
PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSS PL 05/00: "Business Boom Can Bust Staffing Plans"

May, 2000



Business Boom Can Bust Staffing Plans

Business is booming! This condition holds true for a great number of architects and engineers across North America. And while few firms are complaining about the number of projects they are involved with, many are finding their resources – particularly their human resources – being stretched to the breaking point.

A midyear 1999 study by the American Institute of Architects identified staffing as the principal concern of surveyed members. Not surprisingly, excessive workload was the second highest concern.

Overworked staff and backlogged workloads are key red flags when it comes to professional liability dangers. As multiple projects compete for time and attention, details often fall through the slats. Documentation may be missed, observation may be lessened and junior employees may be assigned to tasks better left to seasoned veterans. The demands of keeping up with the plethora of projects can lead to critical errors and omissions – along with unwelcome disputes and professional liability claims.

Being willing to hire more employees is not always a solution. Beyond having financial constraints, design firms are finding it difficult to locate qualified staff in this overheated economy. According to a study by the Engineering

Workforce Commission of the American Association of Engineering Societies, the number of engineering graduates earning bachelor degrees declined approximately 9% between 1989 and 1998.

So what's the answer to this dilemma? Obviously, turning down attractive projects is not the solution that design firms are looking for. Instead, firms should take a proactive approach to locating and hiring qualified professionals and implementing necessary steps to train and retain top performers. If the supply of qualified workers simply won't meet the demand, companies can investigate alternative employment options that can help them keep up with the workload while holding liability exposures in check.

Perpetual Recruiting

In good times, design firms should be in an aggressive recruiting mode whether they are currently hiring or not.

(Continued on page 2)

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(Continued from page 1)

This does not simply mean running nonstop help-wanted ads in local newspapers and professional trade journals. Rather, it means keeping eyes and ears open to available talent that may add to the quality of staff.

For example, management should regularly network through professional associations. Word of mouth can often unveil talented architects or engineers looking for a new challenge or a change of scenery. Brazenly headhunting for your competitors' key employees may lead to retaliation, but a low profile and an open ear can bring opportunities to light.

Another low cost and effective recruiting tool is your company website. Many firms have created extensive "career opportunity" sections, with clear and prominent icons on the home page linking prospects to this section. They provide a brief description of the company and its culture as well as listing any positions currently available. A contact e-mail address for inquiries is a must, as is a mechanism for prospects to attach resumes and work samples. Also list company addresses, phone numbers, and names of contact persons so prospects can make a personal call.

Intern programs continue to be a popular way to bring junior talent into a design firm. But keep in mind that an AIA Work-On-The-Boards survey reported that 36% of firms feel interns are poorly prepared for practice, and therefore are not always an easy fix.

Alternatives to Traditional Staffing

A drawback to hiring during strong economies is the potential for downsizing once the market cools off. Firms that repeatedly grow and shrink along with the whims of the economy often suffer decreased morale and lowered performance as employees become distracted by the apparent instability. Design firms, therefore, may want to look to alternative staffing methods that are growing increasingly popular during times that demand more workers.

Contract professionals or contingent em-

ployees are becoming increasingly commonplace in the design industry. In fact, across all industries, professional and technical workers are the fastest growing segment of a flexible workforce once known as "temporary employees."

No longer do clerical and administrative workers comprise the bulk of temps. Highly qualified architects, engineers and other professionals can be hired through national agencies and specialized staffing companies.

And it's not just those workers who can't find a steady job that fill the ranks of contract professionals. This employment option is proving attractive to skilled designers looking for professional challenge, diversity of assignments, travel and the ability to increase skills for heightened marketability. Plus, if they like your company, and decide it's time to set their roots for a while, they may accept your offer to stay as full-time employees.

The benefits these workers provide are obvious. They allow flexibility with staffing as job skill requirements and project load fluctuates. Contract workers are typically paid hourly and the employment agency handles administration, payroll taxes and benefits. Plus, you enjoy lower recruiting costs compared to hiring employees.

Disadvantages include potential higher turnover and reduced job loyalty – although this is not always the case. Plus, you usually have to pay overtime.

Independent contractors are another alternative to permanent staff. These are essentially the same types of workers as contract professionals, but you deal directly with the worker rather than going through an agency.

The advantage is that the per-hour cost is generally lower since you don't pay a fee to an agency. The disadvantage is that you lose the administrative services often provided by agencies. (Some contractors work with a third-party administrator that helps them handle payroll and benefits administration.)

Meeting the state law requirements to avoid employee status is even more important when dealing one-on-one with a contract worker. Be sure to check state labor laws regarding what qualifies a worker as an "employee." Sometimes the number of hours worked, duration of hire or scope or work requirements may inadvertently cause a contract

(Continued on page 3)

(Continued from page 2)

professional to be qualified as an employee.

Loaned employees are a less common but growing source of contract workers. With this approach, consulting firms “borrow” employees from another consulting firm to work on a short-term basis in exchange for a fee. This practice is proving effective between design firms with good working relationships. However, there are substantial gray areas here regarding professional liability. For example, if there is a claim arising from a loaned temp employee’s services on a project for the borrowing firm, the lending firm can easily be brought into the suit.

Subconsultants are certainly not new to design firms. Most architects, for example, have experience hiring subconsultants from a variety of engineering disciplines. However, in today’s hot market, it is becoming more common to find architects subconsulting with other architects, civil engineers subconsulting with other civil engineers, etc., to help handle large workloads. Rather than hiring subs to perform functions where a firm lacks expertise, companies are subcontracting work they would typically perform themselves if they had adequate staff.

