

3.1 Introduction

Text provided by ENCON Group Inc.

Good contracts protect land surveyors, but a few words can make the difference between security and risk. They can mean a lot more than profit and loss on a given project. The terms of a contract can literally mean the survival of the firm and the livelihood of the land surveyor.

A very large percentage of land surveyors continue to render services without a written contract. How can you realistically expect to protect yourself against unreasonable claims from other parties, limit your liability, ensure you receive your fee and be indemnified against the re-use of your work and documents if these provisions are not set out in writing?

It would be difficult to overemphasize the importance of obtaining a written agreement covering every piece of work a land surveyor prepares. As discussed below, we may all want a world where 'handshake' agreements are still good, but in today's complex environment, the written word offers the best and often the only hope for a successful outcome.

Land surveyors hold a special place in the justice system. The law recognises their exercise of judgement, acknowledges the uniqueness of their professional services, and protects the land surveyor who practices in a reasonable and prudent manner. However, the law also recognises that parties can use contracts to define their own responsibilities and obligations. This ability to modify their normal legal liabilities by contract means land surveyors can assume unintended, or at least unexpected, risks. That is why attention to contract language is so important.

3.1.1 Land surveyors are personally liable

While land surveyors can be incorporated, that does not mean that land surveyors enjoy the freedom from liability of corporate owners. They can remain personally liable for their professional actions. Where a contract exists, that liability can be limited in certain directions. Where no contract exists, in a situation where the general public is injured or at risk, the land surveyor's liability is unlimited. There are definite limits to the ability of professional liability insurance to protect the land surveyor for alleged acts of omission or errors. Without a contract, the judicial system makes the ultimate decision about the extent of professional liability.

3.1.2 Contract versus tort

Contract law is different from other kinds of law because it typically only involves the parties to a given contract. Under the law, contracts exist between land surveyors and their clients, even without a written agreement; courts will hold the professional to the land surveyor's 'reasonable standard of care'. The written contract may define the contractual obligations between the parties more precisely than would otherwise have been the case. Contracts can seem lengthy because it is important that they express as clearly as possible the intentions of all parties under a wide variety of possible circumstances.

Torts are civil wrongs, which involve violations of the personal, business or property interests of persons whom land surveyors ought reasonably to have foreseen would be impacted by their actions, if they were not prudently carried out. With or without a contract, land surveyors are, like

any other people, still responsible and liable for any of their actions that cause physical or economic harm to others.

3.1.3 Types of agreements

Oral

Agreements do not have to be in writing to be enforceable. However, it is simply not possible to think of any business or professional reason to use an oral contract. Land surveyors who have been lucky with the work they have done on a handshake are just that – lucky. When things go wrong, the parties to an oral contract can find themselves in court, working from memory to recreate a version of events that might have taken place years ago.

Letter

When clients and land surveyors use letterform agreements, usually for small, well-defined jobs, they should address project-specific terms and information: owner obligations; compensation; schedule; and identify any additional services.

Purchase orders

When clients insist on using purchase orders, the form will probably contain provisions that are inappropriate for survey services. When buying goods or procuring construction work, for example, it is customary for a client to require express warranties and performance guarantees. As we state elsewhere in this guide, land surveyors are governed by the ‘professional standard of care’, and are certainly not in a position to agree to warranties or guarantees.

Standard form

Standard form agreements are usually the product of a great deal of effort and consultation with owners, contractors and other groups as well as land surveyors.

They are often updated to eliminate inconsistencies or accommodate changed circumstances. These forms are effective because they are based on current legal precedents and litigation. Because standard forms are fair, balanced and backed by industry and trade associations, owners often accept them.

It is fairly easy to make amendments to other construction contract documents, but the parties should be careful to use language that is consistent with the rest of the document.

Custom

Where it is important to use custom agreements, due to the nature of the project or the client’s wishes, the land surveyor may find it useful to check its terms against those of a standard contract.

3.2 Contracting Surveying Services

The “Contracting for Surveying Services” manual (that follows the end of section 3) was prepared in 1995 by the Canadian Council of Land Surveyors and published in magazine format for distribution to practicing land surveyors and student. As noted in the introductory paragraph of the document itself, “(It) is intended as a guide and idea generator to assist in customizing a contract for use in a particular situation.”

