READY, SET, PRACTICE:
ELEMENTS OF LANDSCAPE ARCHITECTURE PROFESSIONAL PRACTICE

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To carry out all responsibilities to both the owner and the contractor, the landscape architect must establish a nonconfrontational relationship. The landscape architect must be reasonable and fair when making decisions, ensure that the contractor conforms to governing laws and regulations and, when appropriate, provide supervision in the contractor's dealings with employees and subcontractors. This concern also applies to the prompt payment of companies supplying materials and equipment. It is in the interest of the project that these matters of payment for labor and materials are dealt with adequately so as not to adversely impact the project or affect the owner's interests.

Issues of Third-Party Legal Action during Construction

The landscape architect also has supervisory responsibility with respect to the contractor's actions in third-party matters. Steps must be taken to ensure that actions of the contractor do not result in damages to a third party, such as an adjacent property owner. Third-party damages could lead to litigation and claims not only against the contractor but also against the project owner. Third-party claims can be made by private individuals as well as private companies or a public agency—such as the U.S. Army Corps of Engineers. Some examples where contractor's actions could result in third-party claims include:

- dumping spoil material on wetlands without a government permit
- destroying private property such as a fence, building structure, or trees on an adjacent property

The landscape architect should, to the extent feasible, protect the interests of the owner and the project from claims or litigation as a result of a contractor's actions.

Surety Bonds

Most construction contracts require the contractor to provide several types of surety bonds. Bonds are a means of protecting the owner against incompetent, irresponsible, and financially troubled contractors. The General Conditions and the Instructions to Bidders included in the bid package and project manual should specify the bonding requirements for a project.

A surety bond is purchased by a contractor from companies that provide this service. The bond provides the project owner with assurance that the surety company will guarantee the faithful performance of the contractor to construct the project, pay the labor working on the project, and pay for the materials used in constructing the project. Three types of bonds commonly used in the construction industry are discussed in the following sections.

Bid Bonds

The contractor submits a bid bond together with the required bid and bid forms. The bid bond is a guarantee to the owner that the contractor will agree to the contract and perform all required work per the bid documents and for the dollar amount bid if the bid proposal is accepted. If the contractor withdraws the proposal after it is accepted by the owner, the surety company forfeits the amount of the bond, usually an amount equal to 5 to 10 percent of the contractor's bid amount. The bond amount is used by the owner to cover expenses to negotiate with another contractor or to re-bid the project.

There are any number of reasons for a contractor to withdraw a bid proposal. In the case of a competitive bid, the owner—if a government entity—is usually obligated to award the contract to the lowest bidder. If the contractor with the lowest bid is far below the next lowest bidder, has second thoughts, and then attempts to withdraw the bid proposal, the owner may elect to allow the contractor to withdraw if the next lowest bidder is within the project budget. If the owner does not accept an intent to withdraw, then the low-bid contractor is obligated to enter into a contract or default, thus forfeiting the bid bond. Surety companies do not look favorably on contractors who default, particularly ones who default often. When a contractor forfeits frequently, the cost of securing a bid bond goes up considerably or the surety companies may be unwilling to do business with the contractor altogether.

Performance Bonds

The performance bond provides the owner with a guarantee that the contractor will execute the work. It also protects the owner against defective work by the contractor. If the contractor does not perform satisfactorily or is unable to complete the work due to financial insolvency or other reasons, the surety company takes over and completes the contract or corrects the defective work.

The surety company has two basic options for completing the contract. The company can act as the general contractor and hire an alternate contractor or group of subcontractors to complete or correct the work. Alternately, the surety company may pay the owner the amount of the bond less a proportional amount of the bond for work already completed and accepted. In most cases, a performance bond is set at 100 percent of the contract bid amount.

Labor and Materials Payment Bonds

A labor and materials payment bond provides protection to the workers, subcontractors, and material suppliers. Its purpose is to assure they will get paid for work performed or for materials supplied to the contractor on a project. It is a guarantee that workers and suppliers will be paid by the bonding company in the event the contractor fails to do so. By not requiring a labor and materials payment bond, the responsibility to pay any liens falls to the project owner.

7. TIPS TO MINIMIZE TROUBLE

Write it Down

Maintain a written record of all formal and informal decisions, as well as communications with all parties. Maintain a personal journal and a daily telephone log, noting the telephone number and person or persons you've had conversations with. Summarize the main topics of discussion, outcomes, recommendations, agreements, and any decisions at meetings or from telephone conversations.

