

Choosing An Environmental Consultant

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Business owners who are buying or selling commercial property or trying to comply with environmental health and safety laws may need to retain a qualified consultant. The consultant you choose may determine the success of a project. Businesses need to take special care to: select the right consultant, to negotiate a fair contract, and manage the consultant's work.

Today businesses that need environmental services will find hundreds of consultants ranging in size from large national firms to small firms that are working in specialized niche markets. Consultants want your business. You need to spend the time and effort required to find the "right" fit.

Do You Need an Environmental Consultant? The growth of environmental regulations has created a demand for consultants who can effectively deal with complex scientific, legal and public policy issues. You may need an environmental consultant if you are:

- Planning to purchase or sell commercial property;
- Considering an expansion and need operating permits;
- Responding to an inspection where there is alleged noncompliance;
- Conducting an audit to avoid enforcement or penalties; or
- Review health and safety issues to lower workers compensation costs.

Given the potential exposure related to environmental, health and safety issues, the selection of a consultant is a critical decision.

Selecting a Consultant. After obtaining a list of qualified firms from referrals, you should obtain resumes of those who may assist on a specific project. Is the firm is qualified to handle your matter? Can they meet your schedule? Check references so that you can verify that the firm has a proven track record.

Consider multiple bids but beware of low bids. You may get what you pay for. To get quality you may need to pay more. Make sure you have described the project and that the consultant understands your needs.

Costs must be carefully reviewed. Routine projects may be set at a fixed fee. More extensive projects, such as site investigations that involving testing, may be billed on a time and materials basis. Watch out for hidden costs. Many firms charge a percentage mark-up for subcontracted services, such as drillers or laboratories. The terms are subject to negotiation.

You need to find a professional who has an appropriate skill set for your project. Two key elements of success are: a consultant's past experience and their interpersonal skills. Your consultant must be able to work effectively with your staff, counsel, government regulators and third parties. The work product typically is presented in a written report. You may need to rely on your consultant in negotiations. Strong communication and advocacy skills are critical.

Many businesses choose to involve their legal counsel when they retain an environmental consultant, especially where sensitive matters, government review or litigation is likely. The project may be conducted under the attorney-client privilege to protect the information gathering and dissemination processes. To claim the privilege, you must initiate it early.

Negotiation of Contract Terms. After you find the right consultant, you need to enter into a contract. The contract contains a Scope of Work, which varies depending on the project. If a Phase I Environmental Site Assessment is required for the purchase of property, the Scope of Work should specify that the Phase I must comply with the current Standard Practice of the American Society of Testing and Materials ("ASTM"). You may need to specify additional work such as an assessment of lead-based paint or asbestos-containing materials.

You may want to require the consultant to meet timelines or to provide progress reports. To watch costs, the consultant may be required to seek your authorization before significant expenditures are incurred.

Carefully scrutinize the "fine print" contained in General Terms and Conditions. Indemnity provisions need to be balanced, allocating risk fairly between the parties. Terms that limit the liability of the consultant to, for example, the cost of the project, should be renegotiated. Courts have upheld these limitations. Mistakes may be made and the client could be saddled with unexpected costs. Consultants should carry professional errors and omissions coverage and be able to provide insurance of \$1 to \$5 million per occurrence. Insurance policies should govern liability rather than an arbitrary figure that appears in a contract. Clients should be named as an additional insured.

Document retention provisions are also important. There is always the prospect of governmental enforcement action or third party claims. A client is well served to carefully negotiate these terms. The retention of drafts, memoranda or handwritten notes may expose a client to liability, especially in litigated matters. On sensitive projects involving acquisitions, it may be appropriate to direct that oral rather than written progress reports be made.

Protecting the confidentiality of work being conducted by the environmental consultant is often essential. Courts have determined that documents prepared for regulatory compliance purposes, even if they are also used in a litigation, must be subject to production in litigation. Oral and written communication between a consultant and client may not be protected. Meaningful involvement of an attorney at an early stage of a project is the best way to protect the underlying work product from disclosure.

Managing a Project. Managing information flow is a key consideration. Your consultant will need access to facilities, personnel and records. A cooperative working relationship must be established so that any issues can be resolved.

The respective roles of the consultant, attorney and the client must be differentiated. The consultant, who provides advice on technical issues, prepares and analyzes information. Your lawyer incorporates legal advice. You receive the final product. All final decisions permit you to apply business judgment. Major decisions about the overall direction of the project rest with you, the client.

Prior to preparation of any final report, you and your attorney should carefully review draft reports. Submissions to agencies, who have the discretion to take enforcement action, should be made after careful consideration. Because the obligation to report releases and comply with regulations rests solely with the regulated party, your direct involvement is required.

Your attorney has a key role to play. Your lawyer can counsel you in making compliance-related determinations. Where a release must be reported or site remediation is being conducted, your lawyer can help guide you through the maze of regulatory requirements.

The relationship with a consultant needs to be carefully managed. By exercising care in selecting and contracting with a consultant you will enhance the prospects of achieving a successful result.

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