



## CASE on Contracts

Part 1

By Steve Schaefer, P.E.

**G**ood contracts are an important part of any structural engineering firm's practice. Having a good contract can make your projects run more efficiently and improve your firm's profits; conversely, an inappropriate or poorly written contract could be disastrous for your firm. This article is the first in a series of articles from CASE to help structural engineers have more profitable businesses by using contracts effectively.

### The Basics

#### What is a Contract?

A contract is an agreement to do or not to do something. Saying that a contract is "valid" means it's legally binding and enforceable. The point of a contract is to clearly outline an agreement so that the "object" is accomplished while preventing disputes that could lead to litigation. A lawsuit is a very inefficient and expensive way to resolve contract disputes; it also means you lose control over the issue being disputed since a judge or jury will be making the decisions instead.

The essential parts of a valid contract include:

- **Parties.** The contract must clearly identify the parties to the agreement.
- **Consent.** A valid contract also requires the parties' consent. Consent isn't mutual unless the parties agree on the same thing in the same sense. This is often referred to as a "meeting of the minds". Generally, there's an offer and an acceptance communicated by the parties.
- **Object.** The product or service being agreed to is also known as the object or subject. It must be lawful, possible and definite. For structural engineers, this is the "Scope of Services".
- **Consideration.** All contracts require consideration, meaning each party must gain something. Typically, your client gains your structural engineering expertise and your firm receives money in return; however, the consideration could also be free advertising, for example.

#### What Should a Good Engineering Services Contract Cover?

In addition to the basic requirements, a good contract will provide additional protection by clearly documenting:

- a. When you will be paid.
- b. The consequences if you are not paid as required, such as being paid interest at the specified rate, allowing you to stop work on the project and/or forcing the client to reimburse you for legal expenses expended in order to collect the amount due.
- c. A detailed Scope of Services:
  - i. Makes it clear what services you are providing.
  - ii. Protects you from an expanded scope or scope creep by providing for extra compensation due to unforeseen circumstances or changes in the scope initiated by the client.
  - iii. Protects you from claims regarding issues that were not within your scope of services.
  - iv. In some cases, you may want to specify some services that you will not be providing.
- d. Other Terms and Conditions that are not the key elements of the contract but cover various situations that may occur.

#### If a Contract Isn't in Writing, is it Still Valid?

Contracts do not have to be in writing. An oral contract is acceptable in many situations; however, there is no way to prove the terms of the agreement with an oral contract. In several states, a contract for engineering services must be in writing. Further, some states require a transaction over a certain dollar amount to be in writing. When the agreement doesn't have to be in writing, all the other elements of a valid contract still have to be fulfilled.

### Standard Contracts

A well written contract is your best protection should a dispute arise. In a perfect world,

before a contract is drawn up or signed, an attorney should review it; however, that can be expensive. Your professional liability insurance carrier probably provides a free contract review service, but this is usually only used for client-supplied contracts. You have other options available: The American Institute of Architects (AIA), the Engineers Joint Contract Documents Committee (EJCDC), the Council of American Structural Engineers (CASE), and others have written standard contracts for use in the architectural, engineering and construction fields. Contracts developed by these organizations cover typical conditions applicable to the members of their organizations and have been reviewed by attorneys.

AIA and EJCDC have great contracts; however, AIA contracts are written to cover the work an architect will be providing to the owner, or the services that a sub-consultant will be providing to the architect. They are not written to address issues relative to the structural engineer. The EJCDC contracts are written to address large civil engineering projects. Neither organization has a good contract to cover structural engineering services for smaller projects with a limited scope.

CASE has written over a dozen contracts specifically for structural engineers and the various situations they might encounter. By far the most widely used of these contracts is CASE Document 1, *An Agreement for the Provisions of Limited Professional Services*. This contract is in the form of a two-page Agreement and a one-page Terms and Conditions, and is intended to be used by structural engineers on investigations and small projects with a limited scope of services where the work will be performed within a relatively short time frame. As with all of the CASE contracts, it has been reviewed by attorneys experienced with structural engineering and construction litigation, and by Professional Liability Insurers.

### Scope of Services

Even when using standard contracts, it is critical to specify an accurate and specific scope

## Problems Caused By Poorly Defined Scope

The intention of both the engineer and their client, a precast concrete supplier, was that the engineer would serve as a specialty engineer checking the reinforcing in the precast supplier's proposed design, and modifying it where necessary so that it complied with the building code. Shortly after the precast was erected, non-structural cracks formed because of the way in which the precast supplier configured the structure. Because the engineer's scope of services said "Design the precast structure" rather than the more specific "Review and modify the reinforcing in the precast supplier's proposed design so that the precast concrete components complied with the building code", the engineer and its professional liability insurer paid a very large claim for the expense of fixing the non-structural cracks.

A structural engineer agreed to check the proposed design for the contractor building the structural frame for an extreme sports event structure. The engineer's contract said the engineer would "Analyze and design a temporary ramp structure" and that the engineer would "coordinate with (the event promoter and the ramp contractor)". One of the athletes was seriously injured due to an error by the athlete compounded by a completely non-structural problem that developed during the competition. The athlete's attorney used the usual "shot gun approach" and sued over twenty firms, any firm that was in anyway involved in the event. Because the judge interpreted the engineer's term "ramp structure" to include all physical aspects for the event and not just the primary structural components, and assumed the engineer's responsibility was to coordinate the entire event and not just the primary structural components, he did not agree to dismiss the engineer from the suit even though the structural components designed by the engineer performed perfectly. As a result, the engineer paid \$25,000 in attorney fees plus \$25,000 for a settlement since the cost to fight the suit would be considerably more than the settlement. If the engineer's scope had been written to clearly say that the engineer was responsible only for the structural design of the primary structural components and to specifically list those components, the firm may have been dismissed from the suit, although they would have still had \$25,000 in attorney fees.

of services, and avoid language that would broaden your scope well beyond what you agreed to perform with the Client. Describe exactly what services you will be providing. For example, are you designing a repair to meet the current building code, a previous code or just to put a damaged structure back into its original condition (since that may be all that the client's insurance company will pay for)?

Since many projects are of a limited scope, you may be providing a lower level of service than on a large project; make sure that this is clear in the agreement. If necessary, note what services are not being provided. Some examples of exclusions or limitations are:

- 1) The preparation of a Construction Contract between the owner and contractor is not included.
- 2) The preparation or review of a construction cost estimate is not included.
- 3) Only one site observation visit during construction will be provided.

It is good practice to offer providing these excluded services for an additional fee. Having an agreement that documents the additional services that were offered, but the client chose not to include, can reduce your liability if disputes arise.

## Summary

Although it may not be legally required, your contracts should be in writing and should cover the various conditions that may apply beyond the basics of Parties, Consent, Object and Consideration. Even when using a CASE or other organization's standard contract, it is imperative that the scope clearly identifies what services you will and will not be providing.

To help your firm use contracts more effectively, watch for these additional articles from CASE:

- Terms and Conditions to be included in your contracts;
- What new Project Managers need to know about contracts;
- CASE's survey of contract use;
- How to respond to onerous clauses on Client supplied contracts. ■

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