Also, maintain what is commonly referred to as a *paper trail.* Write down summary statements of all communications relative to a project, particularly communications where recommendations, directives, and any substantive information are given to you or provided by you. A paper trail should be kept from the early marketing and contract negotiation phases continuing throughout the remainder of the project until project closeout and final

payment is made. The paper of a paper trail may consist of letters and memoranda summarizing conversations and decisions, written throughout the life of a project.

Adhere to Established Chains of Command

During all phases of contracted work, follow agreed-upon, established chains of command in all communications (written and verbal) with owner, client, contractor and subcontractors. For example, direct all communication regarding construction work to the contractor or the contractor's representative named in the construction contract. This means avoid giving directions, recommendations, or any instructions directly to laborers or to the subcontractors on a project construction site. All directions should be given to the representative of the prime contractor. This will reduce potential claims by the contractor for additional money or for time extensions.

Take Care of Liability Issues Even When Working for Free

Landscape architects are often asked to provide free professional services for community and nonprofit organizations. Doing design work for free does not limit one's professional liability. An eventual injury that can be attributed to faulty or inadequate design can result in a lawsuit. The landscape architect is responsible even when the design services were provided gratis. For instance, the parents of a child injured seriously on a piece of outdoor play apparatus would be just as likely to bring legal action whether the apparatus was designed free of charge for a community group or under contract for a parks department.

Take care of potential liability issues just as carefully when providing design services gratis as when providing services on a fee basis. The same degree of care is necessary for both small and large projects as well. The potential impact on a landscape architect in monetary and time losses from a legal action can be just as significant for a project with a construction cost of $1,500 as for one worth $1,500,000. What is at issue is the nature and severity of the injury or loss to the litigating party, not the dollar amount of project construction.

Regardless of the fee involved (including the gratis project) and the dollar amount of the project, the landscape architect should insist that a contract be drawn up and that the proper handling of professional liability be fully addressed prior to starting work and performing any services.

Act in a Timely Manner and Keep People Informed

Most of the work landscape architects perform involves others in some way. Clients hire a landscape architect with certain expectations as to what services and products to expect within an agreed-upon schedule and fee structure. Subconsultants to the landscape architect have similar expectations and rely on the landscape architect, as the prime consultant, to supply needed information so that the subconsultant can perform on schedule. The contractor also relies on the landscape architect, particularly in making the inspections of work critical to maintaining a tight construction schedule, reviewing submittals, and responding to special requests in the field as problems or questions arise.

In all cases, it is important for the landscape architect to perform and respond in the time frame expected, making sure that the client, subconsultant, and contractor know well in advance of any potential delays. It is far better to say you expect to be late on a submittal or scheduled meeting if you know in advance that a prearranged schedule is not going to be met. Delays can lead to claims and litigation against the landscape architect unless the landscape architect notifies the affected party in advance. If notification in advance of some delay can be made, verbally or in writing, an agreement for a time extension or to reschedule can usually be negotiated.

8. IN-BASKET

You are a partner in a landscape architecture consulting firm. The firm has two partners and a staff of landscape architects that fluctuates from seven to ten. As one of the principals, you are reviewing activities in the offices that have potential legal implications. Consider the following situations. Develop a short paragraph describing your reaction to each scenario and what you believe the legal ramifications are to you and your firm for each situation.

1. You are at the job site checking the planting and the location of several specimen trees. You decide that moving a group to a new location would provide a better screening effect. There are three laborers at the site and no foreman. How should you convey your wishes to shift the tree locations? Consider potential liabilities and problems. Also consider: chain of command, possible presence of underground utilities, and direction versus observation.
2. You have been asked by a client to change a particular detail of a wood deck you designed. It turns out the carpenter talked to the client while the client was out on the job and recommended changing a structural element, advising that the member size and spacing was overdesigned and would be very costly. Do you have any legal concerns? What course of action would you take in response to the client's request to change the detail? Consider: professional liability, structural integrity, change order, chain of command, and design intent.
3. You have just gotten off the telephone with a contractor. She has suggested changing the play equipment for a city park you designed and her firm is constructing. She claims the equipment she wants to use is equal to the one shown on the drawings. What is your reaction, the professional basis of your reaction, and the legal ramifications? Consider: change order, or-equal issues, documentation and specifications, costs, safety, and contract addendum.
4. You have found out that your partner, during lunch with one the firm's long-standing clients, verbally agreed to prepare a design for the entry of the client's office building. On a handshake your partner agreed to do the required work for a fee of $3,500 and promised to have a concept drawing next week. Do you think it is necessary that you take any steps to formalize your partner's action in order to protect your firm from any possible misunderstanding? What are the possible areas of misunderstanding that may later cause a legal problem for you and your client? Consider: contracts, written documentation, and professional conduct.
5. You have been asked by the principal at your child's school to prepare a free design for a small children's play area at the school to be constructed by PTA fathers and mothers. What is your reaction to this request and can you imagine any possible legal questions

that might come in to play? What steps should you take to protect yourself from possible legal action in case a child is seriously injured at some future date? Consider: professional liability, safety, quality control responsibilities, and professional reputation.

