

LSP-SPECIFIC CONTRACT TERMS: UNANTICIPATED ADDITIONAL CLIENT COSTS

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In April 2007, the Loss Prevention Committee began a series of articles concerning liability issues specific to LSP practice, and how some of these potential liabilities may be mitigated by addressing them in the LSP's contract with the client. The April 2007 article introduced the subject, and provided an overview of the issues that might arise most frequently. In subsequent months, the following articles appeared in the Newsletter focusing on particular issues:

- LSP obligations to notify DEP September 2007
- Client obligations to notify abutters October 2007
- Contracting Implications of Asbestos-in-Soil Regs June 2008

In each case, the article discussed the potential for contention between the LSP and the client, and how addressing the issues clearly in the LSP's contract can help to minimize such difficulties.

This article will focus on the additional costs that the client might incur that an LSP would not typically include or anticipate in the scope of work, again from the standpoint of informing the client in advance to avoid later misunderstandings. Such situations may include the following:

- Costs of additional response actions required by DEP audit after achieving an RAO.
- Costs of investigation required by identification of new or additional conditions.
- MCP fees (and potential for DEP delays in issuing invoices).
- Attorneys' fees and other costs related to the response action or to AULs.
- Responsibility for costs of maintaining an AUL.

For a number of reasons (including some discussed in previous articles), it is important to highlight to the client that the requirements of the MCP, and DEP's interpretation of the regulations, are not always "black and white," and that the shortcomings identified by DEP in MCP submittals or response actions (during an audit, for example) may constitute only a difference of professional opinion or matters of professional judgment. While it may be difficult to assign the future costs arising from additional work required by subsequent audit in the LSP's contract, the LSP can add text to inform the client in advance that such situations do not necessarily constitute a mistake on the LSP's part. Of course, the LSP is on his or her honor, and consistent with sound business practices, to accept responsibility for costs incurred to address obvious LSP mistakes or oversights.

While responsibility for the costs resulting from identification of new conditions may be more clear-cut in the LSP's mind, it may nonetheless be worthwhile, for clients who are

unfamiliar with the complexities of the MCP, to include an additional contract clause that describes this potential issue. While most clients would understand that they are responsible for the costs of dealing with an underground storage tank discovered in the process of excavating an unrelated metals release, it may be less clear to some that investigation of a previously unknown plume overlapping a known one, for example, cannot be completed without incurring additional cost.

Another expense that frequently takes clients by surprise is the MCP Annual Compliance Fee (ACF). Particularly given the irregularities and delays with which fees are invoiced, a client may be surprised to receive an invoice months or years after work at his site was concluded, and may assume that it should have been handled by the LSP. In the event that the LSP does not include the ACF in the scope of services, it will forestall misunderstandings to make clear in his contract that the client can expect an ACF, and that it is not included in the LSP's fees.

Finally, preparation and implementation of AULs is an MCP activity that has considerable potential for unexpected costs, which the LSP should anticipate and explain in the contract. As was described in the Loss Prevention Committee's April 2008 Newsletter article concerning AULs, an LSP is wise to suggest or even require the involvement of an experienced environmental attorney to assist in the preparation and filing of an AUL. In the event that the AUL can be anticipated at the time that the contract is prepared, the client can be forewarned that legal costs will be incurred to prepare the legal documents associated with the AUL, and that it would be more appropriate for the attorney to be retained directly by the client. In addition, implemented AULs sometime require periodic passive ventilation system or pavement maintenance, or other periodic activities, to remain in compliance with the AUL. In such situations, the issue is not (typically) whether the LSP is responsible for the costs, but simply that the client may not foresee them. Anticipating this in advance, and informing the client in advance, will not only demonstrate that the LSP has the "big picture" and is thinking ahead, but projects greater professionalism.

