
A/E RISK REVIEW

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GETTING PAID WITHOUT COUNTERCLAIMS

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The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances. We would like to thank XL Insurance for contributing to this article.

What's a surefire way of being hit with a lawsuit from one of your clients? Threaten to sue your client for unpaid fees.

Clients who are sued for fees are very likely to respond by suing the design firm for negligence, and these counterclaims are not always meritless in the client's eyes. Almost all instruments of service have some degree of error, omission, inconsistency or ambiguity. While such imperfections may not rise to the level of negligence, a client's lawyer will have little trouble finding a "hired-gun" expert witness who will testify that the design firm performed below the standard of care. They will contend that negligent performance damaged the client – and presented a valid reason for nonpayment.

In many cases, the cost of defending a negligence claim will be greater than the amount of fees you would likely net from a claim of nonpayment. This puts your client in a position of great leverage, especially if payment terms are not detailed in your contract. That's why many design firms are willing to settle a dispute by accepting only a fraction of the fees they are owed.

Increasing Your Chances of Getting Paid

There are contractual measures you can take to help avoid the problem of a countersuit related to client nonpayment. Add language to

your client agreements that spells out payment provisions for services rendered and your rights to remedies in the event you are not paid according to contract terms. The more precisely you define the details of these payment terms and your right to enforce them, the more likely you'll receive prompt payment -- and the less likely your client will consider a counterclaim.

Billing and Payment Terms

Here is sample billing and payment contract language from XL Insurance that you and your attorney should consider adding to your client agreements:

BILLING AND PAYMENT TERMS

RETAINER. *The Client shall make an initial payment of ____ dollars (\$____) (retainer) upon execution of this Agreement. This retainer shall be held by the Consultant and applied against the final invoice.*

PAYMENT DUE. *Invoices shall be submitted by the Consultant (monthly, bimonthly, weekly, upon completion of each phase), are due upon presentation, and shall be considered past due if not paid within ____ (____) calendar days of the due date.*

INTEREST. *If payment in full is not received by the Consultant within ____ (____) calendar days of the due date, invoices shall bear interest at one-and-one-half (1.5) percent (or the maximum rate allowable by law, whichever is less) of the PAST DUE amount per month, which shall be calculated from the invoice due date. Payment thereafter shall first be applied to accrued interest and then to the unpaid principal.*

COLLECTION COSTS. *If the Client fails to make payments when due and the Consultant incurs any costs in order to collect overdue sums from the Client, the Client agrees that all such collection costs incurred shall immediately become due and*

payable to the Consultant. Collection costs shall include, without limitation, legal fees, collection agency fees, and expenses, court costs, collection bonds and reasonable Consultant staff costs at standard billing rates for the Consultant's time spent in efforts to collect. This obligation of the Client to pay the Consultant's collection costs shall survive the term of this Agreement or any earlier termination by either party.

SET-OFFS, BACKCHARGES, DISCOUNTS. *Payment of invoices shall not be subject to any discount or set-offs by the Client, unless agreed to in writing by the Consultant. Payment to the Consultant for services rendered and expenses incurred shall be due and payable regardless of any subsequent suspension or termination of this Agreement by either party.*

Satisfaction With Services

If possible, incorporate a satisfaction with services clause in your contract. This language can help you in the event a client fails to pay a subsequent invoice and later claims dissatisfaction with your entire range of services. XL Insurance recommends the following language:

SATISFACTION WITH SERVICES

Payment of any invoice by the Client to the Consultant shall be taken to mean that the Client is satisfied with the Consultant's services to the date of payment and is not aware of any deficiencies in those services.

Withholding Fees for Disputes

Refuse to allow your client to include contract language that permits him or her to withhold all fees for disputed invoices. If the client insists on a clause regarding disputed fees, make sure it reserves your right to collect fees on all undisputed portions of the invoice. Here is a sample clause from XL Insurance to discuss with your attorney:

DISPUTED INVOICE

If the Client objects to any portion of an invoice, the Client shall so notify the Consultant in writing within _____ (__) calendar days of receipt of the invoice. The Client shall identify in writing the specific cause of the disagreement and the amount in dispute, and shall pay that portion of the invoice not in dispute in accordance with the other payment terms of this Agreement. Any dispute over invoiced amounts due that cannot be resolved within ten (10) calendar days after presentation of invoice by direct negotiation between the parties shall be resolved within thirty (30) days in accordance with the Dispute Resolution provision of this Agreement. Interest as stated above shall be paid by the Client on all disputed invoice amounts that are subsequently resolved in the Consultant's favor and shall be calculated on the unpaid balance from the due date of the invoice.