6. You have received notice from your client to begin working on the schematic design phase of a golf course subdivision located in some bottom lands on an old farm. Think about what research you believe is necessary before you begin this phase. Consider: legal description of property, regulatory and permit requirements, codes, flood and wetland delineation, and local ordinances.

CHAPTER 14

Professional Services Contracts

1. A Contract Is More than a Handshake
2. The Different Clients in a Contract Agreement
3. Elements of a Professional Services Contract
4. Use of Standard Contract Forms
5. In-Basket

1. A CONTRACT IS MORE THAN A HANDSHAKE

A handshake or nod of the head seals many agreements. A person's word is sometimes all that is necessary to close a deal for many people offering or receiving goods or services from others. Some business dealings are still conducted on the basis of a person's word; however, one should not count on the courts to uphold this casual basis of binding an agreement between two parties. The world has become far too complicated to indulge such a simple means of binding an agreement. Nor is it good business practice.

Many consultants—landscape architects included—continue to provide and receive services based on an oral promise made in person or by telephone. In their enthusiasm to please—to be a team player—landscape architects will often begin a project for a client without any written agreement documenting what was agreed upon on prior to doing the work and delivering the products.

Legal issues, however, go beyond agreements and differences between two people. Usually the relationship between people at the outset of a project is good. A feeling of goodwill generally exists between client and consultant, paralleling the euphoria of a new project and a new beginning. The excitement and enthusiasm of the client is because the project is finally beginning; for the consultant it comes from the opportunity of a job with new design possibilities. But any number of things can go wrong once a project is underway, such as differences of opinion between the landscape architect and client, costly delays by review agencies, and unacceptable performance by a contractor.

Preparations to deal with legal matters must be made in advance, before a problem occurs. Once a dispute develops, it is very difficult for people to agree on much. Involved parties will attempt to ensure their own interests when serious disagreements occur. Each party believes he or she is right and that a misdeed or injustice was caused by the other. The reason for preparing a contract at the beginning of a project is that the parties concerned are in a positive frame of mind. Feelings toward each other are usually positive, and their mindset is focused on the merits and objectives of the project. It is at this stage that the process for resolving disputes should be established.

2. THE DIFFERENT CLIENTS IN A CONTRACT AGREEMENT

There are several types of clients that a landscape architectural firm may do business with. The project owner is one type of client, and may range from a private individual to a corporation. The project client might also be a government agency. Other types of clients include architectural and engineering firms seeking the specialized services of a landscape architect on their project team. In this case, the landscape architect is a subconsultant who provides services to the prime consultant who in turn has a contract and is providing services directly to the client.

Sometimes the landscape architect will be the prime consultant of a project team. When this is the case, the landscape architect will invite the participation of other consultants, such as architectural or engineering firms. This will in turn require that separate contracts with each subconsultant be drawn up together with their individual terms and agreements.

3. ELEMENTS OF A PROFESSIONAL SERVICES CONTRACT

The complexity of events over time in a client–landscape architect relationship, require that written agreements be made prior to proceeding with a project. A landscape architect should be very cautious about working for a client without a written contract agreement. When one considers the degree of uncertainty that accompanies a new project or new client, it becomes clear that working with a contract makes good business sense.

Each project begins with a program, budget, and a set of objectives established by the client. These elements are used by the landscape architect as the basis for identifying a scope of work to be incorporated in a professional services contract. The scope of work may be later revised as a project advances through the various phases. These revisions may be the result of changes made by the client that are caused by intervening government regulations and administrative requirements, changing market conditions, and other influences. The unique physical qualities, the environmental setting, and the history of a project site can also alter a project program and, hence, the scope of work for the landscape architect. With all the potential for change, it is good advice to have a written contract to protect the landscape architect who might otherwise become overextended in time and money beyond what would be profitable. The chances for misunderstanding, and changes and modifications of a host of conditions require that a document of force, written with foresight, should be executed in order to steer the client and the landscape architect along the complex and changing conditions of a project's life.

