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Five tips for hiring environmental consultants

In my practice as an environmental lawyer, I often retain consultants to perform Phase I environmental site assessments as well as Phase II investigations, environmental compliance audits and remedial activities. However, there are many small deals where the economics may not support involving an environmental attorney, at least at the initial stages.

In these cases, the real estate or corporate lawyer quarterbacking the deal may be called upon to engage an environmental consultant. For those who do not have the benefit of the experience that comes with hiring environmental consultants every day, these five tips may prove invaluable.

Tip #1: Build a stable

Over time, it's best to actively build relationships with a number of different environmental consultants whom you can trust to handle an engagement efficiently and effectively (depending on criteria such as the scope of the investigation, the complexity and the timing).

For example, small, local environmental assessments or relatively simple remediation projects (such as most underground storage tank removals) might be best performed by a smaller regional consulting shop. Conversely, assessments of large national (or even international) real estate portfolios, or tackling known complex environmental problems, typically requires a large consulting firm with worldwide offices and a high level of expertise and capabilities.

While the Internet can be a useful source of basic background information (for example, to see if a consultant performs Phase I ESAs, or if the consultant has an office close to the subject property), personal recommendations from other attorneys in your firm,

or others with whom you have a professional relationship, or even members of the environmental section of the local bar association often provide the best way to match an appropriate consultant with your particular need.

Tip #2: Confirm the scope in writing

Before beginning work, most consultants will provide a proposal specifying the exact work to be performed (and the type of fee involved, as discussed later). Pay close attention to the description of the work to make sure that it covers what was discussed and that the scope is appropriate to the project.

First, a proposal for a Phase I ESA should specify compliance with the ASTM Practice E1527-13 (the "rule book" for performing Phase I ESAs) to achieve "All Appropriate Inquiry" under 40 CFR Section 312.

Be aware that under the ASTM standard, several fairly common environmental issues such as asbestos, wetlands, mold and endangered species are considered "non-scope" items, but they can be included in the Phase I at an

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extra charge. Thus, the attorney with his or her client must decide which, if any, of these add-ons makes sense for the deal.

Other common add-ons include but are not limited to the disposal of investigation-derived waste (IDW) that is generated in the course of invasive Phase II sampling of soil or groundwater.

If provision for IDW is not made in the proposal, the con-

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sultant may simply drum such waste and leave it on site for the owner to deal with — which can be especially problematic if your client is not the owner of the property being investigated or does not have independent disposal arrangements in place.

Tip #3: Understand the fees

The consultant's proposal will specify the fee structure for the work, but such terms can be confusing. Commonly, the quote will only be an estimate, not a fixed amount. Typically, fixed-fee arrangements or not-to-exceed costs must be specifically negotiated.

In some cases, remedial work may be reimbursable from state funds such as underground storage tank or dry cleaning remediation funds. Many consultants will be reluctant to perform work contingent on reimbursement

from the state, but if such an arrangement is agreed to, that should be spelled out in the proposal.

Tip #4: Beware the terms and conditions

Most proposals will include a set of lengthy terms and conditions — often as an attachment — which you may be tempted to overlook as boilerplate. However, critical provisions such as liability

limitations are often hidden within the T&C.

Often, the T&C limits the consultant's professional liability to the greater (or lesser) of a nominal amount such as \$5,000, or the value of the contract. Such liability limitations have been upheld by courts, and these limitations provide little relief in the case of serious consultant malpractice.

While most consultants will not agree to unlimited contractual liability, many will agree to a limitation based on the amount of the consultant's professional liability insurance, which usually is at least \$1 million (and which can be specified in the T&C).

Other potential traps may be administrative markups for lab fees and similar subcontractor work (sometimes 15 percent or more); these often can be negotiated down or removed altogether.

Tip #5: Call your lender first

If your client is purchasing property or business assets using conventional financing, be aware that lenders not only typically require a Phase I to be performed but also may require certain non-scope additions like checking for asbestos, lead-based paint and so forth. The lender may have a list of approved consultants from which the client must choose.

On the other hand, for smaller deals, some lenders allow for "transaction screens" or other limited investigations that may save money over a Phase I. Either way, it's best to look into your lender's requirements before commissioning the Phase I.

In conclusion, while a good environmental attorney can help navigate the issues that arise even at the initial stage of engaging an environmental consultant for a project, these tips should be useful if you must go it alone for one reason or another.