

ProNetwork News

Risk Management Tools for the Design Professional

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Just a Rabbit? Small Projects Can Bite

by Eric L. Singer of *Ice Miller LLP*

In a classic Monty Python movie, King Arthur and his knights approach a cave known to be guarded by a ferocious beast. Upon seeing that the beast is but a wee rabbit, they let down their guards, proceed forward and are savagely attacked. Was the mistake having approached the cave at all or having done so without anticipation of the risk and use of appropriate protection? I sometimes ask the same question of design professionals who undertake small fee projects and unhappily receive large claims. But it has always been true that little projects can generate big claims, particularly where we let informality replace careful practice and appropriate documentation. In a troubled economy, a/e's want to take the work and no responsible lawyer should tell you to minimize your risk by eliminating your work. Take the work but don't skimp on process, procedures and gut feelings in contract negotiations and documentation, even if done less formally.

Just a Rabbit

Like King Arthur's knights, I have frequently heard that the project was just a rabbit, or just a slab on grade, or just a retaining wall, or just a room addition, or just a (fill in the blank). Insurance statistics prove that smaller firms do not necessarily get smaller claims, nor do smaller projects necessarily generate only small claims. A modest structural engineering engagement for balcony maintenance on a condominium building can bring in modest fees. When one of the balconies collapses or defects become apparent in 350 identical units with 350 separate plaintiffs, the defense and repair costs can be astronomical. The same can be true for a small church addition, with the church school remaining open during construction.

Just a Contract

Aside from legalities, written contracts serve two important practical purposes. First, before work begins, the contract serves as a discussion outline with which a client can be educated about what you do for a living, what they have to give you in order for you to do the work, what work you have in mind and, equally important, what work is not included. All of these topics are much more easily and less emotionally discussed before anyone has started working and before a problem has arisen.

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I frequently receive calls about contracts just as the a/e is finishing Construction Documents and realizes either that nothing has been paid to date or that a risky project is about to go out for bid. This is not ideal, but very common, and still better than having the discussion after CDs are out or a problem has arisen. I also frequently receive calls after the contract is signed, work is proceeding and could I just take a quick look at the contract, because it is "just a room addition" or similar small project? Once signed, there is little I can do but warn the a/e of the teeth on that rabbit.

Contracts serve a second important purpose as well – to tell a third party (judge, jury, arbitrator, Grand Inquisitor) what the parties thought about the scope of services, risks, rewards and the deal before they got to court. If you show up to court with a contract calling you "contractor," saying that you will perform your services to the "highest, best" standards of care and that you intended to "ensure" a successful project, you will be hard pressed to proclaim otherwise, even if Mrs. Justaroomaddition was a little flaky and Mr. Justaroomaddition employed his brother-in-law to do some of the work. You will also create insurance coverage problems for the claim, perhaps ending up with two lawyers and two lawsuits instead of one of each. Use the same scrutiny of contract language for your small projects that you use for your large projects, because the same words can cause problems regardless of size of the work.

What about no contract at all? The lack of a written contract means that you have an oral agreement, the terms of which must be discerned by that third party (judge, jury, arbitrator, Grand Inquisitor) on the basis of testimony after the fact. Oral agreements are therefore exercises in proof, by what is remembered and which recollection has been colored by whatever bad thing brought the matter to court in the first place. This never goes well for the design professional, even if it was just a room addition. The client will remember something promised, said, implied or wished for and there will be little or nothing in writing to prove that it never happened. (*More on that, below.*) You will not need a written contract if your client fully understands everything included and excluded, they have plenty of money, nothing goes wrong and there are no surprises. For everything else, a contract is essential.

A/e's who would never think of taking on a large project without negotiating an appropriate contract frequently agree to bad forms for "just a _____" project. If the long form B102 and B201 are too long for just a room addition, use one of the abbreviated forms or prepare a short form or letter form of agreement and have it reviewed by a lawyer who understands your business.

