



Verbal Agreements: Working Without a Net

Despite all the case studies and anecdotal evidence that warn against the practice, A/E firms still find excuses for beginning projects—or even completing them—without a written contract. Find out why the excuses we hear simply don't hold up.

While reviewing a recent spate of large claims against architects and engineers, claims managers from the Design Professional group of the XL

Insurance companies noticed a common factor: in nearly all of the claims, the A/E either had no contract with the client or was working merely on the basis of a proposal.

It's a perennial problem. Our study of over 13,000 claims revealed that an underlying cause of a significant number of claims was the absence of a contract as work began.



But even that doesn't tell the whole story. The reality is that regardless of the cause of the claim, if you don't have a contract, you make it more difficult for us to successfully defend you if you're sued.

Our insured's tell us they understand the dangers of working without a contract. (In some states it's even illegal.) Then why do so many firms continue to provide professional services on the basis of a handshake? We frequently hear one of the following three reasons:

– “I don't want to rock the boat...”

Some A/Es say they are hesitant to raise the issue of a contract with a client with whom they have a good, long-term relationship. They're concerned

that asking for a contract at this point will somehow offend the client and undermine the relationship. One observer likened it to asking for a prenuptial agreement on his fifth wedding anniversary, but the analogy isn't a very good one. Rather, A/Es should think of it as renewing their vows. A contract can help preserve a valued association. If you and your client have a good relationship, why wouldn't you want to protect it?

Indeed, why not commit your agreement to writing for an important client? When disputes occur (and they will occur), it's much easier to look to the contract in order to resolve the matter simply and professionally. In the absence of a written agreement, you are forced to rely on the memory and integrity of those who shook hands. But memories can be faulty, and there's always the possibility that the person who shook hands has left the firm.

If you provide services to a single client on a number of individual projects over a period of time, consider a continuing service, or master, agreement. Such a document sets forth the agreed-upon business terms and conditions, and sometimes the fee schedule, for a specified period of time, perhaps a year or two. This establishes a framework within which you can provide services without having to go through detailed contract negotiations each time. The scope, schedule and perhaps fee can then be easily established with a short-form task order for each specific project. You'll need to update the master agreement periodically to account for changes in law and current compensation schedules. (EJCDC publishes a standard form agreement E-505 for multiple assignments from the same client, patterned after the E-500.)

A good client shouldn't object to your desire to safeguard your relationship. On the other hand, if the client balks at the idea of a contract, then maybe the relationship isn't as good as you thought.

– “But the fee is small...”

Sorry, but this isn't a valid excuse, either. The size of the fee makes no difference—what's really at stake is the value of the project; if there are problems, the value is what the owner will attempt to collect from you. Again, without a written contract, you can't prove what your scope was or what risks you were willing to assume, and our ability to successfully defend you is substantially weakened.

Consider the structural engineer who was retained, on the basis of a verbal agreement, for a very limited walkthrough to look at existing joists for a remodel. Later, without his knowledge, doorways were cut into overhead load-bearing walls. After the dust cleared, the SE's share of the liability was over \$200,000. His fee: \$200.

If your project and fee are small, and the thought of negotiating a large, comprehensive agreement is daunting, consider AIA's B-155 for small projects and its B-727 for special services. In addition, EJCDC's E-520 is a short-form agreement.

– “We can deal with the details later...”

Here's another excuse we hear from time to time. If you're like most design professionals, you're eager to get on with the interesting, fun part of the job and attend to all those pesky legal fine points later. Jumping in can be tempting, but it's just too risky. Once you've committed resources to a project, you may find you've weakened your position when attempting to negotiate crucial contract terms. Plus, you're gambling that something won't go wrong. If you applied that same thinking to driving, you'd never wear a seatbelt. Your luck only needs to run out once.

Your contract protocols should include a “no signed contract, no work” policy. Don't begin work until the agreement is signed. Period.

It's rare to find a construction project that's free of all controversy. When a problem does occur, you have to be able to establish your rights and obligations. This is easier and less contentious if you and your client have already thought through the issues.

Contract formation can also be an effective marketing tool. Some A/Es think of the process as an opportunity to learn more about their client's long-term concerns and goals, and to realign their relationship to address them. None of this is likely to happen if you and your client don't sit down and talk about it. If you're still worried about rocking the boat, think about this: nothing will ruin that solid client relationship faster than a nasty dispute in the middle of a project.

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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