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When Your Client Says "Stop!"

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.

Most projects begin with great optimism, if not elation. The project owner is excited to get a brand-spanking-new project in motion. The design firms can't wait to see their designs turn into an impressive physical structure. Ribbon-cuttings, brass bands and local dignitaries may add to a public celebration.

Unfortunately, not all such fairy tale beginnings have a happy ending. In many cases, the root of the project evils is money -- or more precisely, a lack of it. A client may have been overly optimistic about projected income that will fund the project. Perhaps a prospective big tenant for the new facility pulls out leaving the prospects of a largely vacant building. Unanticipated expenses due to unforeseen conditions can jack up the overall cost of building. Or financial strife can strike another of the client's projects, impacting the financing of your work.

Prudent design firms know the importance of examining a potential clients financials before signing a contract for a new project. But sometimes, even healthy looking financial statements can turn sickly if project funding is based on income projections that don't come to fruition.

All design firms, therefore, must occasionally take off their rose-colored glasses and ask some tough questions of themselves and their clients. What would happen if the client faced financial or other trouble and suddenly had to put a halt to the project? What if the client called for a three, six or nine month suspension of design services? What if the suspension turned into a permanent termination? And what happens if the project is restarted? All of these scenarios should be considered right from the beginning of project planning, not after the client has raised its stop sign.

When A Project is Suspended

Damages caused to the design firm by a client who temporarily suspends a project can be substantial and far-reaching. Having to stop and start services one or more times on a project is almost guaranteed to bring added expenses. Design staff will have to be rescheduled. That can add to payroll and inevitably affects the scheduling and staffing of other projects. The suspended project's schedule will need to be revised, probably extending the completion date by the length of the suspension or more.

Project suspensions that go beyond 30 days usually result in a loss of continuity among all parties and require additional meetings between the client, contractor and design staff to ensure everyone is still on the same page.

Despite the damages caused to the design firm, it's not unusual for the client to expect that things pick up just where they left off when the suspension began. Clients often expect that schedule delays can be made up over the life of the project and that project fees remain the same. That's why it is important to address the potential ramifications of a project suspension during the drafting of the initial contract, before design and construction commences.

Here are some items you and your attorney may want to include in your contract regarding your client's suspension of services:

- Set a limit for the number of days a project can be suspended before you can seek remedies for the damages caused by the delay. For instance, your contract might specify that after 10 calendar days of consecutive suspension of your services, or 30 cumulative calendar days, you have the right to renegotiate your scope of services, fees and schedules to reflect the extra work, expenses and delays incurred.
- Set a limit on the number of calendar days the client can suspend your design services before you have the right to terminate the contract. For instance, your contract might establish that you have the right to terminate the contract after 90 calendar days, consecutive or aggregate, of project suspension upon giving the client five days written notice.
- Establish that you will be compensated within 30 calendar days of the suspension of your services for any and all services performed and reimbursable costs incurred prior to the suspension.
- Establish that you will be compensated within 30 calendar days for all reasonable costs that were incurred during the suspension.
- Establish that if the contract calls for a retainer from your client you have the right to apply the retainer against outstanding billings for uncompensated services.

- Establish that you will be compensated for all reasonable time and costs required to restart your services once the suspension has ended.
- Have the client agree that you have no liability for any delay or other claims as a result of the client's project suspension.

(The time frames listed above are examples only.

Choose durations that make sense for your firm, your client and the project in question.)

When a Project is Terminated

In extreme cases, a client facing long-term financial concerns may go beyond a suspension and terminate a project altogether. In such an instance, your firm not only can lose substantial income from the terminated services, but there can be sizable costs associated with shutting down your work on the project. Likely, you have incurred costs for physical resources such as equipment and software. You may have hired additional personnel to take on the project. Your goal is to ensure you are paid for all services rendered leading up to the termination and recover costs associated with the termination itself.

There is really nothing a design firm can do to prohibit a client from terminating a project, with or without cause. The same does not hold true for the design firm, however. Terminating a contract without cause would leave an architect or engineer with substantial liabilities for failure to perform its scope of services. Plus, the damage to a design firm's reputation for pulling out of a project without cause could be irreparable.

