



RISK MANAGEMENT ADVISORY | ARCHITECTS & ENGINEERS | PROFESSIONAL LIABILITY INSURANCE

Avoiding fee disputes

Unclear or unspecified payment terms and untimely billing and collection of accounts commonly precipitate claims and counterclaims among contracting parties. By requiring clients to make timely payments for services rendered and by taking action to collect accounts when payments are overdue, firms may have an opportunity to identify and cure problems or unmet expectations. Left unaddressed, such problems often result in claims.

Consulting firms should take the time to establish meaningful fee collection practices such as an agreement executed *prior* to the performance of the agreed-to services containing both payment terms and a payment schedule. Providing clients with *dated* invoices and implementing a system to send *dated* unpaid balance reminders to reflect attempts to resolve payment problems is a fundamental element of the fee collection process. This practice can assist firms in managing their financial risk and prevent claims. Avoiding fee disputes with clients helps maintain positive working relationships while safeguarding the ability to provide services on future projects, including those of existing clients. Timely collection of fees is essential since consulting firms typically do not have a high profit margin that allows them to subsidize clients who do not pay.

In Victor's experience managing professional liability insurance programs for design consultants including managing claims, we have found that one of the precursors for a professional liability claim against a design firm is a fee dispute between the firm and their client. Fee collection practices that help avoid fee disputes are an essential risk management tool.

Create clear scope of services

A written agreement with clear terms and conditions is another essential risk management tool that can serve to avoid fee disputes. A written agreement detailing the scope of services and the payment schedule is the first step to avoid fee disputes. The scope of services the firm is providing must be clear, detailing the manner and method for delivery of those services. It is essential that the scope of services clarify what is **not included** so that there is no ambiguity about the requirements of the agreement. The timeframe for the execution of services should be clear as well so that both the client and design firm have clarity on the schedule. If there is a clear and transparent scope of services and schedule obligations, disagreements that could lead to fee disputes are less likely.

Outline specific responsibilities

Another cause of fee disputes is the failure to outline specific responsibilities. As more information becomes available about the client's program requirements, site conditions and government-imposed requirements, it is inevitable that modification of the scope of services will occur, allowing the firm to provide a design solution to address the changes. Therefore, the professional services agreement should address how the parties will handle questions or problems that arise during design and construction. Some of the issues that the firm will have to address in the agreement are payment for changes in scope, government-mandated modifications that require additional services and changed site conditions that require alteration of the initial design solution. The agreement should also address what remedies the firm has if the client is unable to complete the project.

Suspend services if necessary

A firm often finds itself in a quandary when a client does not make timely payments. The firm should follow up with the client when payments are late. A firm who is in regular contact with clients should make it a point to discuss unpaid fees during their meetings. The bargained-for exchange between a firm and client is that the firm provides services in exchange for fees. If the client does not pay the fees in a timely manner, the firm does not receive the benefit of the bargained-for exchange.

Be sure to address the right to suspend services for non-payment of fees in the professional services agreement. A clear contractual right to suspend (and potentially terminate) services gives the design firm the right to inform their client that services will be suspended until outstanding fees have been paid. This will certainly get the client's attention as it forces the client to propose a resolution or specifically state why they have not made payment.

ACEC Document 31, *Engineering Agreement between Client and Engineer*, includes a clause that clearly states the ability to suspend or terminate services:

GC 10.4 – If the Client is in material default in the performance of any of the Client's obligations set forth in this Engineering Agreement, including but not limited to the non-payment of Fees and Reimbursable Expenses of the Engineer in the manner specified in this Engineering Agreement, the Engineer will notify the Client that the default must be corrected. If the Client does not correct the default within 30 days after receipt of such Notice, the Engineer may terminate this Engineering Agreement upon further Notice to the Client. In such event, the Client will promptly pay the Fees and Reimbursable Expenses of the Engineer that are incurred and unpaid as of the date of such termination, plus the Termination Expenses, without prejudice to any other rights or recourses of the Engineer.

Communicate and document changes

Ultimately, ongoing communication with the client is essential to avoid payment disputes. The firm should provide regular and prompt narratives detailing the services provided; the invoices should also clearly identify the services billed. Promptly inform the client of any exceptions to the anticipated progress of the project, ideally with a proposed solution to the problem. The client's ability to complete any project hinges on the design firm's communication of any problems. Lack of clarity on the status of the project often leads to a client withholding fees, precipitating an erosion of trust between the client and firm. It is essential to involve the client in the design process to document client feedback and changes throughout the project.

Visit us at victorinsurance.ca/ae to learn more.

The information contained herein is based on sources we believe reliable and should be understood to be general risk management and insurance information only. Victor makes no representations or warranties, expressed or implied, concerning the accuracy of information contained herein. The information is not intended to be taken as advice with respect to any individual situation and cannot be relied upon as such, nor does it play any role in a determination on issues of coverage. Statements concerning legal matters should be understood to be general observations based solely on our experience as a managing general agent and should not be relied upon as legal advice, which we are not authorized to provide. Insureds should consult their insurance and legal advisors with respect to individual coverage issues.