Before You Sign

Designers keeping a watchful eye on project contracts ensure that both they and their clients are protected and happy.

By David Whitemyer
Each piece supports the others. “And like with a building design,” he says, “if you don’t know the program and structure of the contract, then you won’t know how to relate to its details.”

WHO, WHAT AND WHEN: BASIC BUSINESS TERMS

Typically labeled as a scope of services, the basic business terms of the contract detail who will deliver what and when. “The scope is the most important part of the contract so that the client knows what services we’re providing,” Wade says.

The scope and business terms outline things such as what services will be provided and how many meetings there will be, sometimes breaking these down into phases, like schematic design and construction documents.

It’s vital that neither the designer nor the client promises more than what they can deliver. Some questions to ask when evaluating this aspect of a contract are: Is the workload reasonable? Does the contract require services not usually provided, such as acoustical engineering or the submittal of CADD files? Design liability experts at the Victor O. Schinnerer & Co. advocate that

Jeffrey Wade, AIA, a Principal at ADD Inc., a 150-person Boston-area architecture and interior design firm, jokes that some contracts have taken longer to hash out than their respective design projects. “We move along on good faith, and the owner is paying us,” Wade says. “And in one case, we got all the way to the point of substantial completion without a final contract in place.”

Wade admits, however, that this is rare. In most cases, the company gets through the contract process quickly and painlessly. His firm even has a contracts committee to help streamline the process.

While the contract process typically is where the designer and the client discuss and agree upon project expectations, in the real world, not all expectations are met. Disagreements arise, and responsibilities of the parties are sometimes open for interpretation.

As a specialist in design and construction law, Chris Noble, a lawyer with Noble & Wickersham LLP, is responsible for ensuring that contractual expectations are reasonable and that designers are protected from risk. “We could spend our lives negotiating contracts,” he says. He looks for red flags and holes in design contracts, and recognizes that it’s “our job to reach closure [in contract negotiation] so that people can do their work.” Design professionals shouldn’t rely wholly on their lawyers, however; they must be responsible for understanding the structure of contracts so they can spot red flags and deal breakers for themselves.

Noble breaks the design project contract into four fundamental parts: the basic business terms, contingent business terms, leverage terms and liability terms.
responsibilities be clearly assigned to only one party. According to the company’s publication, Managing Risk Through Contract Language: Interior Designers (See Resource Guide), “Co-responsibility creates a situation in which neither party is fully responsible.”

**WHAT IF: CONTINGENT BUSINESS TERMS**

As with disaster planning, the contract must prepare for the “what ifs.” What if the project extends longer than scheduled? What if the client alters the program? What if the budget changes? Planning for the what ifs of a project is done in the contingent business terms section of the contract. This is what allows the designer to request more money when additional services arise.

And they do pop up. Things change, and often, it’s no one’s fault. In DPIC’s Contract Guide: A Risk Management Handbook for Architectural, Engineering and Environmental Professionals (See Resource Guide), designers are strongly encouraged to insert a changed conditions clause into contracts. It provides a clause example that allows the designer to determine changed conditions of the contract.

“if … circumstances or conditions that were not originally contemplated by or known to the Consultant are revealed.”

Sometimes, the what ifs exceed the bounds of the contract terms and strain the designer/client relationship. In a worst-case scenario, the designer will either be let go or walk away from a project. As a result, the termination clause of the contract must be examined in detail. No designer should lose money because the scope changed outside of his or her control.

**SHOW ME THE MONEY: LEVERAGE TERMS**

The part of the contract that serves as the motivation to keep all parties on the same page and moving forward is the leverage terms, sometimes called the enforcement terms. These terms encourage the designer to accomplish the work and the client to pay for it.

Enforcement can be either negative or positive. The most-common negative enforcer is the stop work order. If the client isn’t paying on time, the designer may halt the job. Change orders and the threat of added costs to a client also can be effective negative enforcers. But few contractual relationships get this adversarial.

On a pleasant note, Noble likes to tell the story of a residential designer he knows who gives an automatic 5-percent discount on time charges that are paid within seven days of invoicing. “His clients love it because they think they’re getting a deal, and it keeps his cash flow going.” Noble says. “What he doesn’t tell his clients is that the discount is worked into his business plan.”

Hoping to ensure there are no hitches, clients sometimes put guarantee and warranty clauses in contracts.
Despite the romanticism of the “starving artist,” without money, interior design businesses would fail. “There’s a word that people don’t learn in design school,” attorney Chris Noble jokes. “That word is ‘profit.’” Designers must get paid for their work, and there are as many ways to charge for those services as there are design styles.

- **FIXED FEE** The designer sets a single total fee based on an estimated amount of hours, project size and scope, and sometimes expenditures. The project is invoiced and paid incrementally.
- **SQUARE FEET** A common payment method for large modular office build-outs, where an average design-to-cost is easily spread out. The designer sets a per-square-foot fee.
- **HOURLY** Not typically a big money maker, the designer is paid on demand, by the hour, with ranges averaging between $50 and $300 depending on the designer and where he or she is located.

Other less common methods of charging for interior work includes retainers, where the whole fee is paid upfront; commission-based, where the designer is paid by a manufacturer and profit is calculated by a percentage of volume sold; and per diem, which is similar to hourly, but broken down by day.

Interior designers sometimes combine these methods to fit the project and the client. In all cases, it’s important to plan for the unexpected, either with a contingency figure or with an agreement about charging for additional services. As with most businesses, “the only way you can make it in interior design is to have more money coming in the door than going out,” Noble says. “There is no other way.”
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NEW GROUND RULES
What are clients asking for in the contract?

Today’s clients are sophisticated. Business dealings are the stuff of everyday life, and clients know how they work. With a smorgasbord of contract formats to use, knowledgeable lawyers and industry trends, clients are requesting to add terms into contracts that they hadn’t in the past.

- **OWNERSHIP OF THE DOCUMENTS** With the prevalence of CADD and the ease of paper reproduction, many clients expect ownership of the project drawings and design. This blurs the lines of intellectual property and becomes a liability concern when clients assume they can manipulate — and even recycle — designs.

- **GUARANTEES AND WARRANTIES** Though commonplace in construction work, guarantees and warranties have no place in a designer’s contract. Clients sometimes expect their designer, whom they often perceive as the leader of their project, to be responsible for every aspect of the final product. Design firms carry insurance for errors and omissions, but they cannot provide guarantees.

- **USE OF CLIENT CONTRACTS** Experienced clients prefer using their own contracts, which have been scoured over by their lawyers or insurance carriers. These tend to be one-sided, whereas industry-based contracts were created collaboratively by a panel of owners, design professionals and lawyers.

- **SUSTAINABILITY** It’s the current design industry buzzword. Clients now sometimes insert LEED certification requirements into contracts.

- **DESIGN-BUILD** With faster schedules and tighter budgets, many clients are requesting the Design-Build process, where designers and contractors work hand-in-hand under a single contract, rather than through the traditional Design-Bid-Build method.

Not all of these items are deal breakers. Clients are looking to protect their interests, just as designers are. It’s important to educate clients about industry standards and what the design process entails. Designers should then create a partnership contract that balances client needs with being responsible and protecting their business.

RESOURCE GUIDE


- For additional research, design articles and industry resources on this topic, visit IIDA’s Knowledge Center at http://knowledgecenter.ida.org.