

## Tight Budgets, Limited Credit Lead to Underfunded Projects

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Today's stagnant economy and the resulting credit crunch have put a double whammy on design firms. Not only are new projects scarce, but project owners may not have the access to capital to which they are accustomed. That may mean projects are not sufficiently funded to ensure a high quality outcome or to withstand surprises that result in added costs and slimmer margins.

In times like today, underfunded projects can be a major cause of professional liability claims and losses for architects and engineers. When clients are strapped for capital, they look for ways to reduce costs. They may ask their designers and contractors to take shortcuts and skimp on details and quality control. In such cases, errors and omissions become more prevalent, leading to an increase in disputes and legal wrangling.

Capital-strapped projects can also result in slow payment for design and construction services. Desperate clients may even file trumped-up negligence claims as a ploy to avoid paying their designers and contractors altogether. Should the funding problem reach crisis stage, project completion comes into jeopardy. Delays, work stoppages and project termination can add to the legal quagmire for everyone involved.

Fortunately, there are preventive steps you can take to avoid or at least minimize the headaches and heartbreaks of an underfunded project.

### Conduct a Financial Check of Your Client

Because inadequate funding can play a significant role in professional liability losses, design professionals should take appropriate steps to determine the financial wherewithal of a client, particularly a new client. But architects and engineers are often reluctant to perform financial background checks on their clients for fear of losing the project. They feel such an inquiry will insult, embarrass or otherwise alienate a current or potential client.

Yet the fact of the matter is most clients have already provided their financial and credit information to a number of other parties in order to obtain credit and project approval. In most cases, they are not reluctant to provide the same information to their prospective design firms or contractors. And if a prospective client is reluctant to share its financial records, maybe that's just the type of client you choose to avoid.

Assume your background check shows that a potential client has a less than perfect credit history. Does that mean you should automatically reject this project? Of course not. The financial check is simply one of many important pieces of information to consider. If the firm or individual has an otherwise clean record as a reasonable, non-litigious client, you can move forward with the project while taking necessary precautions in the form of solid contractual language. However, combine that spotty credit record with a trail of litigation and you might make the best business decision of your life by avoiding this firm.

**Underfunded Projects** (continued on page 2)

In This Issue...

Underfunded Projects

2012 Risk Management Seminar Series

Live Well, Work Well

Community Bulletin Board

## Secure an Adequate Scope of Services

Should your investigation reveal the potential for project underfunding, an adequate scope of services becomes critical. Your services should include pre- and post-design activity designed to enhance quality control and lower your risk exposures. Services you should attempt to negotiate in your scope of services include:

- **Pre-qualification of contractors** – Help your client assure that all contractors invited to bid are reputable, experienced, bondable and otherwise qualified to perform the work.
- **Pre-selection conference** – Encourage your client to co-host a conference where pre-qualified contractors are invited to address any questions they may have about the project and to learn the project ground rules from you and the client's representatives.
- **Plan and specification review** – As part of the selection process, have pre-qualified contractors review the constructability of plans and identify potential errors, omissions, ambiguities or inconsistencies.
- **Pre-construction meeting** – Meet with the selected contractor and client representative to review schedules, establish lines of communication and otherwise solidify understandings regarding key project components.
- **Full construction observation services** – the lack of construction observation services may be a deal-breaker for any financially questionable project that must be completed on a tight budget.

Getting a cash-strapped client to agree to have you perform these services for a fee may be difficult. Nonetheless, the need to perform them should be addressed. If the client summarily dismisses your proposed services and demonstrates a desire to proceed with the project in the least expensive way possible, you will be given a clear insight into the client's priorities. The question you then must ask yourself is: *“Do I really want to work for this client under these conditions?”*

Should you decide to accept an assignment from a financially-challenged client, it is prudent for you and your attorney to draft contract language that provides you an

## RISK MANAGEMENT SEMINAR SERIES

### Parent Care Conversation

Friday, October 12, 2012

Registration: 7:30 am

Program: 8:00 am - 10:00 am

### Contractual Risk Transfer

Friday, November 9, 2012

Registration: 7:30 am

Program: 8:00 am - 10:00 am

All training sessions available to our clients.

\* Reserve early / seating is limited!

### Register for upcoming seminars

Contact Bethany Mongold at [mongold@cavignac.com](mailto:mongold@cavignac.com) or call 619-744-0540

\* **NOTE:** Due to the popularity of our seminars and limited space available, we regret we cannot provide refunds or credits with less than 72 hours advance notice of cancellation.

“out” should the project turn sour. This includes language that gives you the right to temporarily suspend services or permanently terminate the agreement if the client reneges on its contractual obligations and financial commitments. Discuss the following clauses with your attorney.

## Suspension of Services

Failure by a client to adhere to the terms of your contract, including payment terms, may be considered a cause for termination of the agreement. However, you may not want to use the ultimate hammer of termination as your first action in the event of a breach of contractual terms. Rather, you may want to use a “Suspension of Services” contract clause that gives you the right to temporarily withhold your services in hopes of forcing the client to fix the breach while keeping the contract in force. Granted, if the contractual breach continues for a sufficient time, you may ultimately wish to terminate the agreement. In the meantime, you at least want to avoid increasing your receivables while you seek payment for services you have already rendered.

Specifically, seek the right to suspend your services without liability in the event of nonpayment of your fees (or for any other breach of contract terms you consider critical to the progress of your services). Stipulate that if

the breach of contract is corrected within a short period of time (e.g., up to 30 days) you will resume services without financial penalty to either party. For a longer suspension (e.g., 30-60 days), stipulate that you will be compensated for the expenses of interrupting and resuming your services. Last, for an excessive period of suspension (e.g., 90 days or more), you need to retain the option to terminate the agreement.

