Small Projects – Big Risk

By Lindsey M. Pflugrath

Small projects with small fees can present substantial risk for the design professional.

This unfortunate reality seems counter-intuitive. Smaller projects often involve less risky design choices and fewer parties, and materials are of the commonly used and understood variety. Furthermore, the modest budget would not seem to support aggressive and lengthy litigation. Unfortunately, small projects generate a disproportionate share of expensive claims. The increased risk of claims on small projects is attributable to two entirely manageable issues:

> The design professional's perception that a small project is less risky, and therefore less deserving of careful contracting and other standard risk management protections;
>
> The failure of the professional to carefully select and educate clients regarding the professional services to be provided.

The following recommendations, if followed, will assist the small project practitioner in managing these risks.

Carefully select clients and projects.

One of the most important things any practitioner can do to minimize risk is to carefully screen potential clients before accepting the assignment. Is the client new to the world of professional services? Have they ever hired a design professional? If so, how did they feel about the relationship? Were there disappointments? These initial questions are intended to assess the potential for an open, communicative and productive relationship to develop.

A frank discussion regarding scope, budget and schedule is also essential. Are the client's expectations achievable within the budget constraints? Is there a reasonable and secure source of funding? Is the budget realistic?

Are there schedule constraints? Is there a contingency plan in the event there are unexpected delays? This is the time to be brutally honest about the realities of the project – it is not unusual for clients to recall statements made during these first meetings as promises they expect you to deliver on later.

With corporate clients there are other considerations. What type of business entity will you be contracting with? If you are considering contracting with an LLC, will the LLC members provide personal guarantees for payment of fees for professional services? Depending on the size of the project budget, a credit report from Dunn & Bradstreet or another financial institution can be prudent.

Finally, a simple search of civil cases in the jurisdiction is a non-intrusive way to find out if the client has tax liens or other financial judgments, or a history of litigious behavior. If either of these things is true, you should politely decline the opportunity.

Do not work without a signed contract.

After you have carefully considered the client and the project and have decided to proceed, it is time to execute a contract. The contract should be signed before you begin work, and should include the following important elements. The AIA provides fair and balanced, time-tested agreements for use on smaller projects.

A clearly defined scope.

A clearly defined scope states with specificity those services you have agreed to provide, and excludes items you will not do. This is often a missed opportunity. Consider the problems with the following scope statement:

Architect will provide design services from the inception of the project, through permitting.

What does this really say to the client? It does not say what design

services will be provided, or what the instruments of service will be. Will the architect provide all design services, or will consultants be necessary? What assistance will the architect provide during permitting? The failure to more clearly define the scope of services greatly increases the risk that the client and the architect have not established a true understanding regarding the services the architect will provide.

A well-defined scope does not include industry terms like “schematic design” - your client may have no idea what that means. It should contain specific statements for each phase of the project, such as: “Architect will prepare and provide 2-D design documents which will depict the site plan, floor plan, square footages, elevations and other basic elements necessary for submission to the planning department for permitting.”

Importantly, you should never guarantee the issuance of permits or the cost of the project. While you can facilitate the permitting process, and you can provide preliminary estimates of cost, you should not risk guaranteeing outcomes over which you have little control.

Consider building in milestones for assessing whether the project remains within the client’s budget constraints. Also consider hiring the general contractor before construction documents have been detailed to help “test” the budget and provide useful value engineering suggestions. Now is the time to educate clients on the risk of cost-overruns due to change orders during construction - clients need to understand the importance of complete construction documents and the dangers of changes during construction.

Legalese.

After you have reached an agreement on the scope of services to be provided, you can move onto the other legal terms that should be in your contract.

Disclaim responsibility for site safety and means and methods.

The first of those clauses is a disclaimer regarding your responsibility for the safety for any parties at the site other than your employees. The

contract should also disclaim any responsibility or ability to direct the actions of any other party on site, including the means and methods utilized by the contractor. This contract clause is intended to protect you in the event another party is injured at the site. Importantly, if you have this clause in your contract, you must ensure that you do not jeopardize the effectiveness of the clause by engaging in the behavior you have disclaimed.

Limit your exposure.

Another way to limit your risk is through a straightforward "limitation of liability" (LOL) clause. An LOL clause simply states that the design professional's liability to the client for any causes of action or damages arising out of the performance of the contract is limited to a certain agreed amount, or the amount of fees paid, whichever is greater. [1] It establishes a cap on your liability to your client.

You should also ask the client to waive the right to seek consequential damages in the event of a claim. "Consequential" damages are indirect damages such as lost rent or business profits. They are typically difficult to prove or disprove, and often have the effect of complicating negotiations by artificially inflating claims.

Finally, you should ask your client to defend and indemnify you from claims asserted against you by other parties simply by virtue of your involvement in the project, and not as a result of your negligence. This could include claims by subcontractors for extra time or cost as a result of an alleged oversight in the design documents, or claims by an injured party. Defend and indemnify clauses can be a point of contention with clients. The simple reason for such clauses is that the design professional has little ability to control the management of the project during construction, when injuries or other claims can materialize. Your fees in relation to the overall cost of the project simply do not justify assuming these risks.

Dictate how disputes will be resolved ahead of time.

No one ever expects to have a relationship go sour – if we did, we probably wouldn't enter into the relationship to begin with. However,

disputes are an unfortunate, but not uncommon occurrence. Utilize your contract to spell out a step-by-step procedure for resolving disputes if they arise. Importantly, include a clause allowing you to stop work, and withhold all deliverables in the event your invoices go unpaid. Do not work without receiving timely payment. Demands for payment are an invitation for claims.

Confirm the contract as the final expression of your agreement.

Last, but not least, you should include an "integration clause" in your contract, stating that the contract is the full, integrated and final expression of your agreement, and that any prior negotiations are superseded by the contract. Require any changes to the contract to be made in writing and executed by both parties.

Insurance.

Finally – as a prudent practitioner, you should procure professional liability insurance to cover claims if they do arise. The defense of claims can be a major cost burden. A policy, even with modest amounts of coverage, provides you with protection for the costs of defense. Your insurance broker can also serve as an important risk management resource.

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