

Guidelines for Developing and Responding to Effective RFP's and RFQ's

Why Contract Forms, Terms and Insurance Matter



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Engineering Our Cities' Futures

Legal Disclaimer

- To start...
 - This presentation is intended to represent some observations on contracting practice in MN from perspective of an engineering consultant with experience on both the public and private side of professional services agreements.
 - Always seek the counsel of municipal and consultant legal staff when drafting contracts.

Aren't contracts just "boilerplate"?

Sometimes...

- Many municipalities have standard forms or terms
 - Developed over time by municipal legal staff
 - May have full contact form or just key terms

Aren't contracts just "boilerplate"?

Sometimes...

- Some terms are mandated by statute
 - Prompt payments to subcontractors
 - MN Gov't Data Practices Act requirements
 - Consultants subject to same requirements as city
- Certain federal and state funding conditions

Aren't contracts just "boilerplate"?

- If the city requires other specific terms, it is important to identify in RFP/RFQ
- If the RFP doesn't include a contract form:
 - Will city require a specific form later?
 - Will city accept consultant's form?

Aren't contracts just "boilerplate"?

- Contract terms directly affect Cost and Time
 - Allocation and pricing of risk
- Some terms require special endorsements
 - Very broad indemnities may be uninsurable

Aren't contracts just “boilerplate”?

- Is it clear what terms are mandatory?
- Will terms be negotiable?
- Can or should proposer suggest alternatives?

Is there an appropriate Form of Contract?

- Professional Service Agreements (PSA) differ from a typical construction contract
 - Construction follows defined Plans and Specifications
 - Normally prepared by a professional

Is there an appropriate Form of Contract?

- Professional Service Agreements (PSA) differ from a typical construction contract
 - Professional Services involve the application of mathematics, aesthetics, and sciences, acquired by education and experience for
 - safeguarding of life, health, or property
 - Planning, design and observation of construction
 - See MN 326 and Board AELSLAGID Rules

Is there an appropriate Form of Contract?

- Long established that contracting process for professionals is different than that for contractors

“Professional services such as architectural and supervisory services need not be competitively bid and assigned to the lowest bidder... Because there is unique skill involved in these services, it is not necessarily in the public's best interest to use the lowest bidder.”

Ruzik v Eden Prairie (1991 Mn Ct of Appeals) citing *Krohnberg v. Pass*, 187 Minn. 73 (1932):

Is there an appropriate Form of Contract?

- Unlike a construction contract -
 - Professional will seldom have a complete set of processes and procedures to guide its proposal
 - Client is relying on knowledge and expertise of the professional in interpreting the full scope of services

Is there an appropriate Form of Contract?

- Many construction contract terms are, by statute, law or custom, not generally applied to professional and technical services
 - Warranties or guarantees
 - Retainage
 - Bonding

Is there an appropriate Form of Contract?

- “Standard of Care” for professional services is generally accepted to be:

“Professional will endeavor to perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances”

Is there an appropriate Form of Contract?

- Good resources for professional agreements
 - MnDOT Professional and Technical Services Contracts (Low Risk or High Risk forms)
 - Contract General Terms have well integrated insurance, standards of care and other terms
 - LMC
 - League of Minnesota Cities
 - Primary Insurer for MN municipalities

Is there an appropriate Form of Contract?

- Good resources for professional agreements
 - EJCDC - Engineers Joint Contract Documents Committee (NSPE, ASCE, ACEC)
 - Owner-Engineer Forms
 - Long, short and task order versions

Does insurance affect the proposal process?

- Typical insurance requirements for designers
 - Worker's Compensation (Statutory)
 - Employer's Liability (Coverage B)
 - Auto Liability
 - Commercial General Liability (CGL)
 - Excess/Umbrella Liability (Usually optional)
 - Professional Liability Insurance ("E & O")

Does insurance affect the proposal process?

- Most municipalities have standard insurance terms
 - Terms and Coverage Limits
 - Often tied to public liability limits (MN 466.04)
- Best if reviewed for each project – especially:
 - Very large or complex contracts
 - Unusual services with unknown risks
 - Very basic services with low risks

Does insurance affect the proposal process?

- For consultants, insurance requirements are a form of pre-qualification
 - Not all consultants can carry or afford same limits
 - Excessive coverage requirements can price a proposer out of the project

Does insurance affect the proposal process?

- Consultants can obtain optional Excess/Umbrella Liability policies to cover some limit gaps
 - Usually lower unit cost for added coverage
 - Can extend limits for CGL, Auto, Employer Liability
 - Terms should state if EUL coverage is allowed
 - Does not augment Professional Liability
- A mandatory EUL coverage requirement may adversely impact small firms

Does insurance affect the proposal process?

- Non-standard or outdated insurance requirements
 - Require special endorsements and premiums
 - Must be listed in RFP or can be deal-breakers later

Does insurance affect the proposal process?

- Examples of non-standard requests
 - Older ISO (pre-2013) Add'l Insured form requests
 - Old forms often difficult or impossible to get coverage
 - Pass-through insurance requirements to designers from railroads
 - 30 Day cancellation notices all reasons
 - Unless endorsed, standard is 30 days except 10 days for non-payment of premium

How does an indemnity affect insurance?

- Indemnification requirements common to many contracts
- No standard indemnity language
- Each indemnity clause must be reviewed
 - Does it go beyond just responsibility for negligence?
 - Is it insurable?

How does an indemnity affect insurance?

- Some municipalities require consultants to indemnify and defend municipality for claims
 - Defense can be insurable for consultant and additional insureds under CGL and Auto policies
 - Defense of others is not insurable under available standard Professional Liability (PLI) policies

How does an indemnity affect insurance?

- PLI normally only insures consultant's liabilities to extent consultant is legally negligent
 - Failure to meet the Standard of Care
 - May insure reimbursement of a third party's reasonable legal costs to extent consultant is negligent

How does an indemnity affect insurance?

- If consultant is not negligent, none of claimant's legal fee would be covered under PLI, but...
 - Consultant could be solely obligated for those legal costs without insurance even if not liable
- Defense coverage gap is big risk for consultant
 - Can be deal-breaker if consultant can't afford risk
 - Basis for a lot of contract questions/negotiations

How does an indemnity affect insurance?

- Risk to municipality if indemnity is voided by unenforceable or uninsurable indemnity language
- *MN Statute 604.21 voids an indemnity clause that requires a design professional to indemnify or defend someone for negligence of someone other than the professional or if indemnity is not insurable*

How does an indemnity affect insurance?

- Solutions
 - Make sure indemnity requirements are fair and reasonable
 - Parties should be held responsible for only their own negligence
 - Be sure designer indemnities conform to MS 604.21
 - Be sure indemnity terms are insurable
 - Recognize different types of insurance have different approaches to negligence and defense obligations

What's “means and methods”?

- Typical construction contract language provides that:

The Owner [or its agents] shall not supervise, direct, or have control or authority over, nor be responsible for, Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of Contractor to comply with Laws and Regulations applicable to the performance of the Work.

What's “means and methods”?

- RFP's sometimes require designers and construction engineers to “supervise” construction and assure it conforms to plans
 - Such duties and assurances are usually NOT insurable under standard Professional Liability

What's “means and methods”?

- It is usually not in municipality's interest to have its designer and construction engineer supervising construction
 - May relieve the contractor of its obligations for its own “means, methods and safety”
- Best to include similar “means, methods and safety” language in the Municipality/Professional Agreement

What's “means and methods”?

- Professional still has an important role in administering, monitoring and documenting the construction contract to achieve project results without supervising or assuring the work of the contractor

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