Reducing Liability

What are some of the steps design firms can take to minimize liabilities while coping with an overheated market and a lack of qualified job candidates?

First, establish strict hiring criteria to meet your needs. Make sure recruits possess the skills, licenses and other requirements necessary to perform the functions they will be called upon to perform. Provide new hires with close supervision, mentoring by senior staff members, and ongoing training from effective instructors.

If you can’t find qualified job candidates or are hesitant to commit to a long-term employment relationship, look to the alternative employment options previously discussed. Develop a short list of qualifications for these firms or individuals. Look for those with track records of delivering high standards of quality and who demonstrate client service and work-ethic philosophies similar to yours. Look for those experienced in providing the specific type of services you need performed, preferably for the

same type of project. Ask about their current workload – you don’t want to hire a contractor or sub who is just as overbooked as you are.

Work Agreements

No matter how competent the other party may seem – even if you have experience working with the individual or firm – put your work agreement in writing. When drafting your contract, you can start with one of the professional association forms (both EJCDC and the AIA have consultant agreements you and your attorney can likely adapt to your situation). Or develop a form of your own. Your goal is to arrive at an agreement that both is reasonable and fair, and allows each of you to reach your objectives.

Here are the critical points you need to address in the work agreement:

1. Draft a clear scope of services that spell out the functions to be performed and the working relationship to be established.
2. Include a fair and insurable indemnity. We suggest a mutual indemnity that gives both parties equal protection. By providing for mutual indemnity based on comparative fault, the party found most responsible for the error or omission will bear the bulk of the liability.

This comparative fault clause only comes into play legally if the claim ultimately is decided in court. However, it can also serve as a valuable guide should a dispute be resolved prior to a lawsuit through mediation or some other dispute resolution technique.

3. Have each party maintain and furnish proof of insurance. Your agreement should require each of you to provide to the other certificates of insurance showing all coverages.

Other issues you will need to address include:

- Who will retain ownership of documents?
- How will you handle payment?
- Will the subconsultant/independent contractor perform construction observation?

If you are the prime consultant, we recommend that you pass through to your subcontractor or independent contractor any liability protections (such as

(Continued on page 4)

(Continued from page 3)

indemnities and limitations of liability) that you are able to obtain from your client. If you loan your employees to (or borrow employees from) other consulting firms, you should have a contract that sets forth who will take responsibility for claims that arise from the employee's services. Probably the best solution is to have the "borrowing" firm assume the responsibility and indemnify the other firm.

A final consideration for lowering liability is to limit the amount of additional work your firm takes on. This doesn't necessarily mean having to say "no" to the next new project that arises. Rather, you can raise your standards for the types of work you will accept. That could include raising your fees, limiting the types of projects you will accept, or raising the standards you demand in a new client. That way, you can continue to accept the cream-of-the-crop new clients and possibly weed out some troublesome ones. Although your total revenues may remain constant or rise more slowly, your

profit margins could increase substantially while your exposure to risk is reduced.

Conclusion

A strong economy and high demand for your services should be a blessing, not a curse. By choosing your new hires and your new projects wisely, controlled sustainable growth becomes a more realistic goal.

Now, more than ever, you should be paying close attention to client satisfaction and making decisions that will pay dividends when the market inevitably cools. Work force flexibility through the use of alternative staffing options can be an important solution to position your firm for success today and tomorrow. ✦

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AIA denounces new model design professional liability contract

By Richard Korman ENR 5/22/00

A top contracts expert for the American Institute of Architects has denounced the new model design professional contract produced by the Construction Owners Association of America. He claims that the contracts as published would invite lawsuits not only against designers but also against owners. AIA's advice: don't sign them.

"It's a prelude to litigation," says Dale Ellickson, AIA counsel in Washington, D.C.

COAA unveiled model contract agreements for designers and contractors at its May 4-5 convention in Orlando, Fla. The designer document contains a raft of representations by architects that COAA believes will hold designers to a higher standard of

performance. These include the designer's responsibility for complete drawings, thorough jobsite inspections and accurate pay approvals. The contract requires a seven-day turnaround on shop drawings and places legal ownership of the design with the owner. In many other contracts, ownership remains with the designer. In addition, COAA's contract drops AIA model contract language that absolves an architect of any role in a lawsuit or arbitration between an owner and contractor.

Robert Rubin, a New York City-based construction attorney who reviewed the COAA agreements for ENR, says the document protects owners

(Continued on page 5)

(Continued from page 4)

but is a thoughtful contribution to the pool of available model contracts (ENR 5/15 p. 12). But Ellickson believes COAA's documents are fatally flawed.

An underlying weakness is that the design contract explicitly states the services that any competent design professional would provide. "Good drafting doesn't redraft all the legal assumptions," says Ellickson.

The contract seems to make architects responsible for knowing exactly how much things will cost and when things will occur. "They require architects to be held to a time-is-of-the-essence standard, and don't give architects the normal discretion that attorneys and other professionals are given to certify something is best or true to their knowledge and belief," says Ellickson.

The liability created under these contracts will come back to roost at the owner's doorstep, says Ellickson. "Many of these things place the client's agent, the architect, in a situation where the client is vulnerable to third-party claims," he says.

Even the legal team that drafted COAA's model design agreement says designers may not at first be able to get insurance that will cover the re-defined role described in the model pact. Ellickson believes the model agreement as it is now written is not insurable. "On the whole, wherever they ask for broad absolute definitive warranties," an insurer won't cover the risk, he says.

Finally, the new model pact is a "dealbreaker" that will force designers to walk away rather than consider the job, says Ellickson. ✦



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