

Risk Management – The American Scene

Robert W. FOSTER, USA

Key words: Risk; risk management; professional liability; risk analysis; risk response; contracting; environmental risk.

SUMMARY

For the professional surveyor in private practice there are many sources of risk. The risks of doing business are general and apply to most or all forms of business. Risk for the professional includes the risk of professional liability in negligence and malpractice as well as the risk of disciplining by a licensing board for failure to meet standards of practice and ethics. This paper will discuss those risks for the professional surveyor in the United States, the assessment of risk, risk management and the various means of risk protection for the professional. It will be seen that many of the principles of risk management for the professional are applicable to environmental risk management, as well.

Risk Management – The American Scene

Robert W. FOSTER, USA

1. INTRODUCTION

Risk is defined as the probability of an unfavorable outcome. *Risk management* is the process of minimizing the probability and severity of an unfavorable outcome at the lowest long-term cost to the organization. Like all businesspersons the professional in private practice recognizes risk in several areas: investment risk, personnel management liability risk, the risk of liability for property damage and the risks arising from professional liability. The professional concerned about professional liability will institute a program of risk management in that area of the firm's practice. The elements of risk management are risk analysis, risk identification, and risk response.

Professional surveyors may identify the risk arising from professional liability by their form of employment. The risk of a suit for negligence escalates from negligible to maximum for surveyors employed by government, surveyors employed in private practice and self-employed proprietors in private practice. This discussion will concentrate primarily on the surveyor in private practice.

In this era of liability crisis in which everyone may be a target and everyone finds his or her favorite institution to blame – attorneys, juries, the insurance industry, big business, government, the other professions – we may be sure that the risk of professional liability will continue along with all the other risks facing the entrepreneur. It is an axiom of life that where the rewards are great there are risks of commensurate magnitude, and it is the purpose of risk management to maintain risk at an acceptable level.

2. RISK ANALYSIS

Analysis of risk is usually the first step in the risk management process. A professional must consider the possible impact of risk to himself or his firm in light of a specific project or form of practice, and then must explore the options available to her to mitigate that risk. In this analysis the professional will consider the following questions:

- Are there unpredictable or unconscionable risks because of the type of project or the client attitude?
- Could that risk have a negative effect on the reputation of the professional or the firm?
- Is the risk exposure greater than the likely benefits to the professional or the firm in terms of fee or further business development?
- Will the professional or the firm be given responsibility in the project without the commensurate authority to control the risk factors intrinsic to the project?

Having completed a risk analysis the professional must explore options available for management of the risk – assuming the project is to go forward. In this process the

professional may rely upon other experts, e.g. lawyers and insurance specialists, for guidance and advice.

It should be remembered that risk management is not a reactive process; it is to be a proactive effort to identify risk, accept or reject the activity under consideration, and identify the best method of control as a project goes forward. Successful risk management permits the professional or the firm to pursue that line of work and professional opportunity within the firm's work profile.

3. RISK IDENTIFICATION

Identification of risk for the surveyor in private practice begins with recognition of the professional's capabilities in the area of surveying under consideration. An orthopedic surgeon does not deliver babies and an obstetrician does not set broken bones, although both are Board-certified surgeons. By the same token a cadastral surveyor may not be qualified to perform construction layout services and a surveyor whose whole experience is in construction work should not undertake cadastral work although both professionals are licensed or registered by their respective state boards of registration. (This does not preclude the possibility of the professional learning new skills and expertise through education, training and experience, and a surveying firm may expand its field of practice by employing additional professionals with the required expertise.)

Risk identification goes beyond an analysis of the professional or firm and the project under consideration; it includes an analysis of the potential client. Questions to be considered are:

- Is the client financially capable of carrying the project forward to completion?
- Is the client or the client's representative experienced in conducting this type or scope of project?
- Is the client's representative, with whom the surveyor will work and communicate, in a position of responsibility to make decisions affecting the surveyor's work?
- Are the client's time of performance expectations realistic and is there flexibility to allow for unforeseen difficulties, like adverse weather for instance?

4. RISK RESPONSE

Faced with a high-risk project proposal the professional must make an initial decision, i.e., to take the project and accept the risk or to reject the project. A firm with a comfortable backlog of work will not hesitate to turn down an assignment whose risks are uncomfortably high but during an economic downturn or when projects are otherwise scarce the proprietor-surveyor is faced with a difficult business decision. If the decision is to go forward with the project in order to provide work continuity for the firm and its employees, means of mitigation must be identified.

