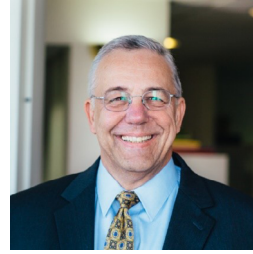


TIPS FROM THE BAR

Signs That This May Be a Project to Avoid

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Sometimes, the best new project is the one you decline. While that might sound counter-intuitive, have you ever looked back and regretted taking on a project either due to the stress caused by your client, or the lack of profitability becoming clear as the project concludes? Thus, you should be on guard for early signs that the proposed project may be one to avoid.

This due diligence needs to be undertaken when negotiating your contract. While nothing is foolproof, if you can reach a fair written and signed agreement, your chances of becoming embroiled in a disastrous project are mitigated. Moreover, the exercise of going through the contract negotiation process is one that can reveal signs that this is a project to avoid. Below I will discuss three situations that may raise early warning signs.

1. Owner Refusal to Negotiate and Agree to Fair Contract Terms

This article is not intended to provide anywhere near the full panoply of contractual pitfalls to avoid, however, some examples bear emphasis. If the owner simply will not enter into a written contract of any kind that is a sign you probably want to avoid that project. If you do proceed, it is incorrect that you have “no” contract. What you have instead is an unclear, and assuredly conflicting “oral contract” that can easily lead to disputes over payments and scope of service obligations.

Often an owner-proposed contract would require the design team to warrant or guarantee their services. Since such a promise is potentially uninsurable, if the owner will not omit such terminology, you are probably better served by walking away. No clear identification of exactly who the “client” is that will be paying the invoices is a troubling sign.

Improper terminology is often used in owner-proposed contracts, e.g., “means & methods” or the architect providing “equipment and Work” or imposition of “site safety” obligations. This is usually a sign that the owner is using an “off the shelf” vendor agreement that is ill-fitted for professional services. Ordinarily, an owner will agree to make changes to the terminology; especially when advised that the contract language needs to be consistent with the professional liability insurance coverage or it may be voided. If an owner is unwilling to negotiate in this scenario, however, it may be that they have erroneous expectations, and perhaps it is a project to avoid.

2. Unrealistic Owner Expectations

Yes, it most certainly is the design professional’s responsibility to manage the client’s expectations – just as is the case with other professionals such as doctors and lawyers – and the failure to do so from the beginning of the relationship may be a recipe for a failed project. If at the outset it seems clear that the owner’s expectations cannot be reasonably managed, you may want to turn down the project. How is this successfully accomplished? By remembering what role the owner must play at the very beginning of the design phase; namely, to advise you in writing of their (a) program, (b) budget, and (c) schedule. Stated simply, before signing the contract you need to strive to get the owner to commit in writing to (a) what they want, and (b) how much they have to spend, and (c) when they want beneficial occupancy.

With this in place from the beginning, you have guideposts for your design. Without it you are flying blind, and there will be a good chance that your design will not meet the unknown, subjective (and often unreasonable) expectations of the owner. If the owner cannot live up to this responsibility it could be a project to avoid.

3. The Inexperienced Owner

Why is this a potential problem since you are the professional who will guide the owner throughout the construction process? Contracting with a novice owner (e.g., some homeowners or a new developer) can often result in the problems discussed in Sections I and II. While it is not being suggested one should only work with savvy owners (e.g., large companies or public entities), if your potential client is a novice, clear communication with them early on is important.

If you come across as experienced, reasonable and confident when describing how a project works, including the different roles and obligations of the different parties, and the inexperienced owner seems receptive and reasonable, it is probably fine to proceed. On the other hand, should you get a sense during these early communications that the novice owner is not going to negotiate a fair agreement, or will have unrealistic expectations, you ought to think twice before signing on the dotted line.

Conclusions

Why is this important? Getting involved in a project that is headed for problems from the outset is likely to be financially harmful. If a lawsuit or arbitration ensues, even if an early settlement is achieved through mediation, the lawyer's fees, litigation costs and your potential settlement payment through your deductible, along with possible liability insurance premium cost increases, may very well exceed the anticipated profit on the project, and this does not even factor in the anxiety and loss of time devoted to defending the claim.