Professional Surveyors Canada invites your comments, criticisms, and suggestions for improvements. Of particular help would be additional examples of forms you have found useful in your practice. Communications should be sent to Professional Surveyors Canada info@psc-gpc.ca

The following section is adapted from an article provided by the current Professional Surveyors Canada Professional Liability Insurance Broker, Roger A. H. Brett.

3.3 Using Legally Binding Contracts and Language to Avoid

A Binding Contract needs five Criteria:

All contracts, whether verbal or written must meet the following five criteria to be considered a binding contract.

- **Agreement:** Both parties to the contract must come to a “meeting of the minds”, whereby one party will provide goods or services and the other party accepts the goods or services for an agreed consideration (fee or goods)
- **Fee or consideration:** An item or monetary reward must be exchanged between the two or more parties effecting the contract.
- **Contract Must Be Legally Enforceable:** The Contract conditions must be legally enforceable in the jurisdiction to which the contract is to apply. For example in the USA, some States indemnification language is not enforceable due to anti-indemnity statutes.
- **The Purpose for the Contract must be Legal:** The Contract must be for a legal purpose. A consultant who is not a licensed professional engineer, licensed land surveyor or licensed architect and signs a contract to provide such professional services, would be signing an illegal contract and accordingly such a contract could not be enforced.

- **Mentally Competent Parties:** The signatories to the contract must be mentally competent and not be impaired by insanity or intoxication. They must be authorized by their respective companies to sign the contract. These persons can typically be company officers or specifically authorized personnel with a mandate to sign the contract.

We all too frequently see consulting companies entering into business arrangements without arranging a written contract to record the agreement they have entered into. This is an extremely poor management strategy that can lead to serious financial losses and to potential liability for the firm involved. Some firms consider a verbal contract to be adequate. The problem here is, should there be a disagreement at a later date over the verbal contract, the courts will be faced with deciding which party has put their “memory” of the verbal contract over best to the court. A written contract will help a court to decide the outcome much quicker and not tie up your company’s time and financial resources.

It is now up to your firm to ensure that the written contract entered into has all the appropriate clauses, and that you have not used language to assume within your contract, liability for a quality of service or something you did not intend to provide. We strongly urge all principals of firms to have their staff attend loss control seminars on the subject of contractual agreements, as part of your firm’s overall risk management program. All staff members should be encouraged to use written contracts or even as a minimum requirement, written letters of confirmation. Most professional associations already have their own basic written contracts to be used by the consultant (for example the ACEC Document 31). Even if

you have your own form of contract, there are times when an owner may present you with their contract. An owner-generated contract needs to be looked at very closely as it will generally include clauses that can cause more problems than a verbal agreement. For example, the indemnification clause is often very encompassing and requires you to indemnify the owner for its own negligence as well as all claims. A typical professional liability policy only insures your negligence also all policies have exclusions, so all claims may not be covered. Therefore you may be taking on liability exposures that are not insured under your professional liability policy.

Another common problem we see in owner generated contracts is the contract was probably intended for a contractor and it is now being used for the consultant. Beware of standard of practice language that includes such words as warranty or guarantee or phrases such as “highest standard of practice”. As your firm is a provider of technical services you must avoid providing warranties for your work. Accepting phrases such as “highest standard of practice” increases your liability. You can only be judged by the standard of practice that exists at the time the services are provided.

Other areas to review in any contract are the waivers of subrogation clause, as no Canadian insurer will waive its rights of subrogation under a professional liability policy (This is commonly granted under general liability policies). You should also check the clause that dictates the contract law. Ensure that this is the law of your province or at least Canadian law. If it is a contract applicable to the laws of a country other than Canada, check to see that your policy covers that country. Other areas of the contract that should be looked at closely are the clause pertaining to any

Occupational Health and Safety Act (OHSA) issues. Some provinces in Canada have very stringent requirements under their acts. Owners are now building into their contracts (originally designed for the contractor) requirements regarding these acts. Ensure that you are not taking on the responsibilities of the contractor for the entire site.

by: Roger A.H. Brett

For contact information please see Section 6.2.