Additional issues may also be worth discussing in an LSP's contract. First is the fate of original (and copies of) documents and data generated by the LSP in the process of moving a site through the MCP. While clients may wish to retain control of these materials, they may be essential to the LSP should the work be subject to audit, which is often years after the work has been completed. It is therefore important for the LSP to at least retain the right to keep and use copies of these materials. (The LSP should check the "Ownership of Documents" provision in its standard contract to see if it might need modification.)

Another provision that may provide the LSP with additional liability protection specifically requires that the client provide copies of all applicable reports, notices and communications pertaining to the site, including not only MCP deliverables, but due diligence investigations, enforcement notices, claims, internal investigations, etc. Such reports may provide information that would not be otherwise available or obvious during

the LSP's work at the site, and which may influence the LSP's investigation, and without them, the LSP may miss critical issues or conditions.

Along the same lines, the LSP is wise to specifically require the authorization of a client representative familiar with the infrastructure of the site to approve all invasive investigation locations, with LSP and its contractors able to rely on that information. While DigSafe notification is required by law, DigSafe is not responsible for markouts and clearances on private property, so the client representative is the party most qualified to clear on-site utilities and locations far removed from property boundaries. By requiring this approval, the client becomes responsible (at least in part) for utility strikes, and may therefore be more diligent in assisting the LSP in selecting drilling/excavation locations.

One final issue concerns the withholding or terminating LSP services or work products if the client is not paying its bills. Clearly, the matter is dependent upon the details of a particular situation and the underlying contract provision, and it may have ethical implications for the LSP. While it is up to the individual LSP to decide whether it is appropriate to address this issue in the contract, LSPs who employ this business practice need to make this abundantly clear to their client in advance. (The LSP should review the "Payment" provision in its standard contract to see if it needs modification, including specific time periods for invoicing and for payment, interest charges for late payment, dispute resolution procedure, termination for nonpayment, attorneys fees for collection, etc.)

Once the project has begun, the LSP needs to anticipate whether the potential exists for the situation to arise with the particular client, and to provide clear warnings (probably multiple times and in writing) of the impending action and its potential ramifications for the client. While withholding work product or terminating services if bills are not paid (particularly in the face of an imminent MCP deadline) after multiple documented warnings may be acceptable business practice pursuant to a contract, doing so without reasonable notice is likely to have unpleasant results.

For this and all contracting issues, frequent and open communication with the client is a key business practice. A client is not likely to do repeat business with an LSP with whom he has had contracting disagreements such as discussed in the Loss Prevention Committee's Newsletter articles, and new business is always harder to find than repeat business. It is therefore in the LSP's interest to communicate in ways that forestall disagreements, and that encourage a good working relationship with the client.

As a review, the issues described in the Loss Prevention Committee's Contracting series are summarized below:

LSP Contract Terms

Notification Responsibilities

- Client responsibility for meeting MCP deadlines.
- LSP's responsibility to notify DEP of certain (IH) conditions, and PRP's responsibility for associated costs for reporting and assessment.
- Costs associated with conditions that may be subsequently identified (CEP, CSR, IH), which will require immediate notification.
- Implications of LSP's responsibility to the public (i.e., "hold paramount" provisions at **310 CMR 4.0**).

Third Party Involvement

- Issues related to off-property access, and costs associated with obtaining access.
- Issues related to notification of abutters whose land is part of a "site".

Unanticipated Additional Costs

- Responsibility for costs of additional response actions required by audit.
- Responsibility for costs of investigation required by identification of new/additional conditions.
- Responsibility for MCP fees (and notation of DEP delays in issuing invoices).
- Attorneys' fees and other costs related to AULs, which are not included in LSP's scope/costs.
- Responsibility for costs of maintaining AUL.

Disclosure/Disposition of Documents

- Obligation of client to provide copies of all previous applicable reports.
- LSP's right to document/data retention and access.

Miscellaneous Issues

- Issues related to asbestos.
- Client involvement in clearing subsurface exploration locations relative to buried utilities - client has ultimate responsibility for locations, particularly with respect to on-site utilities.
- Withholding work products or services for non-payment, and implications for meeting deadlines.