



Risk Tip 4.

Managing Risks in Feasibility Studies

Provided as a courtesy by the ACEC/MA Risk Management Forum

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Engineering studies conducted to determine site conditions, property conditions or the feasibility of a proposed project are generally considered to be very low hazard work when compared to engineering or designing projects. In fact, professional liability insurers discount fees derived from studies by as much as 75% when developing a premium cost to insure an engineering firm. However, if not properly managed, studies can result in expensive and protracted litigation.

Consider the case of a civil engineering firm in the late-1970s that provided advice to a West Coast utility on the feasibility of constructing two nuclear power stations. The firm was engaged to assess whether there would be sufficient demand for the plants to justify their cost of construction. The firm's study was then used in a bond offering intended to raise the funds needed for the construction. The bonds were sold to retirees and pension funds. Due to a lower demand for power than estimated and increased regulation over the construction of nuclear power stations in the wake of the Three Mile Island accident, the two units were never completed. As a result, the utility defaulted on \$2.25 billion of bonds which led to class action litigation from the bond holders. The civil engineer was sued along with the utility and other parties involved with the project. The litigation lasted almost 10 years and the civil engineering firm was one of the parties that contributed to the \$750 million settlement.

When performing studies, an engineering firm needs to carefully consider proper risk management procedures to mitigate risk. First determine the purpose for the study and who will be relying upon it. Will only the client be relying upon the report or is it to be distributed widely to other parties such as lenders or investors? What harm might be suffered by parties relying upon the conclusions or findings in the report if the findings are not accurate? For example, an existing property owner might be less subject to harm arising from an erroneous finding in an environmental report, than a client who engages an engineer for an environmental report on a site to be purchased. These are also important considerations, when determining the size of the fee to charge for the study. If there is greater risk of harm to the client or multiple parties relying upon the report, the fee should reflect the increased risk.

The contract needs a very clear scope of services and should limit who can use the report. State in the scope of services that unless particular services are expressly included in the scope, such services were not performed and assumptions cannot be based upon services which were not performed.

Only intended users should be allowed to rely upon the report. Have a statement in both the contract and the actual report identifying the intended users and that the intended users can only rely to the same extent that the client can rely on the report. Also, state in the report that no party, other than intended users, may rely upon the findings without the express written consent of the engineer.

The report should begin with a statement of its purpose. Also include a statement confirming these were the conditions at a specific point in time when the services were performed and state that this is not a guarantee or warranty of future conditions. This is especially important for environmental studies that confirm site conditions comply with EPA or State DEP requirements, as these requirements will change over time as could site conditions. State in the report that it is a professional opinion based upon the information available at the time of the evaluation. Qualify any findings or conclusions in the report identifying the facts upon which they are based. Express that the report was prepared subject to the standard of care applicable to engineering or other professional services at the time the services were performed. Specifically disclaim any express or implied warranties.

Given that fees for studies and reports tend to be small as compared to other engineering services, if you have the opportunity to obtain a limitation of liability from your client, do so. Some jurisdictions such as Florida and Georgia may not uphold the limitation, but in most states, limitations are allowed in private sector contracts so long as the party that is agreeing to the limitation has the ability to negotiate it. The four conditions generally applied in upholding limitations of liability are:

- The limitation cannot be against public policy
- The limitation is clear and concise as to what liability is being limited and to what amount
- The party agreeing to the limitation had the right to negotiate it before signing the contract
- The parties are of relatively equal bargaining power

As with any contract, it is always best to seek the advice of competent legal counsel when drafting studies or reports.

This Risk Tip is intended to provide current and accurate information to assist the reader in becoming more familiar with the subject matter. It is informational only and not intended to substitute for technical, legal, or risk management professional advice. The reader is encouraged to consult with an attorney or appropriate professional consultant to explore this information further.

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