Just a Note

On a larger project, there are written meeting minutes, site visit reports, authorization for additional services, changes in budget and scope and confirmations of owner instructions. On smaller projects, these tend to be collapsed into in-person meetings and occasional email or text messages that may or may not be saved to a job file. Documents are important because they are more trustworthy than mere recollection and therefore have their own evidentiary significance.

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At a trial or arbitration on the oral contract described above, Mr. and Mrs. J will tell the judge and jury what they remember, through the lens of their points of view and their long-after-the-fact recollection of what they think you told them. You will do the same, perhaps relying on the testimony of a junior architect now with another firm in a whole new phase of his or her career, assuming he or she remembers working for you at all (or worse, how you angrily fired them one day and threw the contents of their desk into a box and sent them packing). Documents created and words put to paper (or email) at the time of the project are more likely to be accurate because they recorded the event at the time and someone took the time to write it down. Which are you more likely to believe:

* Architect remembers that Mr. Justaroomaddition told him to change to mahogany finishes, though architect doesn't remember the exact date or time, but is pretty sure it happened in the basement early in the construction phase. Architect distinctly remembers telling Mr. and Mrs. J about the \$100,000 cost of doing so and that they told architect to proceed. Mr. and Mrs. J testify that architect never told them about the budget impact, or deny the change entirely.

* OR: Architect remembers the same things and shows the judge or jury a printout of an email chain, one sent to Mr. and Mrs. J on August 1, confirming the discussion in their basement that morning, and a later email from Mrs. J in the same chain, responding by noting that the mahogany should be domestic and not imported.

What if the same exchange were confirmed by text message or a handwritten note, scribbled on a paper towel? Email tends to be retrievable for a long time or is saved on a computer somewhere. Text messages and paper towel scribbles may only exist on one device or in one location, making later searching and production impossible. Trials can be years after the fact. How many phones have you owned, used or shattered on concrete in the last five years? The medium isn't necessarily important but the ability to produce it at trial is critical. If at all possible, communicate consistently using methods that can be retrieved later. Text messages, while convenient, are too tied to a single phone.

Just a Failure to Communicate

A large proportion of all a/e claims arise from a failure in communication, either by way of misunderstanding or lack of effective communication among the project team. The best letters/emails/memos are those that avoid a misunderstanding in the first place simply by communicating. In the example above, when Mr. Justaroomaddition tells you during a meeting that he wants mahogany millwork in his multimedia man-cave and you tell him verbally that it will add \$100,000 to his budget, Mr. Justaroomaddition may not hear you and Mrs. Justaroomaddition may never know. Writing a letter or an email confirming the discussion gives Mr. and Mrs. the chance to see it in writing and reconsider, argue about it or let you move forward. With any of these reactions, you will have avoided the misunderstanding and would not have to rely on the limited evidentiary value of one-sided documentation.

And such a letter/email/note does not have to be a "just to confirm so I don't get sued later" letter. It can be just a note, thanking Mr. J for a productive meeting, confirming that he wants you to order the mahogany and that he had no trouble with the \$100,000 budget increase. You are happy to help and will see them next week. Then wait to see if the phone rings or Mrs. J shows up at your door.

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What about a memo “to the file?” A memo that doesn’t go to Mr. and Mrs. J is a one-sided communication, like talking to yourself. It writes it down but doesn’t give Mr. or Mrs. J the chance to react. As described above, that memo will have some evidentiary significance at a trial or hearing later, but someone will ask why you didn’t send it anywhere – afraid of getting sued? Why not avoid the misunderstanding altogether?

So-called small projects have all of the same traps for bad contracts and miscommunication as larger projects, yet there is an overwhelming temptation to skimp on formality because it is just-a- fill in the blank project. Unlike Arthur and his knights, there will be no Holy Hand Grenade to help when you’ve lowered your guard for such a project. Avoid being bitten in the first place by using written contracts and email to educate your clients, document everyone’s expectations and keep the lines of communication open.

NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.

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