

Design Professional Industry Trends

Public Entity Contracts

Public entities are using tough new contracts as a way to transfer inordinate amounts of project risk onto design professionals, jeopardizing their insurance and making demands that design firms can't reasonably fulfill.

The Claims Department of XL's Design Professional group has seen their share of onerous public contracts. Here's some examples of ways in which inordinate risk can be transferred to you:

Examples of language that can put the public agency—not the designer—in the driver's seat:

- reserving the right to approve the hiring of subconsultants
- requiring notification of hazardous materials
- requiring the “on time” and “on budget” completion of the work

Stipulations that can turn every aspect of the project into an opportunity for the public agency to sue the design firm:

- no changes to the project staff without the owner's approval
- design firm is responsible for all services under the contract

AVOID THESE CONTRACT PITFALLS:

INDEMNIFICATION

Some public agencies include indemnity clauses in their contracts that aren't limited to the A/E's negligence. Since professional liability insurance is intended to cover *your negligent acts, errors or omissions*, if you agree by contract to a clause that raises or modifies that standard of care, there may be no coverage.

DUTY TO DEFEND

If you agree to “defend” the client it means that long before any legal liability on your part has been established, you may be obliged to retain an attorney and mount a defense on your client's behalf. Generally, this is an obligation your insurance carrier is likely to refuse to accommodate; you could find yourself paying for the client's attorney out of your own pocket.

INSURANCE REQUIREMENTS

Public entities also attempt to get A/Es to accept onerous or unrealistic insurance requirements, such as naming the client as an additional insured or specifying maximum deductibles, higher policy limits or extended coverage. Some of these conditions are unreasonable or prohibitively expensive; others are simply unobtainable at any price.

STEPS YOU CAN TAKE:

- **Read the contract.** It sounds obvious, but too many A/Es assume the contract for a new project is the same one they received from the same entity on the last project. Onerous clauses and phrases that you negotiated out of one contract have a way of finding their way back into another.
- **Look for what ISN'T in the contract:**
 - Is there a dispute resolution provision, or does it default to the civil courts?
 - Do you disclaim responsibility for the discovery, handling or disposal of hazardous or toxic materials on the site?

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- Do you have the right to terminate the contract if you aren't paid or if there's a material change to the conditions of the agreement?
- **Ask your attorney and insurance agent or broker to review client-drafted agreements** before you negotiate. Your attorney can help you understand the legal implications of proposed provisions, and your agent or broker can explain insurance-related issues.
- **Educate your client.** Explain why certain contract provisions are just not appropriate for design services. Often, people don't understand an A/E's obligations under the law. For example, they may see no reason why you can't agree to guarantee your work.
- **Once you've identified the worst provisions, negotiate to delete or amend them.** No matter what the client tells you, nearly every contract is negotiable.
- **Do your homework.** Be prepared to explain the issues and know your bottom-line position on each critical provision. Remember, you're not in a position to assume someone else's risk, nor can you insure against that risk.
- **If the client tells you everyone else signed the contract,** remember that what other A/Es accept has nothing to do with you. You have an obligation to your firm to accept only those risks you feel you can manage.
- **Check with an XL Insurance Agent** for a checklist of terms to look for. Find an agent in your area at xldp.com.

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