable management agreement? YES NO

Make sure that this is spelt out in the proposed agreement.

29. Does your professional liability policy cover joint venture liability? YES NO

Check with your Insurance Broker, if not, have them amend the exclusion.

Pricing and other Financial Considerations regarding a Project

30. Has a pricing method been agreed? YES NO

Check to see that the proposal has a Schedule of Rates; Lump Sum is defined; Cost Plus is defined; Expenses are defined and Percentage of Capital if applicable is defined.

31. Does your client want evidence of your financial status? YES NO

If Yes, Prepare a financial statement or arrange Surety Bonding with your Insurance Broker.

32. Have you agreed a schedule of payments yet? YES NO

If not, get this negotiated and write it into the agreement.

33. Are there provisions in place for late payment by client? YES NO

Discuss this with your client and write them into your agreement and ensure that there are provisions for cessation of work if payments by client are more than 60 days overdue.

34. Have you identified your maximum exposure? YES NO

If not, identify it and consult with your Legal Council or Insurance Broker on how to protect your company.

35. Is your fee subject to any foreign exchange rate fluctuations? YES NO

Make sure you make an allowance for this in the fee you negotiate with your client.

36. Are you entirely happy with the prices you are tendering for this project? YES NO

If not, have them reviewed until you are confident with the figures.

37. Does your tender price allow for an adequate margin of profit? YES NO

Double check your figures.

38. Have you made any contingency allowances? YES NO

This is very important, make sure you have an adequate amount built in to allow for any contingencies.

Conditions of Engagement

39. Are the conditions of engagement under a standard form such as the ACEC 31 document? YES NO

If not, have the agreement checked out by your Legal Council, and negotiate for the removal of any onerous clauses.

40. Are there any clauses in the contract giving your client the right to withhold payments? YES NO

If Yes, negotiate to have them removed and have any amounts owing be paid as long as they are not in dispute.

41. Does the Contract call for high limits of professional liability insurance? YES NO

If so, negotiate a limit equal to your fee; or to the amount of insurance you carry under your practice Professional liability insurance and also limit the number of years you can be held liable.

42. Are there any warranties clauses in your contract? YES NO

If there are, consult your Insurance Broker as they may limit or invalidate your insurance. An Engineer / Architect cannot warrant his/her work.

43. Is there a fitness for purpose clause? YES NO

If Yes, check them out with your Legal council and Insurance Broker, to ensure that it does not invalidate your insurance.

44. Is there any call in the contract for liquidated damages? YES NO

If Yes, refer the clauses to your Legal Council and Insurance Broker.

45. Is Surety bonding or is a Performance bond required? YES NO

Try to avoid this requirement, as it is difficult for Engineering Companies to obtain Bonding.

46. Is there a guaranteed maximum construction price? YES NO

Ensure you have allowed ample amounts for contingencies; decide whether this is the type of contract you wish to proceed with.

47. Are there provisions for the payment of variations? YES NO

Negotiate this at the outset.

48. Are all documents to be supplied to the client? YES NO

Ensure you keep one complete set for your records.

49. Does the contract call for you to provide the client with all the drawings and paperwork for the client to use as they wish? YES NO

Ensure that your drawings in CADD are locked, put a clause in the contract that if they are reused then compensation will be due to you.

50. Does your contract with the client allow for the client to terminate your contract? YES NO

Make sure that there is an article in the contract setting out how you will be compensated.

51. Does the indemnification agreement provide for a limitation of liability? YES NO

Refer this clause to your Legal council and Insurance Broker. Try to limit the amount of damages to either the fee earned or a specified amount or the amount of insurance you carry and insert a time limit.

52. Does your contract define the construction phase responsibilities? YES NO

Ensure that your fee allows for an adequate level of construction supervision.

53. Is the contract involving work in a foreign country? YES NO

Check the clause relating to the law of the country that will apply to the contract. Change it to read either Canadian Law or as advised by your legal council.

54. Does the contract contain an "Arbitration" clause? YES NO

Negotiate for an Arbitration clause to be inserted in the contract, which would provide for independent arbitration for the resolutions of disputes.

55. Is your contract a “design/build” contract? YES NO

If Yes, discuss the contract with your legal council and insurance broker and ensure that you have your own written contract and that you are not committed to back-to-back contracts.

56. Are there statutory conditions imposed by environmental acts or codes? YES NO

Ensure that you have taken these requirements into account when setting your fee.

57. Does the contract call for you to be responsible for any Occupational Health and Safety Act legislation requirements? YES NO

If so, have the contract amended so the contractor is responsible or ensure that you are being paid for this risk.

58. Does this project have a pollution exposure? YES NO

If Yes, discuss the project with your Insurance Broker.

59. Does the project call for your insurance to cover a specified maintenance period? YES NO

Talk to your Insurance Broker, to ascertain that your policies comply with contract requirements.

60. Have you explained to the client the level of inspection you intend to provide under this contract? YES NO

Ensure that you have clarified this with the client and put it in writing.

A Question frequently asked by Insureds

Can our Broker or Agent issue a Certificate of Insurance providing our client with a 30 Days Notice of Cancellation or Material Change to our Professional Liability Policy?

No, the Broker or Agent can not issue a Certificate of Insurance, and if he does, the Insurer will not recognize it. The Insurer has to issue it as the Insurer needs to know that they are responsible to issue the 30 Days notice of cancellation to your client and they would need to issue an Endorsement to the Policy demonstrating their acceptance of the additional exposure. Please also note that under no circumstances, will an Insurer writing Professional Liability risks, issue a Certificate of Insurance providing 30 Days Notice of Cancellation for any “Material Change” to a Professional Liability insurance policy. The reason for this is being there is an aggregate limit under these policies, so any claim brought against the policy by another client of the Insured will materially change the limit available to other clients of the Insured and Insurers would then be obligated to advise that client of the details of the claim, which of course they can not do.

Contact Jardine Lloyd Thompson Canada Professional Liability Division

Sun Life Plaza, Suite 300, East Tower
112 - 4th Avenue S.W.
Calgary, T2P 0H3

Telephone: 1.800.461.5142

(403) 264-8600

Fax: (403) 265-5505

Roger A.H. Brett
Executive Vice President
(403) 231-8686

Direct Line:
Ante Petricevic
Vice President
(403) 770-2489

John Ashton
Vice President
(403) 231-8688