



# SURVEYOR'S TERMS AND CONDITIONS REVIEW GUIDE

A contract review resource especially for policyholders in Schinnerer's surveyor's program.

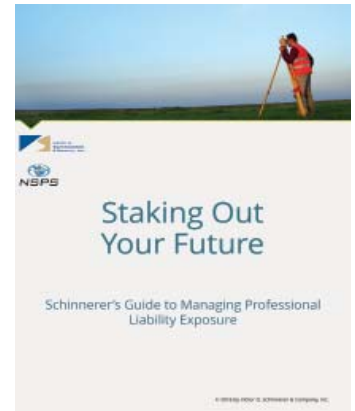
## USING THIS RISK MANAGEMENT TOOL

The *Surveyor's Terms and Conditions Review Guide* provides policyholders with a comparison of acceptable language to assist them in reviewing language provided by a prospective client. The contractual provisions of this guide also serve as model provisions for policyholders that would like to incorporate clear, unambiguous language into their professional services agreements.

This guide is not a model contract. The commentary and model provisions are based on Schinnerer's experience in loss prevention and on the general scope of insurance coverage offered under the CNA policy. The information is offered for general guidance over your risk management activities. Please be aware that these model provisions do not replace the need for you to rely on local legal counsel for a review of the terms and conditions of contracts you negotiate with your prospective clients. Your independent insurance broker can also provide advice on the applicability of professional liability insurance to the exposures you negotiate when crafting a professional services agreement.

This guide is meant as a supplement to *Staking Out Your Future: Schinnerer's Guide to Professional*

*Liability Exposure*, published jointly by Schinnerer and the National Society of Professional Surveyors (NSPS). This manual is a negotiation and contract development tool addressing common risk issues facing surveyors. Please see ordering information on the back.



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## INSTRUCTIONS

This information is designed to inform surveyors about some of the issues to consider when reviewing or negotiating professional services agreements. It is not intended as legal or insurance advice applicable to specific circumstances. Consultation with local legal and insurance counsel is recommended before applying or acting on anything contained or suggested by this material.

#### AUTHORIZATION TO PROCEED

Often, the date the professional services agreement is signed by both parties is not the date that the surveyor's services are to begin. A provision that addresses how the client should notify the surveyor to proceed with professional services should be included in the agreement.

**Sample provision:** Unless specifically provided otherwise in the scope of services, Client shall give Surveyor authorization to proceed for each phase of services and for each Additional Service prior to Surveyor commencing work. Authorization shall be provided in writing.

#### COMPENSATION

A schedule of compensation due the surveyor should always be expressly addressed to avoid potential disputes.

**Sample provision:** For the scope of services stated in Attachment \_\_\_\_, Client agrees to pay Surveyor the compensation stated in Attachment \_\_\_\_ to this Agreement. Surveyor agrees to submit invoices monthly for services rendered in the manner and format stated in Attachment \_\_\_\_.

#### DISPUTE RESOLUTION

Clients and surveyors should anticipate the possibility of disputes or claims and include some provision for dispute resolution in their agreements. Alternative dispute resolution through mediation is a non-binding process in which an impartial mediator actively assists the parties in identifying and clarifying issues in dispute, and in designing and agreeing to solutions.

**Sample provision:** Client and Surveyor agree that they shall first submit any and all unsettled claims, counterclaims, disputes, and other matters in question between them arising out of or relating to this Agreement to mediation in accordance with the Construction Industry Mediation Rules of the

American Arbitration Association, effective as of the date of this Agreement.

#### FORCE MAJEURE

Circumstances or events may occur that are outside the control of either party. This provision states that neither party shall be liable for losses arising out of any cause beyond its reasonable control.

**Sample provision:** Neither party shall be deemed in default of this Agreement to the extent that any delay or failure in the performance of its obligations results from any cause beyond its reasonable control and without its negligence.

#### HAZARDOUS ENVIRONMENTAL CONDITIONS

If the surveyor is not engaged to perform services related to hazardous environmental conditions, affirmative language should be included in the contract to exclude such services and exposures.

**Sample provision:** It is acknowledged by both parties that Surveyor's scope of services does not include any services related to the presence at the site of asbestos, PCBs, petroleum, hazardous waste or radioactive materials. Client acknowledges that Surveyor is performing professional services for Client and Surveyor is not and shall not be required to become an "arranger," "operator," "generator" or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 (CERCLA).

#### INDEMNITY

Indemnity provisions allocate risk and liability among parties. In the context of professional services agreements, each party should be willing to be responsible for losses and claims arising out of its own negligence.