The purpose of a contract is to minimize any misunderstandings by clarifying what is expected of the client and of the landscape architect, the elements of which should be arrived at through mutual consent. Contracts between a client and a landscape architect must be lawful; that is, the elements, terms, and conditions must be within the law. Both parties signing a contract must be legally competent to enter into a contract. Criteria for legal competency might include age, professional registration, and possession of a valid business license. Also, a contract must provide for a valid exchange of value such as the payment of fees by the client in exchange for services and professional instruments of service such as drawings, reports, and construction inspection from the landscape architect. To the extent practicable, a contract needs to be fair to both parties.

A landscape architect should insist on a written contract for all clients and for each project, regardless of whether the client remains the same. There are two types of contracts that a landscape architect should be familiar with:

- **Design services contracts:** These are used for consulting services between a landscape architect and a client or between a landscape architect and other consultants. Where the landscape architect is the prime consultant and employs the services of subconsultants, contracts should be made between each subconsultant. These subcontracts should reference the prime contract and avoid conflicts with the prime contract. Particular attention to professional liability insurance requirements should be made. Most insurance companies require all subconsultants to maintain professional liability insurance in amounts at least equal to the requirements in the prime contract.
- **Construction contracts:** These differ significantly from design services contracts. Building industry practices and government procurement regulations together influence terms and conditions of construction contracts. Most government entities have standardized contracts and contract conditions.

  Construction contracts in the private sector have been formalized by the construction industry involving the Associated General Contractors (a national organization with state chapters), the American Institute of Architects, and the American Society of Civil Engineers. Each entity has developed standard construction contract forms that are in common use in both the public and the private sector.

Elements of Design Services Contracts

Contracts can be lengthy and detailed or they can be a few short pages and of a general nature. The contents of a document are called the *conditions and terms*, which can vary greatly from one contract to another. However, there is a great deal of similarity in most design services contracts, at least on the surface. Most design services contracts begin by identifying both parties—owner or client, and the landscape architect. When the owner is a government agency or private corporation, the individual authorized to represent the owner is named together with his or her title.

Other elements that are normally considered essential in a professional service contract are discussed in the following sections.

Project Description The opening sections of a contract should describe the nature of the project and its intended use, identify the project by name and location (address and legal property description), and include any other pertinent information that will clarify any unusual or important conditions relative to the project, such as land use or zoning and deed or other restrictions.

Responsibilities This section should clearly indicate responsibilities of both the client and the consultant. It should also detail what information both the client and consultant are responsible for providing. The client is often responsible for providing such information as a site survey, a soils survey, a property description, and a project program. The landscape architect secures any other information required to perform contracted services.

Also in this section, lines of communication are formalized. A project manager or primary contact person authorized to represent both the client and the consultant are assigned. The responsible person named by each party must have the authority to answer questions and make decisions on behalf of the party represented.

Among other obligations, the client is to pay the consultant for services rendered and for making decisions in a timely manner during the design and construction process. The client is also required to give approvals of work completed at the end of each phase of service. Normally, the client is responsible for providing the following information to the landscape architect:

- project program and objectives
- project construction budget
- topographic and property boundary surveys, legal description, and soils engineering report of the property[1]

Scope of Work The section of the contract that contains the scope of work outlines services to be provided by the landscape architect. Care should be given to indicate specific services adequate to produce all the work under the contract. The items included in a scope of work are to establish the fees in the contract negotiations process. Services fall under two categories:

- **Basic services:** These include project programming, schematic through final design and construction document preparation, and construction administration.
- **Additional services:** These include post-construction evaluation, display model building, marketing brochure design, and landscape maintenance programming.

The contract should delineate specific deliverables developed by the landscape architect under each phase of work. The number of copies of each deliverable item should be indicated with a method of determining costs to the client for additional copies.

This section of the contract should also contain a project schedule with either specific milestone dates or numbers of calendar days indicated for each phase of work.

Fees The contract establishes basis and method of payment by the client to the landscape architect for services and products included under the scope of work. There are three standard methods for establishing fees when an owner reimburses the consultant for the actual cost of completing work under the contract:

- **Percentage basis:** A fee is calculated on the basis of the percentage of project construction costs, for example 6,8, or 12 percent of the cost of construction. The more complex design such as a zoo exhibit, may require a higher fee percentage. The simpler, more common design, such as a planting plan for a subdivision residence, will have a lower fee based percentage.
- **Fixed-fee basis:** A fee is negotiated as a fixed price, often based on an estimate of projected labor hours and expenses.
- **Multiplier basis:** A fee is based on an agreed-upon multiple of direct personnel expenses that is in turn based on an estimate of labor time, materials and billable expenses, The multiplier generally covers expenses over and above salary or payroll expenses to cover business overhead costs, administrative and marketing costs, and profit. A common multiplier is 2.5 to 3.0 times direct salary and labor costs.