Still, a design firm does need to establish under what conditions it can rightfully terminate its agreement with the client. In almost all cases, the realm of just cause for termination is nonperformance of the contract on the part of the client.

With that in mind, you can work with your attorney to include a termination clause in your client contract that seeks to minimize your losses should the client terminate the agreement and specifies under what

conditions you have the right to terminate the agreement. Accordingly, the contract clause should:

- Establish that should the client decide to terminate the contract, you must be provided at least seven calendar days advance written notice.
- Establish that should the client terminate the contract with or without clause, you will be paid within 30 calendar days of project termination for all services rendered, all reimbursable expenses, and all expenses reasonably incurred executing an orderly project close-down. (Some design firms are also able to include estimated lost profit on unperformed services to this payment amount.)
- Establish that you will be paid according to the payment provisions specified in the contract.
- Establish that you have the right to terminate the agreement with cause, giving at least seven calendar days advance written notice.
- Define which causes are grounds for your termination. This typically includes substantial failure to perform in accordance with the terms of the agreement, the assignment of the project and/or the contract to a third party, or a suspension of the project or the designers services for more that 90 calendar days, consecutive or total.
- Establish that imposition of changes in the scope of services or other project conditions that are not agreed to by both parties are grounds for termination.
- Establish that failure of the parties to reach agreement on compensation and scheduling following a material change to the project is grounds for termination.
- Establish that the design firm retains ownership of design instruments for the terminated contract unless a purchase agreement can be made with the client.
- Establish that if you terminate services for cause within the rights granted in the contract, you

will not be liable to the client for delay or damages caused by the termination.

One of the most common reasons for the potential termination of a contract by the design firm is nonpayment of fees by the client. In such instances, it may be advisable to first temporarily suspend your services, giving reasonable written notice to the client, rather than terminating the agreement fully. This will keep the contract in force while giving the client time to make good on the fees due.

National associations serving design firms have similar recommendations for drafting contract language to address suspension and termination of projects and services. The AIA, for example offers recommended language in AIA Document B101, as does the EJCDC E-500 (2014) standard agreements. Review these with your attorneys when negotiating your own contract language with clients.

Restarting a Suspended or Terminated Project

A client who decides to restart a suspended or terminated project usually contacts the designers who originally worked on the project and asks them to continue where they left off. While a project restart is typically seen as good news, design firms need to be extremely careful before agreeing to accept such an assignment. You need to thoroughly reacquaint yourself with the project and determine what changes need to be made to get the project up and running toward a successful conclusion.

First, review where the project stood at the time of suspension or termination. It is a good idea to meet with the owner, the contractor and important subs to ensure agreement on the plan going forward.

Read the contract and your project files thoroughly. What was the owner's primary objective for the project? Has that changed? What was your scope of services, your design criteria, the project schedule and the construction budget? If the project has been in limbo for any extended period of time these may all have to

be readjusted. In fact, you may have to renegotiate a new or revised contract with the client. At the very least, you'll need to adjust the schedule and secure compensation for any additional costs associated with restarting the project.

You also need to determine whether any laws, codes and regulations have changed since the project was halted. Approvals and permits may need to be renewed, and studies and reports redone. New products may be on the market that call for changes in specifications. New software, computer models or other technology may be available that could benefit the project.

Examine your overall fee structure. Make sure you are adequately compensated for changes in scope. Don't neglect to take into account inflation or any changes in your standard rates.

Insurance is another consideration. Work with us to determine how the suspension and restart of services may affect your coverage.

Restarting a project that you previously worked on is a challenge. Restarting a project that was previously started by another design firm can be a liability nightmare. Critical issues regarding who is liable for what work, who owns copyrights and designs, and whose insurance carrier covers what work all need to be clearly sorted out. You'll need expert legal advice in drafting an indemnity-laden contract with the owner. It is highly recommended that you meet with the previous designer and find out why their work was terminated and why they were not rehired to complete the revived project.

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.