

This material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, confer with a qualified professional who can provide guidance that considers your unique circumstances.

Show Me the Money: Avoid Disputes Over Billing and Payment

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

For design professionals, few times are as exhilarating as the day you reach agreement with a client on a new project. You nail down the price for your professional services that is both fair and profitable, sign on the dotted line, shake hands, and wish each other success.

But agreeing on a price is not enough. When hammering out the client contract, it is essential to establish specific terms regarding how your client will be billed and how and when you will be paid. The greater the detail in these terms, the greater the chance you get paid in full and on time and the lesser the chance you battle through fee-related disputes, claims and counterclaims.

Establish Billing and Payment Terms

When drafting your contract, address these factors regarding billing and payment:

Fees for services. Your contract should spell out how much you will be paid for your professional services. A detailed scope of services should specify precisely which services you are agreeing to provide for that fee. If there are additional services that the client may consider, list them individually in an addendum along with the additional fee for each. It's also a good idea to list proposed services the client has declined, noting that these are not included in your scope of work.

Terms of billing. Spell out exactly how you will bill the client. Will you invoice weekly, monthly or quarterly? Will billing be tied to completion of specific services or project phases? Will you bill for your services in full at substantial completion of the project? Regardless of the billing schedule, be sure to deliver detailed invoices that clearly spell out the services for which you are billing and the terms of payment.

Terms of payment. Specify when payment is due once an invoice has been sent. Do you expect payment in 10 days, 30 days, 60 days? Will the client send you a check or make an electronic payment? It's a good idea to talk to your client's accountants regarding how they normally handle billing and payment. If they typically pay bills on the first Monday of the month, for example, consider timing your billings and terms of payment to match that schedule.

Retainer. Wherever feasible, require your client to pay a retainer upon execution of the client-designer agreement. This can be a set dollar amount or a percentage of your total fee. Specify that the retainer will be held by the designer and applied to the final invoice.

Protection Against Late Payment

Good clients are usually diligent about complying with payment terms. In a few instances, a client may be a day or two late with a payment because of an oversight, and it is reasonable to forgive and forget an isolated mistake.

Unfortunately, however, some clients become chronically late with payments. It is important, therefore, to put some teeth into your payment terms. This can be accomplished with the following:

Contingency funds. Negotiate a contingency fund into your client contract. This is a reserve set aside by the client that can be used to pay unanticipated expenses that arise over the course of the project. Such expenses are often the result of scope creep, change orders, increases in material costs and the like. This fund also helps ensure monies are available when your payment due dates arrive.

Interest charges. Make late payments cost the client by charging a monthly interest on balances past due. Your contract should specify the rate of interest applied to late payments; for example, 1.5% monthly or the maximum rate allowable by law, whichever is less. Also specify how future payments will be applied to the balance due. Usually, payment is first applied to the accrued interest and then to the unpaid principal.

Collection fees. Hopefully, you will never have to turn to an outside agency to collect late payments from a client; but should that occur, you will want the client to be responsible for collection costs. Require that the client pay for all legal fees, outside agency fees, court costs, internal staff costs and any other expenses related to the collection effort.

Protection Against Nonpayment

Unfortunately, a slow-paying client can morph into a nonpaying client. Therefore, your contract should contain remedies in the

event a client cannot or will not pay its bills. You and your attorney should consider contract clauses that address:

Transfer of documents. Make the final transfer of design documents to your client contingent on you being paid in full for your services. Similarly, you might consider making the submission of documents required for permit approvals, certifications, etc., contingent on your invoices being kept current.

Suspension of services. You and your attorney might consider pushing for a contract clause that requires your client to pay any undisputed past-due portions of your bill within a specified period or you have the right to suspend your professional services. Before doing so, however, have your attorney check to make sure such a contract clause is legal and enforceable in your state, or the state in which the project resides.

If a suspension-of-services clause is indeed viable, specify when the suspension can take affect; e.g., when any undisputed payment becomes 60 days past due. The clause should also state that you are not liable for any losses the client may suffer as a result of your suspension of services. Agree that you will resume your services when the client becomes current on all invoices due. Then work with your client to make any adjustments in the project schedule or your fees made necessary by the suspension of services.