5. RISK MITIGATION

Risk mitigation options may include reducing risk by higher than usual work supervision within the firm, increased training or education of employees, heightened quality control/quality assurance procedures, an addition to the project team of employees with special skills, and the like. It will also include extra effort to maintain close communication with the client and it will include close attention to billing and fee-collection procedures. Constant communication among the firm's employees and management on the one hand, and between the firm and the client on the other hand will provide for early detection of problem areas and the opportunity to solve problems at the embryonic stage, before damages occur and liability claims arise.

6. CONTRACTING

Much of the risk mitigation effort is applied at the contract negotiation stage. Having preformed a risk analysis study of a prospective project, and having made to decision to go forward with the project, the surveyor will enter the contract negotiation stage with the identified risks in mind. (The professional must never enter into a contractual arrangement *before* the risk analysis effort has been accomplished.)

Risk mitigation through contract language will include special attention to scope definition, assumptions on which the fee and time of completion are based, responsibility allocation, provisions for contingencies and terms. Poor scope definition may be the primary cause of dispute between surveyor and client. Any assumptions made by the surveyor in completing a contract must be clearly specified in contract language. Parties with authority to change contract terms during performance must be identified. For surveyors, more than perhaps any other design professional, weather, climate and site conditions can have disastrous effect on job performance and timely delivery. Contingencies for such conditions must be specified in every contract. The *terms* section of a contract will define not only the fee for services and time of delivery, but conditions under which services may be suspended.

Special clauses may be added to a contract where risks are perceived by the professional to be especially high. Provision may be made for dispute resolution, e.g., through mediation or arbitration. It is possible to allocate risk when the surveyor and her client agree that certain risks are beyond the control of the professional, in which case the client may agree to limit the professional's liability to a specified amount. (Recognizing, of course, that third party liability cannot be limited by contractual agreement between the surveyor and his client.) All surveyor contracts should contain a clause specifying control of documents. Final ownership of plans, notes, specifications, reports should be well defined by the contract. The application of copyright by the professional and the use of terms like "works for hire" and "instruments of service" should be clearly defined in a contract.

In summary, the purposes of a professional service agreement (contract) are to:

- Define project scope,
- Establish relationships and clarify communications,
- Allocate responsibilities and risks and

- Confirm the mutual understanding in writing.

7. RISK TRANSFER

Risk transfer does not refer simply to the “it’s your fault, not my fault” defense. Insurance is the classic form of risk transfer. A professional has a responsibility to practice competently within his or her area of expertise. Failure to perform to an accepted standard may result in a liability claim against the professional in which certain damages are claimed. Insurance may be provided for this eventuality just as it is for the liability attendant upon driving a vehicle. A professional charged with negligence or other failure to perform may well consider herself not guilty of the offense, and will attempt to defend against the claim. But even a successful defense can be costly and in the American system even a successful defendant must pay her own defense expenses. Errors and omissions insurance (professional liability insurance) is the practical, ethical provision available to all professionals.

A surveyor may make a business decision to go forward with a project that entails high risk, but can do so with a degree of assurance that comes with insurance. But insurance is not without cost and should not be used as a safety net for shoddy work or short cuts in performance. Some considerations in selecting insurance coverage for the professional:

- Coverage limits. The professional must estimate the greatest liability exposure he may risk based on the type of work he does, and the type of client he serves. For instance, construction layout usually entails much higher risk than single-parcel cadastral survey work. The volume of services produced by a firm also determines coverage limits. Limits of coverage of most professional liability insurance policies are expressed in two figures: maximum coverage for a single occurrence in the policy year (per claim limit) and maximum coverage for the aggregate of occurrences in the policy year (annual aggregate limit).
- Deductible limit. The greater the deductible the lower the premium. Once again, the professional must estimate the amount of cost he can tolerate as his contribution to defense or settlement of a claim. The deductible may be thought of as self-insurance.
- When considering professional liability insurance the professional must make an analysis of exposure based on her control of the work being delivered by her firm. The greater the number of employees she supervises the more her control is dispersed among staff, and the greater her risk of error or oversight in her firm’s work output.
- Coverage agreements, exclusions and conditions are critical elements of any insurance policy. Read the fine print. A professional liability insurance policy should contain an agreement that the insurance company will not settle a claim without the insured’s informed consent. (In other words, No forced settlement.) All policies exclude coverage for certain events, e.g., coverage for claims arising out of unlawful discrimination by the insured against an employee; claims arising out of the insured’s liability of others assumed by the insured; claims made against the insured by an entity in which the insured has an ownership interest, and so on. The conditions included in a policy may include the rights and duties of the insured including what the insured is expected to do when he receives a claim. The policy will specify subrogation rights, cancellation rights and severability rights among other things.

