Fine-Tuning the Contract

In contracting with consultants, employing the industry's best practices offers tangible benefits

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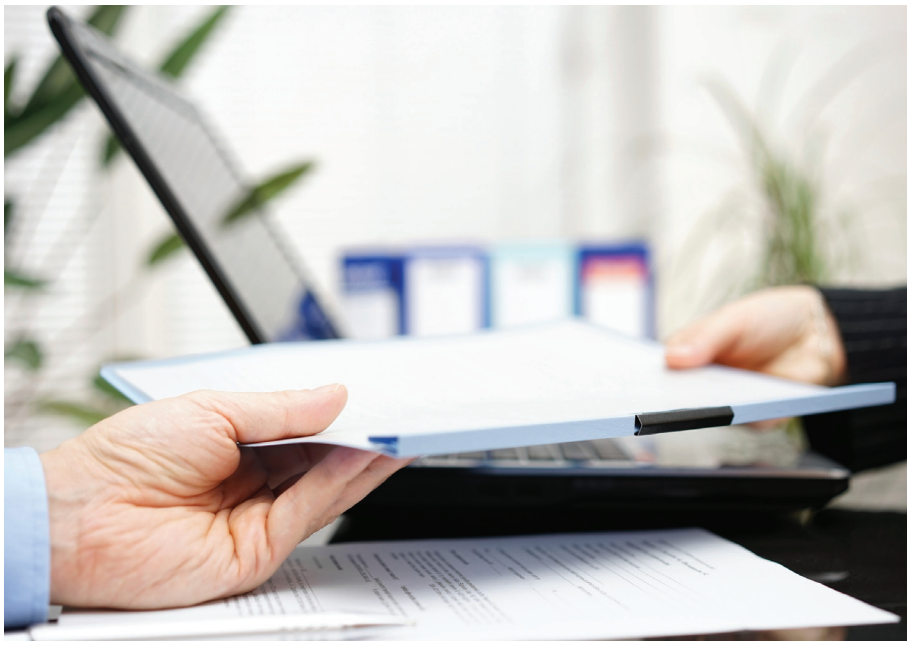
Since 2002, the Right of Way Consultants Council has played a vital role in addressing key issues facing the industry. Comprised of the industry's leading right of way consulting firms, the council is committed to raising the standards of practice among our member companies. To accomplish this, we continually review and advance current hiring and employment practices, recommend best practices for contracting methods, help clients reduce costs and ensure a more positive outcome for all parties.

A Collective Voice

At the Right of Way Consultant Council's annual meeting in April, we had the opportunity to speak with representatives from most of the major right of way consulting firms about the main issues they currently face. These companies—which range from boutique firms to large multi-state entities with several hundred employees—handle a variety of right of way acquisitions from energy transmission corridors to rails and roads. But regardless of size, the consulting firms all had similar concerns. Despite the many advancements made in the right of way profession, consulting agreements have not benefitted from the same level of progress.

The reality is, right of way agents provide professional services that are more akin to appraisers and attorneys. The role they play is not really part of the "construction project." Unfortunately, right of way agents are still being placed in the engineer and contractor rubric, a throwback to the time when engineers acquired much of the right of way. The unfortunate consequence of this is that it leads to a series of mistaken assumptions. In turn, this leads public and private agencies to include inappropriate (and sometimes illegal) contract terms into the right of way consulting agreements.



Given the various retention schedules dictated by state, federal and local law, providing the agency with project notes and records at the conclusion of the assignment is recommended.

The result is wasted time and resources, which drives up project costs and impedes efficiency.

While right of way professionals need to continue to educate agencies on what their role is—evaluating, negotiating and processing land acquisitions—it is also important to have contracts with provisions that reflect the type of work being done. To facilitate this process, we have developed some best practices that will ensure the best outcome when contracting with right of way consulting firms.

PROVISIONS FOR RISK SHIFTING

Indemnification and hold-harmless clauses in contracts are risk-shifting provisions designed to assign responsibility and risk of loss to one party or the other. Unfortunately, many indemnification provisions are entirely one-sided and shift an excessive amount of risk to the right of way consulting firm. Not only has this been regarded as inequitable, but it has proven to be an ineffective way to prevent accidents or injuries. Recognizing this, several states have enacted laws that prevent this type of excessive risk shifting away from the party that is primarily responsible for the damages. The reason for this is because it unfairly places a burden on one party to assume the risk for actions that they have no control over. Further, these agreements are not binding on third parties who are usually the injured ones. The preferred practice is for both parties to remain responsible for their own actions, including their employees, for whom they have control over. In turn, this usually results in cost savings, as right of way consultants do not need the same level of coverage as a city or construction contractor.

