



Understanding Your Contract: The Foundation for Successful Projects

Your professional services agreement with your client is a critical document to formalize the roles and responsibilities of the project participants and establish the business parameters of your design services. Your contract is also the first line of defense in the event of a dispute or claim—in fact, it's the first thing a claims examiner will ask to see when a problem arises.

In this edition of our multi-part series, we address the importance of including a clear and definitive **Scope of Services** in your contract.

Foundational Element 2: Scope of Services

Your scope of services and deliverables (*what you will do*) and the related fees (*what it will cost*) are at the very heart of your client agreement, whether that is with a project owner or another design professional. If your scope, deliverables, and fees are clear and concisely defined in your contract—and well understood by your client—then you will have a mutual basis of understanding that will serve you well throughout the life of the project. If not, then you are leaving your services open to interpretation and your firm open to potential claims and financial exposure.

When drafting your professional services agreement, be as precise as possible in defining: the services, activities, and deliverables to be provided; the time frame in which they will be performed; and the related compensation. Industry standard agreements, such as those published by AIA and EJCDC, are model agreements for a wide range of projects and design firms. Accordingly, scope descriptions in those agreement forms are often not as specific as you and your clients may want them to be. Institutional and corporate client agreements, such as state and federal government agencies and healthcare and university systems, tend to be more prescriptive in the definition of services and deliverables and often have design, technical, and system standards as well.

Regardless of the client type, you should provide greater definition in your contracted scope as the size and complexity of your projects increase. In all cases, beware of wording that results in unlimited or open-ended obligations for services, deliverables, and durations (avoid phrases such as “as required” and “as necessary”).

Make note of any services that you do not intend to deliver except as an additional service (See “Basic, Supplemental, and Additional Services” on page 3). It is often just as important to define and document services that will *not* be provided as it is to document and define the agreed-upon services—especially if the client excludes or does not want to pay for a service that is typically rendered or part of the scope that is being negotiated, such as construction site observation.

Scope Basics

In general, the contract should define the following:

- What services you **will** perform for the negotiated fee (basic services)
- What services you **can** perform for an additional fee (supplemental services)
- What services you **will not** perform (specifically excluded)
- What services should be **performed by others** (e.g., consultants and contractors retained by the owner)

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Scope of Services Checklist

Here is a checklist of services and deliverables, by phase, to help you identify and capture what you need to define in your contracted scope of services:

Predesign Services

(These are normally supplemental or additional services—see “Basic, Supplemental, and Additional Services” on page 3.)

- Site, facility, feasibility analyses
- Environmental studies and reports
- Programming or program verification
- Master Planning
- Multiple concept or schematic design options
- Submissions for entitlements or grants

Design Phases

- Deliverables (print and electronic): plans, specifications, reports, renderings
- Client meetings and presentations for each design phase
- Number of bid packages
- Submissions to and meetings with code officials and other authorities having jurisdiction (AHJ)
- Submissions for sustainable design certification

Procurement (Bidding, Negotiation) Process

- Responsibility to assemble corollary contract documents (such as bid notices, owner-contractor agreement)
- Participation in contractor prequalification process
- Participation in pre-bid meeting(s)
- Preparation and issuance of addenda
- Analysis of bids, proposals, or GMP documents
- Opinion as to contractor qualifications
- Submission of contract documents for permit or other Authorities Having Jurisdiction (AHJ) review

Construction Phase Services

Understanding the duration of the construction period is critical to budget and manage labor and fees in this phase. Start date and substantial completion date(s) should be defined in the contract documents as they become contractual obligations of the contractor that the owner and design professional rely upon.

Memorialize the extent, quantity, and frequency of construction administration services in your contract including the following:

- Assistance provided in the permit review process after submission of contract documents to AHJ
- Site observation and reporting—prime consultant and subconsultants
- Construction progress meetings
- Submittal, RFI, change order review and response time
- Payment application review and certification
- Initial Decision Maker services
- Substantial completion certifications
- Project closeout activities
- Post-construction reviews or warranty inspections



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Basic, Supplemental, and Additional Services

In a contract between an owner and design professional, the term “basic services” ordinarily denotes the services that will be directly provided by the prime design firm as well as those that will be provided—via the prime design firm—by typical subconsultant firms. In an owner-architect agreement, for example, the architect’s scope of services would likely include the usual and customary structural, mechanical, electrical, plumbing, and fire protection engineering services.

There are two types of additional or optional services that can arise during a project: those that are known at the time of contract negotiation (“supplemental”) and those that may arise during the course of a project (“additional”).

Supplemental Services

During contract negotiation, you can identify and offer supplemental services that can add value to the project and command an additional fee.

This might include direct services such as programming, master planning, site evaluation, sustainable design services, and detailed cost estimating, as well as services from additional subconsultants such as civil engineering, landscape design, or other specialty consultants.

Supplemental services are typically shown as a matrix of services and consultants, together with related fees, that the owner can opt to add during the project.

Additional Services

During the project, your client may make changes to the project’s scope, size, schedule, and quantity of meetings, presentations, renderings, and models.

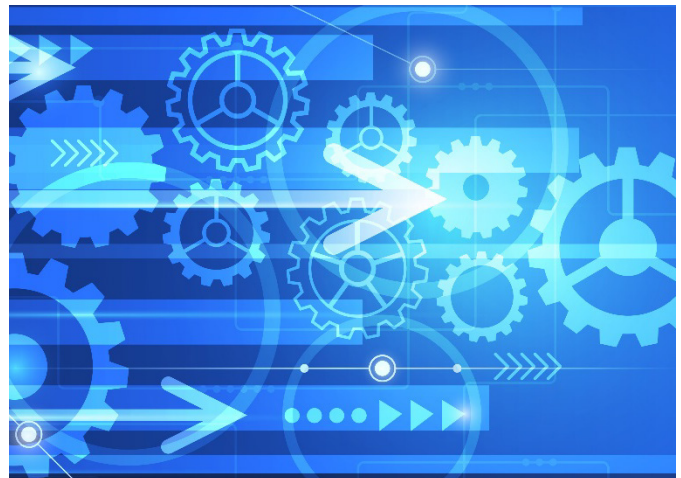
Your client may reverse previous decisions and even change the construction delivery method.

