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## **When Your Client Says "Stop!"**

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Most projects start with high hopes and excitement. The project owner is eager to get a new project underway, and the design firms are enthusiastic about seeing their designs come to life. Ribbon-cuttings, brass bands, and local dignitaries might even join in a public celebration.

Unfortunately, not all projects have a happy ending. Financial issues often lie at the heart of project troubles. A client might have been overly optimistic about the projected income to fund the project. A prospective major tenant might pull out, leaving the new facility largely vacant. Unanticipated expenses due to unforeseen conditions can inflate the overall cost. Financial troubles in another of the client's projects can also impact the funding of your work.

Prudent design firms understand the importance of reviewing a potential client's financials before signing a contract for a new project. However, even seemingly healthy financial statements can become problematic if project funding relies on income projections that don't materialize.

Design firms must occasionally ask themselves tough questions. What if the client faces financial or other issues and halts the project? What if there's a suspension of design services for three, six, or nine months? What if the suspension becomes a permanent termination? And what happens if the project restarts? These scenarios should be considered during the initial project planning, not after the client has raised the stop sign.

## **When a Project is Suspended**

A client temporarily suspending a project can cause substantial and far-reaching damages to a design firm. Stopping and starting services multiple times almost guarantees added expenses. Design staff will need to be rescheduled, affecting payroll and the scheduling of other projects. The project's schedule will need to be revised, likely extending the completion date.

Project suspensions lasting more than 30 days usually result in a loss of continuity among all parties and require additional meetings to ensure everyone is still aligned.

Despite the damages, clients often expect the project to resume right where it left off, with no impact on the schedule or fees. Therefore, it's crucial to address potential ramifications of a project suspension during the drafting of the initial contract.

Here are some items to consider including in your contract regarding the suspension of services:

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- **Limit the Suspension Period:** Specify that after 10 consecutive days or 30 cumulative days of suspension, you have the right to renegotiate the scope of services, fees, and schedules to reflect the added work, expenses, and delays.
- **Right to Terminate:** Establish that you can terminate the contract after 90 days of suspension (consecutive or aggregate) with five days' written notice.
- **Compensation for Services:** Ensure you are compensated within 30 days for all services performed and reimbursable costs incurred before the suspension.
- **Costs During Suspension:** Establish compensation within 30 days for all reasonable costs incurred during the suspension.
- **Use of Retainer:** If the contract includes a retainer, have the right to apply it against outstanding billings for uncompensated services.
- **Restart Compensation:** Ensure compensation for all reasonable time and costs required to restart services after the suspension.
- **Liability Waiver:** Have the client agree that you are not liable for delays or other claims resulting from the project suspension.

### When a Project is Terminated

In extreme cases, a client facing long-term financial issues may terminate a project altogether. This can result in a significant loss of income and substantial costs associated with shutting down your work. You may have incurred costs for resources like equipment and software and hired additional personnel for the project. Your goal is to ensure payment for all services rendered up to the termination and to recover costs associated with the termination.

A design firm cannot prevent a client from terminating a project, with or without cause. However, a design firm can face substantial liabilities if it terminates a contract without cause. Additionally, terminating a contract without cause can severely damage a design firm's reputation.

A design firm needs to establish under what conditions it can rightfully terminate its agreement with the client, usually for the client's nonperformance. Work with your attorney to include a termination clause in your client's contract. Such a clause should seek to minimize your losses if the client terminates the agreement and specify the conditions under which you have the right to terminate the agreement.

Consider the following in your termination clause:

- **Notice Requirement:** Require the client to provide at least seven days' advance written notice before terminating the contract.
- **Compensation on Termination:** Ensure that, regardless of the reason for termination, you are paid within 30 days for all services rendered, reimbursable expenses, and costs incurred in executing an orderly project close-down. Consider including estimated lost profit on unperformed services.
- **Payment Provisions:** Ensure you are paid according to the contract's payment provisions.
- **Right to Terminate for Cause:** Establish your right to terminate the agreement with cause, giving at least seven days' notice.

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- **Grounds for Termination:** Define grounds for your termination, such as substantial failure to perform in accordance with the terms of the agreement, assignment of the project or contract to a third party, or suspension of the project or services for more than 90 days.
- **Scope Changes:** Establish that imposition of changes in the scope of services or other project conditions that are not agreed to by both parties are grounds for termination.
- **Compensation Disputes:** Establish that failure to reach agreement on compensation and scheduling after a material change to the project is grounds for termination.
- **Ownership of Design Instruments:** Ensure you retain ownership of design instruments unless a purchase agreement is made.
- **Liability Waiver:** Establish that if you terminate services for cause, you are not liable for delays or damages caused by the termination.

One common reason for a potential termination by the design firm is nonpayment of fees by the client. In such cases, it may be advisable to temporarily suspend services, giving reasonable notice to the client, rather than terminating the agreement fully. This keeps the contract in force while allowing the client time to pay the fees due.

National associations serving design firms, such as the AIA and EJCDC, offer recommended language for addressing suspension and termination of projects and services. Review these recommendations with your attorneys when negotiating your contract language.

## Restarting a Suspended or Terminated Project

When a client decides to restart a suspended or terminated project, they usually contact the original designers. While a project restart is typically good news, design firms need to be cautious before accepting the assignment. Thoroughly reacquaint yourself with the project and determine what changes are needed to resume work successfully.

First, review the project's status at the time of suspension or termination. Meet with the owner, contractor, and key subcontractors to ensure agreement on the plan moving forward.

Read the contract and project files thoroughly. Assess the owner's primary objective for the project and whether it has changed. Review your scope of services, design criteria, project schedule, and construction budget. These may need adjustment if the project has been in limbo. You may need to renegotiate a new or revised contract with the client, adjusting the schedule and securing compensation for any additional costs associated with restarting the project.

Determine whether any laws, codes, and regulations have changed since the project was halted. Permits and approvals may need renewal, and studies and reports may need updating. Consider new products, software, or technology that could benefit the project.

Examine your overall fee structure to ensure adequate compensation for changes in scope. Factor in inflation and any changes in your standard rates.

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Insurance is another consideration. Consult with your insurance provider to understand how the suspension and restart of services may affect your coverage.

Restarting a project that you previously worked on is challenging. Restarting a project initially started by another design firm can be a liability nightmare. Critical issues regarding liability for prior work, ownership of copyrights and designs, and insurance coverage need to be clearly sorted out. Seek expert legal advice to draft an indemnity-laden contract with the owner. It's highly recommended to meet with the previous designer to understand why their work was terminated and why they were not rehired.

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventatives, 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.*