Recommendation: Draft contract provisions that require each party to insure and indemnify for their own actions. Depending on state law issues regarding concurrent negligence, joint and severable liability may impact how this provision is drafted. You should consult your attorney.

REQUIREMENTS FOR RECORD RETENTION

With the proliferation of data and information being recorded, the process involved with record retention and retrieval can become problematic. Statutory obligations under the Freedom of Information Act and many state and local laws may require contractors to comply with records requests to the extent that the records would need to be maintained by the agency. This places a significant burden on right of way professionals who maintain records for their own business purposes, but could become contractually or statutorily required to maintain records under a variety of retention schedules dictated by state, federal and local law.

A good solution is to provide a copy of identified notes and records to the agency at the conclusion of the assignment. If the contractor is required to respond to records requests after the assignment concludes, the contractor should be provided additional compensation.

Recommendation: Discuss any potential legal obligations with your attorney and consider including a contract provision for records retention similar to the following: "All records created on behalf of the agency as part of the project shall be provided to the agency at the conclusion of the contract period. By providing all documents, the contractor is relieved from any obligation and/or duty to respond to records requests made by or to the agency. The exception to this might be state licensing requirements for real estate license holders. The contract and the law should be consistent. If the agency requires the contractor to provide records in addition to those previously provided, the contractor shall be compensated for all costs incurred in retrieving the records according to the contractor's then current fee schedule."

MODIFICATIONS THAT REFLECT REALITY

Although most agreements require that any changes in the scope of work be approved through a particular process, these provisions are routinely ignored. As consultants, most of us have worked on projects where a public or private agency requests scope of work changes be done on the fly. Whether these requests come via phone call, email or during a site visit, this often creates a problem for contractors if there is a change in management or a subsequent contract dispute. It

is a better practice to have contracts reflect reality. This means allowing for changes to be made with the understanding that they will be documented in various forms at a later date, or that the work product is used and accepted by the agency.

Recommendation: After consulting with your attorney, consider including a contract provision along the following lines: "Modifications and/or changes in the scope of work may be made at the request of the agency provided that they are documented either by letter, email, change order or other correspondence. Use and/or acceptance of work product not specifically delineated in the original scope of work shall be compensated for by the agency, if used in connection with this or other projects regardless of documentation."

TIMELINES FOR DISPUTE RESOLUTION

Today, most agreements include an alternative dispute resolution provision (ADR). And this has become a popular way to find resolution prior to litigating disputes. While many of the ADR provisions are fairly generic, their implementation can become problematic if dealing with difficult personalities in highly contentious disputes. It is a better practice for ADR provisions to set out specific timeframes and a process to make such provisions more timely and effective.

Recommendation: Establish something specific in your ADR provision such as: "The parties agree that in the event of a dispute that is not resolved within 30 days, either party may initiate the Alternative Dispute Resolution process by requesting mediation. If mediation is requested, it shall be set within 60 days of the original request unless otherwise agreed to by the parties. The cost of the mediator shall be shared equally between the parties. If the result of the mediation requires payment for goods or services, the payment shall be made within 30 days following the conclusion of the mediation. If a party refuses to engage in mediation or otherwise wrongfully obstructs the dispute resolution process, that party shall be responsible for all costs and fees incurred in enforcement of this provision. It's important to seek the advice of your attorney, as laws regarding the award of attorney fees and other matters vary by jurisdiction."

DISCRIMINATION AND COMPLIANCE

Unfortunately, this is a continually evolving area of the law that is driven by social change. Previous prohibitions included age, race and sex. Today, discrimination can also include areas such as disability, gender identity and sexual preference. While initial prohibitions occurred on a national and state level, local jurisdictions have now instituted their own anti-discrimination laws that vary by jurisdiction. Many contracts include verbiage that stipulates that contractor will comply with the rules regardless of where their employees are located. Thus, contractors are required to have a clear knowledge of local jurisdiction requirements and determine which may require them to make changes company wide, as well as which requirements may result in conflicts when trying to comply with the rules of multiple jurisdictions.