Termination of services. In the event a client simply refuses to pay past due invoices and fails to respond to a suspension of services, you should have the right to terminate your services. A clause in your contract should state that the client's failure to make payments for your services per the agreed-to terms constitutes a material breach of your agreement and is a cause for termination of the entire contract.

Client Clauses to Avoid

In addition to including clauses in your contract that increase your chances of being paid in full and on time, you want to avoid clauses included by your client that unfairly threaten your right to prompt payment for services. Such clauses may include:

Withholding fees for disputes. Avoid contract clauses that give your client the right to withhold payment of all fees when there is a disputed invoice. If your client insists on withholding payment on...

...disputed invoices, make sure that only those fees related specifically to the dispute are withheld. All other amounts due should be paid according to your contract terms.

Set specific protocols for clients to present a disputed invoice. For instance, require that any dispute be filed within 10 days of receipt of an invoice. Have the client provide its objection in writing, citing the specific problem and the amount in dispute. Insist that all portions of the invoice not in dispute be paid according to the agreed-to terms. Require that if the parties cannot settle the dispute via one-on-one negotiations, the issue will be addressed via the dispute resolution method specified in your contract (preferably mediation). Include that interest will be paid on any invoice amounts that have been withheld more than 30 days and that are subsequently settled in your favor.

Release of liens. We have noticed lately an increase in clients who ask their designers to sign a form that relinquishes the designer's right to file liens in regard to disputes over services for which they have been paid. Generally, such a clause can be acceptable if it is specifically limited to paid-for services. Problems arise, however, when such clauses are too broadly worded and begin to impact broader indemnities, or apply to other parties and/or design services for which the designer has yet to be paid.

Have your attorney carefully examine any release-of-lien clause presented by your client to ensure it doesn't diminish your ability to collect fees for services for which you have yet to be paid. Also recognize that laws regarding liens vary widely state-to-state and any release-of-lien clause should reflect the laws in the appropriate jurisdiction.

Pay-When-Paid Policies for Subconsultants

Whether you are a prime designer hiring subconsultants, or a subconsultant working for a prime, you may have entered into contracts including a pay-when-paid clause. With such an agreement, the subconsultant agrees that it will be paid by the prime only after the prime has been paid by the client.

The courts have often ruled against pay-when-paid clauses that fully relieve the prime of its duty to pay the subcontractor. But there are contractual wrinkles that can be applied to this concept that courts will approve. We generally recommend that a pay-when-paid clause includes the following conditions:

- The subconsultant should be required to submit invoices according to the schedule spelled out in the contract, and the prime should review them promptly (e.g., within five working days) and reply with either approval or a dispute.
- The prime should be required to make a reasonable, timely and diligent effort to collect payment from the client per the contract agreement.
- Should the client pay the prime on time, the prime is required to pay the subconsultant within a reasonable time, e.g., no more than 10 working days after the client's payment was received.
- If the prime does not collect payment from the client when due, the subconsultant should be paid for its services following a reasonable waiting period; e.g., 60 calendar days after the client's payment was due.
- The prime should be willing to pay a reasonable interest rate on amounts past due to the subconsultant, e.g., 1.5% monthly.

It's a Team Effort

Your accountant and attorney can be invaluable in creating billing and payment policies that create the foundation for ensuring your company gets paid in full and on time for services rendered. However, everyone involved in project management can play key roles in making your policies work.

The keys to success are not new. It starts with client selection, avoiding or closely managing projects from clients with a history of delinquent payment and/or litigation against their designers. Remember, claims against clients for nonpayment of fees often result in counterclaims alleging errors or omissions in design services.

Communication is another preventive must. Have a project representative regularly communicate with the client's accounts payable clerk and others who will be reviewing your invoices to ensure all billing and payment activities are understood and progressing on schedule. If payment is late, quick communications that include an acknowledgement of the situation and a confirmation of payment terms is essential.



Finally, management must be diligent in enforcing payment terms as stipulated in the contract. There's little point in negotiating detailed billing and payment procedures if you're unwilling to enforce them.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN).

We're here to help.

*Paula Selvaggio
Senior Vice President, Industry Segment Leader
Architects and Engineers*

*1-855-4OSWALD
pselvaggio@oswaldcompanies.com*

www.oswaldcompanies.com