The Suspension of Services clause should similarly outline your rights in the event the client suspends your services. For example, stipulate that if your services are suspended by the client, you will be immediately compensated for all services performed to date as well as any reimbursable expenses you have incurred. In addition, should you be compensated for the past amounts due and your services are resumed, the contract should require your client to compensate you for any expenses incurred as a result of the suspension and resumption of your services. The clause should also state that your schedule and fees will be equitably adjusted to reflect the current status of the project.

The Suspension of Services clause should further specify that in the event the project or your services are suspended for a long period (for example, more than 90 days), or if the client has materially breached payment terms or other conditions of the contract, you have the right to terminate the agreement without penalty upon giving five days' written notice to the client. The clause should state that the client agrees to make no claim against you for any delay or damage as a result of you suspending or terminating services due to any client breach of your agreement. The contract may also specify that upon receipt of payment in full of all outstanding sums due from the client, or upon correcting the contract breach that caused you to suspend your services, you will resume services with an equitable adjustment made to the remaining project schedule and fees as a result of the suspension.

Be sure to coordinate your Suspension of Services clause with your Billing and Payment, Retainers, Changed Conditions and Termination provisions in your agreement.

## **Termination Clause**

Unfortunately, a client in serious financial trouble may have no option but to terminate your services or even put a halt to the entire project. Obviously, you cannot contractually require a client not to terminate a project; however, through a "termination" clause you can hold the client responsible for any costs you incur associated with stopping your work on the project. What's more, a Termination clause can provide you the right to put an end to your agreement with your client for specified causes and offer you protection should you quit for justifiable cause.

A typical termination clause states that in the event either party terminates the client-designer contract, the client has a certain number of days (typically 15 – 30) to pay the designer for all services rendered and all reimbursable costs incurred up to the date of termination, in accordance with the payment provisions of the contract.

Most termination clauses state that the client may terminate the agreement for the client's convenience and without cause upon giving the design consultant not less than seven to ten days' written notice. They also typically state that either party may terminate the agreement for cause upon giving the other party the same amount of written notice for a list of specified reasons. These reasons may include:

- Substantial failure by the other party to perform in accordance with the terms of the contract through no fault of the terminating party
- Assignment of the contract or transfer of the project to any other entity without prior written consent
- Suspension of the project or consulting services for a given period of time (e.g., 90 consecutive or aggregate days)
- Material changes in the conditions under which the contract was entered into, the scope of design services or the nature of the project, and the failure to reach agreement on the compensation and schedule adjustments necessitated by such changes

If possible, have the termination clause state that in the event of any termination that is not the fault of the design consultant, the client agrees to also pay the consultant for all expenses reasonably incurred in connection with the orderly termination of this agreement. These termination expenses may include the cost of demobilization, reassignment of personnel and associated overhead costs.

Finally, you may want to include strict contract provisions concerning ownership of instruments of service in the event of project termination. This can help prevent clients from taking ownership of your complete or near-complete construction documents while cancelling your agreed-to scope of construction administration services.

Discuss these issues with your attorney. We can help you analyze the insurance and risk management issues involved. ✂

Disclaimer: This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.



Articles courtesy of Cavnac & Associates Employee Benefits Department

## LIVE WELL, WORK WELL

### Six Household Remedies

The next time you or your loved ones come down with a cold or other ailment, consider rushing to your pantry instead of the nearest drug store. The following six commonly used household ingredients are great for treating minor illnesses and saving you a few dollars in the process. As always, use your judgment when deciding whether or not to seek professional medical help.

**Honey:** A spoonful of this wonder-ingredient will not only help to ease a sore throat, but applying it directly to a minor burn and covering with a bandage can serve as an antibiotic and speed healing times.

**Oatmeal:** Not just a nutritious breakfast, oatmeal can be used to soothe a rash or irritated skin. Create a poultice by putting cooked, cooled oatmeal in a cotton cloth and applying to the affected area, or steep uncooked oatmeal in a warm bath to treat the entire body.

**Toothpaste:** The next time you or a loved one is stung by a bee, consider reaching for a tube of toothpaste. Just a dab of toothpaste on a bee sting can quickly relieve the irritation.

**Baking soda:** This versatile ingredient soothes sunburn when added to a lukewarm bath, relieves the itching from insect bites when added to a cool bath, and can relieve an upset stomach when half a teaspoon of it is dissolved in a glass of water.

**Olive oil:** This common cooking ingredient can soothe an earache for most adults. Put two to four drops of warm oil in your ear to lessen the pain until you can contact a medical professional.

**Ginger:** For hundreds of years, ginger has been used to combat nausea and upset stomachs. Simply steep a 1-inch slice of this root in hot water and drink to ease a bellyache.✂



### Five Weight-loss Roadblocks

Think you're doing everything right with your diet, but still not dropping any pounds? One of the dieting obstacles below might be to blame. Avoid these five weight-loss roadblocks on the path to a healthier you:

**Stress:** When you're stressed out, your body releases a hormone that causes you to crave fatty, sugary foods. Avoid stress and you might be able to resist dessert.

**Unhealthy "healthy" foods:** Labels such as "all natural" and "fat-free" can be misleading and may not tell the whole story. Make sure you check the nutritional facts to see exactly what you're eating.

**Not enough sleep:** Too little time spent asleep may keep your body from producing hormones that regulate your appetite, causing you to overeat. To keep your diet on track, make sure you're getting at least six to eight hours of sleep each night.

**Missing a workout:** We all know missing a workout means burning fewer calories, but new research shows that people who skip the gym are more likely to give in to temptation when it comes to their diet.

**Eating out:** Most restaurants are concerned with how your food tastes, not your waistline. Because restaurant foods tend to have more calories, sodium and fat, consider cooking more meals at home when trying to shed a few pounds.✂



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