Recommendation: If required, modify the provision to limit compliance to local law, and only to those employees and operations located within the jurisdiction and to the extent they are not in violation of other state, federal or local law.

APPROPRIATE PAYMENT SCHEDULE

Right of way firms are often sub-consultants under larger engineering (prime) contracts. The sub-consultants perform the work, and then submit invoicing through the prime contractor. Ideally, the prime will approve the invoice quickly and submit it with their next invoice. However, it is not unusual for the prime to respond with, "Sorry you missed our cutoff," in which case the billing is processed a month later during the next billing cycle. The client typically takes 30 to 60 days to approve, process and pay the prime, who in turn pays the subs anywhere from 10 to 30 days after receipt of payment. A 90 to 120-day delay in payment is not uncommon in the sub-consultant's world.

> **"Whatever benefits and advancements are gained will ultimately be passed on to those who have hired us."**

"Pay when paid" is a concept that greatly burdens the sub-contractors. If the client disputes anything on the prime billing, delays in payment can extend even longer. Being the last to be paid creates a significant carrying cost for the sub-contractor, especially DBE and smaller firms. Payroll, rent and insurance are all being paid on time while the subs wait at the back of the line for payment. This adds a huge burden and an

additional cost to their bottom line. In addition, the prime typically adds a contract management fee to their billing to pass through the sub-consulted services. Ultimately, these costs end up back on your project through higher overhead. The viability of a small contractor you seek to support is also at risk, as their capacity to borrow money is often less assured.

Recommendation: Consider direct billing and direct payment options for sub-contractors. With today's demand for instant delivery, requiring anyone to wait three to four months to be paid following delivery and acceptance of services and products is no longer acceptable. Interest charges on past due accounts should be considered allowable under updated contracting standards. The traditional payment process for both public and private entities needs to keep up with the technical tools and project expectations. Direct capture invoicing and ACH payment tools are readily available for both faster approval and payment for all contractors, especially subs at the end of the payment line.

CONTROL OF INTELLECTUAL PROPERTY

Many right of way consulting firms have created technology specifically designed for the right of way industry. These tools contain intellectual property that is licensed to public and private users. When a client purchases and uses one of these right of way tools, they believe it to be a lifelong license. Not so. Much like the individual copies of Microsoft Windows you purchase for each computer or user, right of way tools are to be used within the terms of the license granted by the developer or owner. Most contracts have become so outdated that they do not integrate new technology, electronic data capture and storage or intellectual property. Government contracts in particular can no longer use "our standard contract" of 20 years ago. Contracts often say the agency "owns" all deliverables, which can be interpreted to include software and code.

Recommendation: Right of way consulting firms with intellectual property must seek qualified legal expertise specific to intellectual property, to review and amend their contract language relative to technology. Clients must understand and accept that they don't own Microsoft code for Windows, nor is it appropriate to demand ownership and continued use of right of way technology tools without proper licensing and ongoing payment for use.

ELIMINATING RETAINED PERCENTAGE REQUIREMENTS

While construction contracts typically include retained percentage provisions, they are entirely inappropriate for right of way consulting work. Holding a retained percentage assures that materialmen and taxes are paid and that the property is kept lien free. These considerations are not even applicable to right of way consultants, who are akin to appraisers and attorneys. While we are sure there will be some push back by those who use the argument that, "This is the way we have always done it," we wonder how far that argument would go if right of way consultants started routinely filing a notice of intent to claim lien on every parcel sought to be acquired.

Essentially, demanding a retained percentage in a right of way contract is an impractical throwback to a bygone era and needs to stop. Placing a retained percentage requirement in a right of way contract only ends up increasing financial obligations for the right of way consultants, driving up operating costs which are then passed on to the agency.

Recommendation: Strike any provision requiring retained percentages of contracts.

In Summary

We believe that it is incumbent for every right of way consulting firms to educate their clients about the specific role of the right of way agent. However, it is also incumbent on clients to understand the role that a right of way consultant plays, and to work with them appropriately and fairly.

The Right of Way Consultants Council is committed to all our clients in the public and private sectors. We have become an active voice in communicating industry concerns and will continue to improve our industry by establishing and maintaining best practices in the right of way profession. Whatever benefits and advancements are gained will ultimately be passed on to those who have hired us. When we all work toward a common purpose, we all benefit. ✪

For more information about the Right of Way Consultants Council, visit www.rowcouncil.org.

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