

## **Contracts: Your Lifeline or Land Mine !**

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### **INTRODUCTION**

Don Cleveland, an owner of WaterColor Management, an AWT founding member and a past recipient of the “AWT supplier of the year” award. The AWT was founded originally in 1986 by WaterColor and a group of water treaters in response to the unavailability for the industry of liability insurance. WaterColor and the members capitalized their own insurer to solve the problem. The insurer ceased operations in 2010 and has been replaced by Lloyds of London. Don is the President, Chief underwriter and claims manager for WaterColor Management. He was the former Director of Risk Management for the Dormitory Authority Of New York where he managed risk on an average of \$3 -\$4 billion in construction per year and worked with 27 law firms and four regional claims offices managing on average 300 construction claims a year. He has more than 40 years’ experience in insurance.

After 37 years, WaterColor still writes insurance only for water treatment and handling businesses.

### **CONTRACTS GOVERN THE LIVES OF WATER TREATERS**

Water treaters lives are ruled by contracts. In fact, one of the first steps taken by most water treaters is to contract with the state and federal government to exist by filing business licensing documents with the city, or county, state and federal government. Obtaining a Federal Employers Identification Number is entering into a one-sided contract with the government to pay withholding taxes, social security and unemployment taxes. That’s just the beginning. Now, you have to go to work and earn money!

**1. Going to work:** You should never go on the job without a written contract! A contract not only sets the goals of both parties but sets the terms of payment as well. And payment is one of the primary reasons you are in business. But all your goals and payments can be chopped up if you don't pay attention to the rest of the contract. Here are points that need to be addressed. Every point is important for your survival in business. However, there are the obvious and the not so obvious provisions in a contract. If you don't pay attention to all of them, you are in trouble!

**A. Purpose of the Contract:** Is there a clear purpose stated in the contract? Handshakes and verbal agreements just don't cut the cake! Can an outsider pick up the agreement and understand what the water treater and the client want to accomplish? Without a clear statement of purpose, the client can claim a breach of contract, because the treater didn't do what the client wanted them to do. By the way, breaches of contract claims or suits are not covered by insurance! You are on your own!

**B. The Indemnity and Insurance Clauses:** We all look for these, because unless they are met, you can't get on the job. Millions of dollars are put on the line in these clauses. But if you think that you'd never face a \$1 million loss, think about a boiler explosion that kills three people or a major legionella out break!

In many cases large property owners and managers require up to \$10 million in excess liability coverage to get on the job. While buying more insurance will solve the problem; is the premium to revenue ratio worth the extra expense?

**BEWARE:** Some indemnity clauses are illegal and against public policy. Most states in the United States make it illegal for a negligent party to be indemnified by a third party for damages it causes. Even though illegal, such clauses still exist in construction and service contracts either because they were pasted there by an attorney or risk manager, or the Client just wanted to see how far they can go. Check your state law! We've reviewed several illegal indemnity

provisions for our insureds and rejected them. The insured's client removed the illegal indemnity provision and proceeded with the contract and job.

**C. Standards of Performance:** As an Example, the water treater should insist on a clause stating the standards of performance if one is not in the proposed agreement. "The Client and Supplier (water treater) agree that the ultimate success of any treatment program provided by the Supplier to the Client is dependent on diligent application of the program in full accordance with the recommendations made by the Supplier . The Supplier shall not bear any liability or responsibility for any failure caused in whole or part by the Client's lack of diligence or failure to follow the Supplier's recommendations. Neither shall the Supplier be liable for any failure or delay in providing its program as a result of any act or circumstance beyond its control. The treatment program recommended by the Supplier is based on the operating conditions at the time this agreement was entered into. The Client acknowledges that it is obligated to provide accurate information to the Supplier and third parties used by the Supplier.

**D. Prior and Existing Conditions:** The water treater needs to make sure that he/she doesn't get the blame for something that was a problem in the system they were hired to solve. A clause similar to the one below should be included in the service contract with the client:

The Client agrees not to hold the Supplier (Water Treater) responsible for any hidden or latent on-going damage to the equipment or systems caused by the work or treatment of unrelated water treaters who have provide water treatment or services prior to the commencement of this agreement or after this agreement concludes.

**E. Other Clauses:** You should always consider the need for other clauses in your contracts. They can include:

- 1) List of Client's responsibilities
- 2) Force Majeure
- 3) Reliance On Others
- 4) Intellectual Property

## 5) Confidentiality

### 2. Always in the Background:

A. If you are selling another company's product as part of your work or business, you should have a sales contract with them. You always have the potential of being dragged into a product liability claim or litigation. A product liability claim can include everyone from the installer through the distribution chain and the manufacturer. There are several ways to deal with this potential problem:

- 1) Use only quality products in your work,
- 2) Use products which have strong and long warranty programs,
- 3) Insist that the manufacturer include you as an insured vendor in its insurance program.
- 4) If you are using a third-party lab as part of your work, insist you have an agreement with them that holds you harmless for negligent errors which produce false or bad test results.

B. One of your most important contracts is your insurance contract. The courts deal with insurance under contract law. The insurance contract can save our sink you. Coverage isn't the only important part of this contract. Did you know that you as an insured have duties under the insurance contract (policy) and if don't perform your duties, you could end up with your claims being denied or your policy cancelled!

- 1) If you don't tell the truth on the application questions, your insurance can be cancelled even when you have a claim.
- 2.) If you are sued and you don't send the suit papers to the insurance company or their representative IMMEDIATELY, the claim may be denied.
- 3) You MUST notify the company as soon as practicable of an OCCURRENCE OR OFFENSE that may result in a claim.
- 4) You need to take action to mitigate or reduce the possibility of further damage developing.

**3. Don't Just Accept It:** Larger corporations, your potential clients or suppliers have one-sided contracts which appear to be non-negotiable. If you feel that they are too one-sided, push back!

A. Don't hesitate to communicate. Even when managing a \$700 million construction project contract, we always tried to be reasonable with contractor and subcontractor agreements.

If you succeed in making a change, frame the changed document, and keep it in the safe until the statute of limitations have passed because it's highly likely that the contract administrator you negotiate the change with will not be there when a claim arises.

B. Or have your own written contract and present it to clients with your proposals. Make your contract the first "iron in the fire. Make it the focal point of contract discussion.

WaterColor Management has several loss prevention bulletins that make suggestions on contract content. The bulletins are available on request. We also coordinate our legal activities with Adam Green of Baker Donelson Law Firm.