



Negotiating Public Agency Contracts

You've seen it before. A town hires a young attorney bent on proving his worth as a take-no-prisoners negotiator. One of his tasks is to rewrite the town's contracts for design professionals and contractors, never mind that he doesn't know much about either. He has a collection of killer contract clauses that he cuts and pastes into a 38-page nightmare. "By the way," the attorney tells you when presenting his new creation, "it's non-negotiable."



Reading the document, you find a one-way uninsurable indemnity that requires you to assume most of the project risk. You also learn you're expected to certify the absence of mold and asbestos, supervise construction and warrant that the finished product is in strict accordance with your plans. The agency

gets ownership of your documents. And just try to collect your fees or suspend services in the event of non-payment, let alone resolve disputes out of court.

CONTRACT RISKS

A one-sided contract can cause serious problems for you and your firm. The Risk Drivers® study conducted by the Design Professional group of the XL Insurance companies analyzed claim and loss prevention files and identified the top non-technical factors that contribute to claims. Negotiation and contract issues were factors in about 13% of the claims, representing 17% of claim dollars.

One of the most fertile areas for claims can be the public—municipal, state and federal—agency contract. These contracts sometimes contain

onerous provisions that transfer inordinate amounts of project risk onto your shoulders.

As you'll see, however, you may have more bargaining power with public entities than you realize and more room for negotiation than you think.

WHOSE CONTRACT?

If you can, get your contract (AIA's, EJCDC's or your firm's) on the table first. Some agencies will accept it. At least two states (as well as a federal agency) are licensed to use the EJCDC documents with minimal changes. There are many municipalities with enlightened public works directors or building department officials willing to accept AIA or EJCDC contracts.

If that isn't possible and you're sent a copy of the agency's contract during the procurement process, you can respond by sending back a copy of your contract with a brief cover letter that says, in effect:

Here is a copy of our standard form contract. We've found this format most practical for developing a professional services agreement. We look forward to discussing its terms and conditions with you in detail.

The agency might not accept your contract, but it could serve as a framework for negotiation.

On the other hand, if their contract hasn't been in use for some time or wasn't provided to you during the RFP phase, you're in a position to ask that the agency's terms be negotiated. After all, you made certain assumptions about the degree of risk you would assume when you calculated your fee...before you were ambushed by the contract.

TALK TO THE RIGHT PEOPLE

If you're trying to negotiate your contract with the agency's attorney, you're probably negotiating with the wrong person or in an unfair match-up. Try to negotiate with the person you'll be working with on the project. The best ally you have in a public agency is often an engineer or architect who has been in private practice (or hopes to be one day), someone who understands your profession.

YOU'VE GOT THE POWER

If you've already been selected by a public entity, you're not without leverage. By then, the agency staff has put in the time and expense of going through the selection process and made a decision that you are the most qualified firm—assuming you weren't selected solely on the basis of price (you weren't, right?). They may be under considerable pressure to get on with the project. In addition, it could put them in a bad light if it became known that they had to begin the selection process all over again because they were unwilling to negotiate a fair contract.



EVERYTHING'S NEGOTIABLE

It may be difficult, but try to regard your contract talks as another negotiation. Do your homework, rehearse, set an agenda and know your “walk away” point. And be prepared to counter these contentions:

“Take it or leave it.” When an agency representative refuses to budge, try sidestepping his or her position and begin asking questions. Find out *why* the representative is making that statement, and respond to that concern.

“Everyone else signs it.” This may or may not be true, and you might want to confirm this. But what other A/E/Es accept has nothing to do with you. You have an obligation to your firm and your staff to manage your business professionally and accept only those terms and risks you feel you can manage.

“Yeah, it's in there but we won't enforce it.” (Yes, we've actually heard this one.) Get the promise not to enforce a provision in writing. Put it in a confirming letter with names and dates.

“We've always done it this way.” During your preparation, talk to your peers and try to get copies of the agency's contracts that don't contain some of the more onerous clauses or that have been changed. Don't confront the other party with charges of dishonesty; just introduce your examples tactfully.

“Think of it as a cost of doing business.” You're not in a position to assume someone else's risk, nor can you insure against that risk. Again, ask questions. What does the agency really want? What does it think it gains by imposing a requirement that deprives you of the financial capacity to respond in the event of a loss?

EDUCATE

Calmly, patiently educate the other party. Sometimes the agency's representative is simply unaware that certain contract provisions are just not appropriate for design services. Often, people really don't understand an A/E/E's obligations under the law. For example, they may think you're required to be perfect and see no reason why you can't agree to guarantee your work.

Be prepared to give them the benefit of the doubt. Your prospective client may not really intend for you to take on all of its risks. On the other hand, if that is the intention, is this really a job you should take?

BACK YOURSELF UP

Have your attorney and insurance agent or broker review your agreements before you negotiate. Your attorney can help you understand the legal implications of proposed provisions, and your agent or broker can help to explain insurance-related issues in writing for your use. But don't bring these individuals into the negotiations, at least not at first.

If necessary, most knowledgeable agents are happy to call contracting officers to explain the insurance facts of life. If you find yourself bargaining with the agency's attorney, you may need to call in your attorney to make it fair.

BE WILLING TO WALK AWAY

Decide *in advance* on your line in the sand, and have the courage to walk away if you need to. Don't be tempted to agree to deal-breaker terms because you're afraid you'll lose the job. You should be much more worried about your exposure to serious liability for circumstances you'd be rendered powerless to control. As tough as it may be to change a public agency contract, it's even more difficult to defend yourself when things go wrong. (To read more about this topic visit xldp.com/primer to access the *Deal Makers and Deal Breakers chapter of Professional Services Agreements: A Primer.*)

JOIN THE RESISTANCE

It may not help you with your current project, but if you and your peers at other firms band together, you can sometimes convince even the most stubborn public agency to change its contract. Work with the state and local chapters of your professional associations and let them bargain on your behalf.

Public agencies have tremendous power and many delight in using it. However, persistence, reason and the knowledge that you were not just selected out of the phone book can get you past more than a few stone-faced government attorneys.

The information in this article is the product of over 30 years of front-line claims experience and is part of the educational service provided to the design industry by the Design Professional group of the XL Insurance companies. For more information, other loss prevention resources and to find an agent in your area, visit xldp.com or phone 800-227-8533 ext. 2102508.

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