Suspension of Services

One of the most effective contract provisions for getting paid on time requires the client to pay any undisputed due portion of the bill within a specified period or otherwise face a curtailment of service. A sample clause from XL Insurance is presented here. Check with your attorney to determine whether such language is enforceable within your state.

SUSPENSION OF SERVICES

If the Client fails to make payments when due or otherwise is in breach of this Agreement, the Consultant may suspend performance of services upon _____ (__) calendar days' notice to the Client. The Consultant shall have no liability whatsoever to the Client for any costs or damages as a result of such suspension caused by any breach of this Agreement by the Client. Upon payment in full by the Client, the Consultant shall resume services under this Agreement, and the time schedule and compensation shall be equitably adjusted to compensate for the

period of suspension plus any other reasonable time and expense necessary for the Consultant to resume performance.

Termination of Services

When all else fails in your efforts to collect fees due, you should have the right to lower the final hammer – the termination of your contract. Here is sample termination language from XL Insurance to consider:

TERMINATION OF SERVICES

If the Client fails to make payment to the Consultant in accordance with the payment terms herein, this shall constitute a material breach of this Agreement and shall be cause for termination of this Agreement by the Consultant.

Be Wary of Client Resistance

Work with your attorney to develop payment terms and language best suited to your firm's unique needs. Check out the advice offered by your professional societies as well. Once you have language in place, seek to apply it consistently among all of your clients.

Be wary of any potential client who balks at signing language that protects you from nonpayment. Occasionally, however, clients may have legitimate problems with specific obligations of your payment terms. For example, a client's billing and accounting procedures may require it to extend the length of invoice payment beyond 30 days. A client who wants to pay in 60 or 90 days should expect to pay a premium for that luxury.

If the client balks at accepting a termination for nonpayment clause, as opposed to objecting to its specific terms, be aware that the client may be contemplating slow or no payment and does not want you to have the ability to suspend or stop services. In such cases, you have to ask yourself, "Do I really want to deal with this client?"

By using appropriate contract language with real teeth and by following a consistent, well-designed billing and collection system, you can minimize the risks of write-offs and slow pay accounts as well as threats of retaliatory liability claims.

Pay-When-Paid Clause

When it comes to payment terms, subconsultants have the right to be treated by the prime, as the prime wants to be treated by the client. The prime expects to be paid promptly for work done for his or her client; so does the subconsultant.

In some instances, however, a prime consultant may feel the need to insist on a Pay-When-Paid provision in its agreement with subconsultants. In such cases, the subconsultant should consider accepting such an agreement as long as the contract language provides adequate protection. For example, the Pay-When-Paid clause should have an outer limit by which time payment must be made, whether the prime has been paid or not. Here is a sample clause provided by XL Insurance:

PAYMENT TERMS

The Subconsultant shall submit invoices monthly to the Consultant, who shall review them promptly. The Consultant shall either approve these invoices or notify the Subconsultant of any invoices not approved. The Consultant and Subconsultant shall confer and attempt to resolve such disputed invoices.

The Consultant shall promptly invoice the Client for the Subconsultant's service in accordance with the billing terms of the Consultant's agreement with the Client and shall use reasonable and diligent efforts to collect payment from the Client. The Consultant shall pay the Subconsultant within ____ (__) calendar days after receiving payment from the Client. Regardless of whether or not the Client pays the Consultant in full, the Consultant shall pay the Subconsultant for all

undisputed invoices within a reasonable period of time after the completion of the Subconsultant's services under this Agreement.

If payment is not received by the Subconsultant for undisputed invoices within ten (10) calendar days after the Client pays the Consultant for such services, or within forty-five (45) calendar days after the Subconsultant submits its invoices for such services, then such invoices shall bear interest at one-and-one-half (1.5) percent (or the maximum rate allowable by law, whichever is less) of the PAST DUE amount per month, which shall be calculated from the tenth or forty-fifth day, as above, whichever occurs first. Payment to the Subconsultant shall first be applied to accrued interest and then to the unpaid principal.

If a prime consultant and subconsultant enter into a joint venture sharing the risks and rewards of working with a client, then each may share the risk of nonpayment. However, in a typical consultant-subconsultant relationship, the subconsultant has the right to expect to be paid within a reasonable time, whether the prime gets paid or not.

A counterclaim filed over fee disputes is one of the fastest growing areas of litigation among design firms. Adding protective language to your client agreements not only helps reduce the chances of such counterclaims, it enables you to judge your clients attitude regarding contract provisions that give you the ability to enforce the agreed to fee and payment schedule for your services.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and

application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.