Unanticipated situations such as client/contractor performance issues or code changes can arise during construction.

All of these events trigger justified additional services and require analysis of the impact on your scope of services that should result in a corresponding change to your fees.

In addition, if your firm offers extensive internal specialty engineering or other design capabilities such as the ones listed below, be sure to negotiate as supplemental services as they can provide added value to the project:

- Telecom/Data
- Lighting
- Environmental Graphics
- Energy Modeling
- LEED or other Sustainable Goal Certification
- Commissioning
- FFE Design, Specification, Procurement Management
- Facilities Management



Whether part of basic, supplemental, or additional services, you should carefully budget, manage, and coordinate your subconsultants to promote quality in project delivery and manage risk. In addition, you should clarify in your agreement any subconsultant services you are NOT providing.

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Scope Creep and Change Management

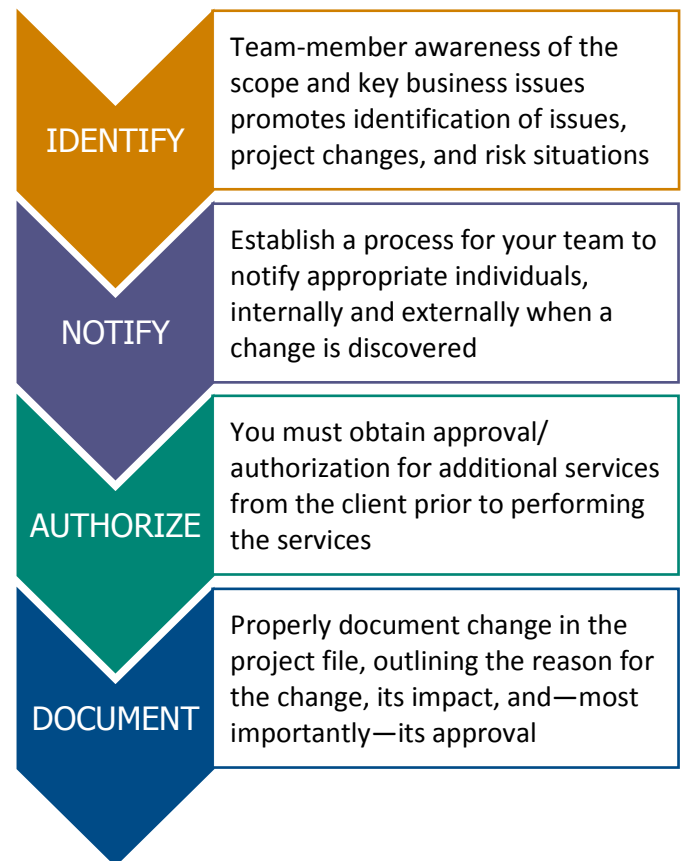
Clearly defining your scope in contract and implementing it in an efficient and timely manner is only half the battle. You must also manage the agreed-upon scope of services in accordance with the agreement and properly handle any changes in services that may occur. Even with diligent efforts in defining a comprehensive scope of basic and supplemental services, unforeseen and additional services are inevitable on most projects. It is important to stay on top of changes to avoid “Scope Creep” and get paid what you deserve for legitimate additional services. Scope Creep happens when your firm expands its services beyond the contracted scope without a corresponding increase in your fees. Your firm’s profit shrinks with every uncompensated service.

Your client has a contractual right to be informed of additional service requests and authorize those services before you perform them. Trying to recover fee after the fact is a tough battle that, at the very least, results in some tense discussions with your client—and at worst, fee disputes, which may lead to a counter-claim against you for errors and omissions. At the beginning of the project, you should work with your client to set up the process for identification and approval of additional services and address the need for the client to establish a contingency in the design phases for legitimate additional services fees.

It’s a fact of design and construction: changes are going to occur, so it’s imperative to prepare your team for this inevitability. For larger and more complex projects and design teams, the more challenging this process is likely to be.

To promote the design team’s awareness of additional services, you should define the process for identifying, notifying, and receiving authorization for additional services in accordance with your contract. You should establish this essential communication protocol in internal design team meetings at the outset of the project and review it at phase milestone reviews. The process of change management is critical to your firm’s business success on the project.

Change Management Policy



Conclusion

To ensure that you receive proper compensation for the services and value you are providing on a project, follow these steps:

1. Clearly define what services you will, can, and won’t perform and the limitations of the services you are providing for the negotiated fees.
2. Carry out your services as planned, and bill your clients in a timely manner.
3. Identify situations and project changes that would take your work effort beyond your agreed-upon basic services, and gain authorization from the client before providing the additional services.

A carefully crafted scope of services aligned with your client’s expectations, diligent monitoring of your firm’s services, and a solid change management policy will help you deliver successful, profitable projects.

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Berkley Design Professional was started in 2013 by a team of people with deep roots in underwriting, loss prevention and claims handling for the Design Professional community. The genesis of Berkley DP was the combination of our team's passion for bringing fresh ideas to the products and services Design Professionals need together with W. R. Berkley Corporation's desire to commit its superior financial strength and A+ rated paper to this industry segment. Berkley DP's motto is: "Better by Design." By this we mean that our policyholders are better businesses because we've designed comprehensive coverage and current risk management solutions that make their practice less susceptible to loss.

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