**The Importance of Written Contracts**

By William Thrush

Risk Management Consultant, Oswald Companies

It is a situation that is not uncommon for design professionals: A client calls up with a new opportunity and requests initial conceptual plans, or a call is received providing notice that a proposal was accepted and services should begin immediately.

Excited about the new job prospect and not wanting to disappoint a client, the design professional promptly begins work. Time passes quickly and, before long, the design professional is approaching the end of the design process without ever having a signed contract.

While it may seem like a minor formality, it is critically important to have a signed contract before beginning professional design services. A failure to do so can lead to significant exposures, lack of remedies, and – in some jurisdictions – may even violate ethical rules and laws.

**Importance of written contracts**

***Mutual understanding.*** A written contract establishes a mutual understanding of the parties as to what services are to be performed, what services are not included, compensation for services, timeline for performance, and the other terms and conditions that will govern the relationship for the project. In the event of any disputes, a decision maker will determine the intent of the parties, which will be much easier if there are clear contractual terms agreed to in an executed contract.

***Roadmap for project.*** As noted above, a written contract provides details of how and when the services will be delivered and the terms and conditions under which such services will be performed. It establishes how the parties will handle critical issues, including how communications and disputes will be handled. A written contract can be referred to throughout the project to provide guidance for project participants.

***Risk allocation****.* Each unique project has its own risks. Those risks should be equitably allocated to the parties that are in the best position to control the risks. The contract negotiation process is the best time to have candid discussions about risk allocation and ensure that the proper mechanisms are incorporated in the agreement.

***Payment rights.*** Your professional design services are not provided for free. Negotiate payment provisions so that you are paid quickly and routinely, and are not subject to unreasonable withholdings, offsets or contingent payment (pay-if-paid) restrictions. It is also important to understand how payment timing corresponds to payment obligations to subconsultants and to applicable lien statutes and notice requirements to ensure that no such remedies are compromised.

***Dispute resolution***. Issues will be encountered on design and construction projects. If such issues evolve into disputes, those involved should have previously agreed to a process to properly handle such disputes. Incorporating alternative dispute resolution processes can help reduce the potential for fractures in the relationships of the project participants and mitigate the potential for lengthy and costly claims processes.

***Client due diligence.*** One of the most important risk factors is client selection. Engaging in a project with an inexperienced or litigious client can significantly increase the potential for disputes and claims. As such, the contract negotiation stage can be an important aspect of client due diligence. If your prospective client does not act with integrity and reasonableness during contract negotiations, it can be expected thatthey will not do so when problems arise during the project.

***Adherence to applicable legal requirements.*** In addition to reaping the benefits of having a written agreement in place, it may be required by law. Some jurisdictions require that contracts for professional design services be in writing and may limit rights and remedies for a failure to comply with such requirements. For example, Ohio law requires architects to use a written contract when providing professional services and mandates that such contracts be executed prior to commencement of any work on a project.

**Written contracts are critical for all project participants**

A written and executed contract should be in place before beginning professional services for your client. However, it is just as important to have written and executed agreements in place with any subconsultants. In addition to addressing the issues discussed above, provisions in your prime agreement should be appropriately flowed down into your subconsultant agreements to avoid gaps and inconsistencies.

It is also important to understand the project delivery method being utilized and make sure the rights and obligations of all project participants are consistent with each other. For example, appropriate insurance limits, waivers of subrogation, limitations of liability, waivers of consequential damages and dispute resolution processes should be consistently incorporated to avoid exposure gaps and conflicts among the different layers of contracts.

**Best practices**

Design professionals are busy, and their primary focus is on providing quality design services to their clients. It can be easy to forego the administrative oversight needed to ensure that written contracts are obtained on all projects. However, there are easy safeguards that can be implemented within your organization.

First, work with your professional advisors (legal counsel, insurance brokers, internal risk managers) to establish acceptable standard terms and conditions. Once established, implement internal policies that mandate that no services shall proceed without:

* Written authorization to proceed in accordance with those standard terms and conditions or
* A separate, written contract that has been negotiated, reviewed, agreed to (in conjunction with your professional advisors) and executed. The same policies and procedures should be in place for all subconsultant agreements as well.

Do not forego the requirements for written contracts for fear of undermining the relationship with your client. A good and valuable client should also value the importance of clearly establishing a roadmap for the project. In addition, do not eliminate the requirements for smaller projects or engagements with limited fees, as the risks and exposures on such projects can be just as great as on larger projects.

**Bottom line**

Having written agreements in place and executed prior to beginning professional services is a critical element of proper risk management for design professionals. It is also beneficial to all project participants and stakeholders.

All design firms should implement proper procedures to ensure that contracts are in place prior to beginning work and to utilize available resources (including consultation with professional advisors) so that such contracts are appropriate and equitable.

The Oswald Design and Construction team can help you determine your needs on every project and obtain proper protection. Contact me at 216-487-2840 or [wthrush@oswaldcompanies.com](mailto:wthrush@oswaldcompanies.com).