[1]If the client does not have these already, the landscape architect may be asked by the client to include the securing of this information as part of the scope of work. The landscape architect would then subcontract to other consultants to prepare the needed land survey and soils engineering report.

This section of the contract should contain format instructions for submitting billing statements, that is, when and where to submit billing statements, and with what substantiating documentation. In the case of a fixed-fee contract, the contract usually breaks down the price by phases of work, or provides for payment on the basis of percentage of work completed. This enables the consultant to submit partial payment requests as each phase or percentage of work is completed rather than waiting until 100 percent of the work is completed. This is an important consideration in the case of projects requiring six months to a year or more to complete.

Liability Limitations and Insurance Requirements This section assigns liability in specific terms. A contract can be written to limit or spread out liability among the parties of a contract. The liability section can also describe the dollar amount of each type of liability insurance required. Types of liability insurance typically required include general business, errors and omission, and automobile and personal injury.

Effective Date The effective date of the agreement should be identified. This information is included either in the main body of the contract or with a written notice to proceed, which the client must issue to establish a starting date and to authorize the landscape architect to commence work.

Changes A method or process for amending the contract for the purpose of adding or deleting services should be contained in the contract.

Termination Valid circumstances and processes for terminating the contract by either party should be included in the contract. Terms of termination usually contain notification methods and processes, an allowable time frame for notification, and other conditions. Also, the contract should provide for the handling of the transfer of business ownership of either party, by sale or otherwise. Finally, it should indicate whether a transfer of ownership of the landscape architectural firm is or is not acceptable and what must transpire should an acceptable or unacceptable transfer occur.

Judicial Jurisdiction This section indicates under which court system the contract falls. It is customary for the state and local court system in which either the project or client is named to be selected.

Arbitration Methods to resolve disputes prior to taking legal action may also be spelled out in the contract. In addition to method and procedure, the contract generally identifies an arbitration board mutually agreed upon by both parties to the contract.

Clarifying Use of Documents The landscape architect, as the author of the design drawing and technical specification documents, owns the copyright to the documents. The rights of ownership include the power to control subsequent use of the documents by the client or by others without the prior agreement of the landscape architect. If reuse by the client of the documents is allowed on another project or site, the landscape architect should not only be compensated but should seek written release from the owner for any liability exposure that may arise out of the reuse of the documents that occurs without the direct involvement of the landscape architect.

Signature A signature block for both parties is contained at the conclusion of a contract. The signature space should be indicated with the name, title, and organization repre-

sented by each signature. Often, a contract requires that each signatory sign in the presence of a notary public. A date should also be written in for each person signing.

4. USE OF STANDARD CONTRACT FORMS

The professional organizations of allied design fields, such as the American Institute of Architects, have developed and published standard forms of agreement, specifically for professional services contracts. These and other standard documents are adaptable for use by landscape architects.

AIA Document B727, *Standard Form of Agreement between Owner and Architect for Special Services* 1988 edition, is an example of a standard contract document used by landscape architects (see Appendix II). It is best used for projects that have a well-defined scope of services. Copies of the documents are available for sale by the local AIA chapter. When a standard document is used, the landscape architect should check the edition to make sure it is the latest edition. As with any contractual document, it is good business to consult with a lawyer and an insurance firm before using a standard contract or signing a contract prepared by a client.

The terms of all contracts are negotiable and as such can be changed. The landscape architect should fully understand and agree with each term in a contract before signing the document.

5. IN-BASKET

As a partner in a modest size landscape architecture firm you have been asked by the owner of a commercial real estate developer to provide full design services for a small office park. The project is to be located in a low-lying area of town. Before preparing a contract agreement, you made a visit to the site and suspect that it is located in wetlands.

1. In addition to the obligations of the client normally included in an agreement, what other information would you wish to include given the circumstances found at the site? Briefly describe why this information is important and discuss what additional services you might need to include under the scope of work to cover additional work in dealing with wetland issues.
2. Consider that you will be hired to prepare a master plan, secure approvals of that plan from the city, and then prepare all necessary landscape design and construction implementation documents. Prepare an itemized scope of work. Divide that scope into basic services and additional services.
3. Prepare a payment schedule based on the itemized scope of work described above. Group the payment schedule to correspond to phases of work and estimate the percentage of the total fee each phase might represent.
4. Well into the design phases of your work, just prior to preparing construction implementation documents, the client informs you that she plans to purchase an adjoining piece of property that will add another group of buildings to the existing project. Assume that the addition requires some modification of the existing design. Outline what new work will be required for you to make adjustments to the existing plans and to incorporate the additional property into a complete design.