

Focus on risk management...

WORKING WITHOUT FORMAL AGREEMENTS

Engineers don't have a "Dear Abbey" to address questions to, but here is one addressed to Ava.

"Dear Ava:

I have a lot of long term clients that I do repeated work for. We have not entered into formal agreements for our work over the years. We are honorable people and everything has worked out just fine. My insurer wants me to use written agreements on all projects and frankly I am not comfortable in changing the way I do business with these people. My biggest concern is that they will become suspicious of my motives when I ask them to sign a large document full of legal stuff. Do you have any advice?

Sincerely, Stuck between a rock and a hard place"



Dear Stuck,

You're stuck? Without more information, I'm stuck as an uninformed answer is worse than no answer at all. So bear with me while I fill in the blanks for you. (Just like a lawyer...rephrase the question until you have one you can answer. Then answer that *Mea culpa*.)

I assume three things:

■ First, I assume by "a formal agreement" you mean an EJCDC E-500, with an Owner needing engineering services, or some extensive, comprehensive contract like them.

■ Second, I assume your client is a small owner, or else their lawyer would be demanding a formal agreement, too.

■ Third, I assume your client's project is a small project; else their insurance broker would be joining the chorus in the "you-need-a-formal-agreement" mantra.

If these assumptions are correct, you want to know whether a design professional with a many-year, many-project, never-a-claim relationship with a small, repeat client needs to sign a E-500 like agreement with that client when that client next has a small project in mind?

You'd like me to say "no" wouldn't you? Okay, "no." Happy?

Probably not. If you are like every design professional I have ever worked with, you would prefer a reasoned decision. In order for me to give you one, we have to start with the basics.

What is the purpose of a design contract? There are more than one, and a good contract delivers on all of them.

■ **At its most basic level, a design contract makes the progress of the project predictable.** It is the "legal schematic" that describes how the project will go if it proceeds well, or if it does not. This view of a contract as a legal schematic is true for every party to the building enterprise, including you and your client. Since all parties benefit from a contract that defines and supports the design and construction process, your client should welcome one as much as you.

■ More broadly, **a contract helps the parties achieve their strategic objectives.** Contract negotiation affords all players the opportunity to lay out their strategic goals. It gives them the chance both to understand each other and to decide whether they really want to and can work together.

■ **A contract affords all parties the opportunity to set realistic expectations of the others.** In order to be an effective tool that allows a project to be predictable, a contract must be grounded in realistic expectations. In addition to discussing strategic objectives, negotiation is the time to work out project scope, budget, roles, quality, quantities, systems, and timing. It also is the time for all parties to discuss and understand the implications of what they can and cannot do, as well as the procedures they will use to work together.



■ **A well-negotiated contract assigns a risk to the party in the best position to control the risk and then gives that party all the responsibility, power, and fee needed to handle the exposure successfully.** Intuitively,

this makes sense. There is no sound reason to assign an exposure to someone not capable of handling it, or to give anyone insufficient resources to manage a risk they have assumed. Project success doesn't result from hedging; nor does design and construction excellence. Claims do. Contract negotiations provide the parties the chance to align scope, strategy, systems, and budget to enhance the possibilities of success.

■ **Contracts help provide the framework to facilitate future negotiations.** Owners, designers, and contractors typically continue to negotiate the design of the project after the contract is signed, hence, negotiation doesn't end with the initial contract. Once a contract is signed, an entire new series of negotiations begin, from what the design should look like, to how it should be configured, to how it should be built.

■ **Contracts help solidify the working relations the parties will need to succeed.** In addition to providing implementable language, contracts help secure working relationships.

■ **Contracts are a private law** - a law written by two parties that our very public courts will enforce. I put this purpose of contracts near the end because it is the least important of all the purposes of contracts for one significant reason: most projects succeed. But when a contract does end up in court, all too often, the parties come to realize that how it was formed was part of the problem that landed them there.

■ **Contracts are what helps you get paid** - and, from the Owner's perspective, what helps the Owner ensure he is not ripped off by the consequences of an undefined scope and its counterpart "We can do it, but it's an additional service."

Given all the power a good contract gives you and your client, I have a question. Why would you not want to have your client sign one?

May I be presumptuous and suggest that your "fear of signing" rests in the type of contract you are asking the client to sign. Maybe EJCDC E-500 family of contracts is too heavy a vehicle for a small client with a small project? If that is your fear, check out the EJCDC's E-520 short form agreement or its E-505 for multiple assignments from the same client, patterned after the E-500 for special services. If that still won't do the trick, ask your lawyer to draft a "scope agreement" that details what the client wants, that details the project's scope, and how much your design services are going to cost to accomplish that scope. You owe your client and yourself at least that.

By the way, though engineers tend to view scope agreements and letter agreements as something other than a "formal agreement," we lawyers call them both a contract - a short, but nonetheless formal agreement. As Shakespeare said, a rose by any other name smells as sweet.

Good luck. --Ava



NOTE: This article is provided by David Shipley of Shipley & Associates, a member of the ACEC Oregon Risk Management Committee. Shipley & Associates specializes in insurance and risk management services for the engineer and architect. This article has been excerpted from an article written by Ava J. Abramowitz, ESQ and copyrighted by a/e ProNet. This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.