

**Q:** *Some of the services I provide to a client, such as construction stake-out and observation, occur during the construction of the project. I am worried, however, about being dragged into a court case for claims that occur during construction, such as injuries. I believe that if I omit construction phase services from my agreement for surveying services, no one will know I have been on the construction site and I can avoid being dragged into a lawsuit. Is it a good idea to leave construction phase services out of my professional services agreement even though I provide some services during the construction of the project?*

**A:** It is important that your professional services agreement includes an adequate scope of services. As the name suggests, project-specific terms include those terms that pertain to a particular project, including the specific scope of basic services. The scope of services should be defined with reasonable precision within the contract. Specifically, a well defined scope of services often provides the first line of defense for certain client and third-party claims. Conversely, an inadequately drafted scope of services may render the defense of claims significantly more problematic and costly.

Omitting from an agreement the construction phase services to be provided will not eliminate you from the possibility of being included in a lawsuit. If you are on the site during the construction of a project, someone will know it and you may be included in a lawsuit. Having a well defined scope of services for construction phase services—a scope that clearly defines your role and responsibilities—will likely be a useful defense. Being on a construction site without an agreement that defines your role and responsibilities during construction may leave your conduct open to interpretation.

## Site safety

Many surveyors are cautious about providing construction phase services for fear of being included in a lawsuit regarding an injured worker or third party. However, inclusion of language stating that the surveyor is not responsible for construction site safety can help manage this risk.

Since the contractor is in control of the site and the work force, he or she is in the best position to ensure safety. However, the surveyor has a difficult task in walking the narrow path between

gratuitously assuming some of the contractor's responsibilities and improperly ignoring apparent safety violations. For example, consider the actions required of a design professional who sees and recognizes (1) an unsafe condition which does not appear to be imminently dangerous, and (2) an immediately dangerous condition.

In both cases, it is unacceptable for surveyors to assume that they have no obligations because safety is the concern of the contractor. In the first case, the surveyor should report what was seen to the contractor's representative in charge on the site, who is normally the superintendent. This communication should be documented. However, the surveyor should not tell the superintendent what to do because safety remains the contractor's responsibility. The goal is to make the superintendent aware of the apparently unsafe condition so that a proper response can be made. If the condition persists, the surveyor should consider informing the client, which has the power under the contract documents to stop the work. In some cases, it may even be necessary to report unsafe conditions to the appropriate regulatory officials.

In the case where imminent danger is apparent or an emergency exists, the surveyor will be expected to take reasonable and prudent action under the circumstances. Often, that will include a warning to workers that appear to be in danger. Again, the surveyor is not necessarily expected to know what is required to make the situation safe; that remains the contractor's responsibility. However, the surveyor must act to bring the matter to the contractor's attention. The question then arises as to whether the surveyor will be expected or required to discover other such circumstances, if any, and to act accordingly. Generally, no such obligation will be imposed on a surveyor who acts to prevent imminent danger. Still, it is a good idea to note in a written communication that the apparently unsafe condition was observed during a normal site visit. ■



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