**Sample provision:** Client and Surveyor each agree to indemnify and hold the other harmless, and their respective officers, employees, agents and

representatives, from and against liability for all claims, losses, damages and expenses, including reasonable attorneys' fees, to the extent such claims, losses, damages, or expenses are caused by the indemnifying party's negligent acts, errors or omissions. In the event claims, losses, damages or expenses are caused by the joint or concurrent negligence of Client and Surveyor, they shall be borne by each party in proportion to its negligence.

### MODIFICATIONS OR ADJUSTMENTS

It is not uncommon that the scope of the surveyor's services or the time in which they are to be performed changes during the course of the project. Therefore, it is important that the professional services agreement outlines procedures to accommodate changes.

**Sample provision:** If specific periods of time for rendering services set forth in the scope of services are exceeded through no fault of Surveyor, or if Client has requested significant modifications or changes in the general scope, extent or character of the project, all rates, measures and amounts of compensation, as well as the time of performance, shall be equitably adjusted. The scope of services may be revised or modified for any reason upon agreement of Client and Surveyor. In each case, the scope of services will be modified in a manner mutually acceptable to Client and Surveyor, and the fee schedule will be equitably adjusted to accommodate the changes. Any change to the scope of services or the fee schedule will be documented in writing.

### OWNER RESPONSIBILITIES

An agreement for professional services is an agreement between two parties. Identifying the client's responsibilities is as important as identifying the surveyor's responsibilities.

**Sample provision:** Client shall, so as not to delay the services of Surveyor: (1) designate in writing a person to act as Client's representative who shall

have complete authority to transmit instructions and receive information with respect to Surveyor's services; (2) provide all criteria and full information as to Client's requirements for the project; (3) assist Surveyor by placing at Surveyor's disposal all available information pertinent to the project; and (4) give prompt written notice to Surveyor whenever Client observes or otherwise becomes aware of any development that affects the scope or timing of Surveyor's services, or any defect or nonconformance in the work of any contractor. Surveyor shall be entitled to rely upon the information and instructions provided by Client and Client's representative.

### OWNERSHIP AND COPYRIGHT OF DOCUMENTS

Drawings, reports and other documents produced by surveyors are instruments of their professional service, not products. Sometimes clients may insist on owning or having an unlimited license to use these instruments of service. If the surveyor can identify the client's specific needs for the instruments of service (e.g., purchasing or identifying property or constructing the project), a limited license can be granted by the surveyor to satisfy those needs. However, if the client insists on owning or having an unlimited license, and the surveyor is willing to acquiesce to this demand, the client should be required to hold harmless and indemnify the surveyor for all liability, costs and expenses incurred as a result of any modification or use of the instruments of service without the surveyor's written authorization.

**Sample provision:** All documents prepared or furnished by Surveyor pursuant to this Agreement are instruments of Surveyor's professional service, and Surveyor shall retain an ownership and property interest therein, including all copyrights. Surveyor grants Client a license to use instruments of Surveyor's professional service for the purpose of purchasing or identifying property or constructing the project. Reuse or modification of any such documents by Client, without Surveyor's

written permission, shall be at Client's sole risk, and Client agrees to indemnify and hold Surveyor harmless from all claims, damages and expenses, including attorneys' fees, arising out of such reuse by Client or by others acting through Client.

#### STANDARD OF CARE

According to common law, a professional is required to act as competently as could reasonably be expected of other professionals practicing under substantially similar circumstances. The law does not require perfection, merely reasonable skill and care.

**Sample provision:** The standard of care for all professional services performed or furnished by Surveyor under this Agreement will be the skill and care used by members of Surveyor's profession practicing under similar circumstances at the same time and in the same locality. Surveyor makes no warranties, express or implied, under this Agreement or otherwise, in connection with Surveyor's services.

#### TERMINATION OF CONTRACT

The rights and obligations of the parties should be clearly expressed, including the right to terminate the contract.

**Sample provision:** Client may terminate this Agreement with seven days' prior written notice to Surveyor for convenience or cause. Surveyor may

terminate this Agreement for cause with seven days' prior written notice to Client. Failure of Client to make payments when due shall be cause for suspension of services or, ultimately, termination, unless and until Surveyor has been paid in full all amounts due for services, expenses and other related charges.

#### USE OF ELECTRONIC MEDIA

The transfer of information by electronic media is inherently risky. One way to reduce this risk is to state that a hard copy has control over any variances or changes that might be introduced by electronic means.

**Sample provision:** Copies of documents that may be relied upon by Client are limited to the printed copies (also known as hard copies) that are signed or sealed by Surveyor. Files in electronic formats, or other types of information furnished by Surveyor to Client such as text, data or graphics, are only for convenience of Client. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk. When transferring documents in electronic formats, Surveyor makes no representations as to long-term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems or computer hardware differing from those in use by Surveyor at the beginning of this project.

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