8. PRACTICE MANAGEMENT

The Risk Mitigation discussion above is offered in the context of a specific project thought to be of higher than normal risk. But the professional and the professional services firm must always strive for excellence of service as a means of risk avoidance. Quality assurance programs are as relevant for service organizations as for manufacturers. Insurance policies and emergency response measures may always be a necessity for professionals in private practice, but should never be seen as a safety net for poor practice. In fact, excellence of performance is the professional's responsibility to his clients and to the general public and should only be thought of secondarily as a shelter against risk.

The professional services firm should have an active in-house education program for key employees. All should have a clear understanding of the firm's professional liability insurance policy, for instance. Managers must know the correct responses to be made in case of project problems and the possibility of claims. But beyond this, there should be programs on quality control and quality assurance; employees should be given responsibility for their participation in the firm's operations where quality, performance and risk are concerned.

9. ENVIRONMENTAL RISK MANAGEMENT

So far, this discussion has dealt with risk to the individual professional or to the professional services firm. Environmental risk is experienced by the general public and society at large, yet many of the principles stated here are applicable to environmental risk.

Design professionals who work on projects expected to have an impact on the environment will be ethically (and perhaps legally) responsible to employ risk mitigation measures. Staff training, quality control/quality assurance programs and assignment of employees with specialized skills are a few of those measures. For the design professional risk assessment will be required but making a risk assessment analysis should also be a prime responsibility of the public agency with permitting authority. Often the costs associated with environmental risk analysis will be beyond the financial capability of a public agency, in which case the project proponent should be required to provide the needed testing and reports. Once again, the design professional is placed in a position in which objectivity is required and the professional's duty to the public will be placed above that to her client.

Environmental risk mitigation must go beyond pre-construction evaluation and safety engineering. Project monitoring, where sensitive environmental issues are involved, will always be required. But agencies and governments are discovering a need for emergency response measures. Ioannidis and others have proposed that operational centers based on spatial information systems be developed for managing large-scale industrial accidents. Chemical process industries are suggested as the type of industry for which such centers could be invaluable in making quantitative estimates of accident consequences. Petroleum refineries and offshore oil loading facilities are additional examples of industries requiring this type of risk mitigation.

10. CONCLUSIONS

Business Matters for Professionals makes the following statement: “A company is embedded in a network of social expectations and state regulations. These have to be appropriately factored into business decisions, if the company’s long-term survival and flourishing (are) not to be jeopardized” A professional surveying firm can flourish and survive only as its leadership and management make risk management a constant concern to the extent that all employees participate in it. It is an ingredient of “social expectations”. Another ingredient is the firm’s participation in environmental risk management that is also subject to state regulation. The professional has an ethical responsibility to make this his or her personal concern. All forms of business risk management are critical to a firm’s survival and flourishing, and along with environmental risk management should hold a prime position in every firm’s business strategy.

REFERENCES

- Foster, R.W., 1989 *The Liability Environment*, A publication of the American Congress on Surveying and Mapping, “Risk Management”, page 31.
- Ioannidis, C., et al., 1999 “Spatial Information Management for Risk Assessment of Major Industrial Accidents”, FIG Commission 3 Annual Meeting and Seminar on Spatial Information Management, Budapest, Hungary.
- Business Matters for Professionals*, 2002, FIG Publication No. 29, Commission 1, Working Group 2 on Business Practices.
- “Understanding and Managing Risk Workshop”, 1997, Victor O. Schinnerer & Company, Inc. *Guidelines for Improving Practice*, 1998, Victor O. Schinnerer & Company, Inc., “Managing Risk Through Contract Language”, Vol. XXVII, Number 4.

BIOGRAPHICAL NOTES

Robert W. Foster is a registered professional engineer and registered professional land surveyor, semi-retired and living in Massachusetts, USA. He provides consulting services in dispute resolution and expert testimony in litigation. Mr. Foster is an Honorary President of FIG, the International Federation of Surveyors, and a past President of the American Congress on Surveying and Mapping (ACSM). He is a member of the American Society of Civil Engineers, the National Society of Professional Surveyors, the Massachusetts Association of Land Surveyors and Civil Engineers (MALSCE), the New England Land Title Association, the Massachusetts Conveyancers Association Dispute Resolution Register and has served on the Board of Trustees of the Engineering Center Education Trust (Boston). He is a Contributing Editor for P.O.B. Magazine and has received several awards and citations from FIG, MALSCE, ACSM, the American Society for Photogrammetry and Remote Sensing, The Engineering Center and the American Society of Civil Engineers.

CONTACTS

Robert W. Foster
85 Frankland Road
Hopkinton
MA 01748
U.S.A.
Tel. + 1 508 435 3304
Fax + 1 508 435 6534
Email: rwfoster@juno.com