



10 do's and don'ts for A/E's

Design Professional

Based on our 40+ years of experience helping A/E firms develop strategies to manage their risk and ward off claims, AXA XL developed this list of the top 10 dos and don'ts that every design professional should know. Some of these you may recognize from past articles, and some have been developed specifically for this list.

1. Select projects and clients carefully

Certain projects (such as condominiums) and certain clients (such as developers) are higher risks than others. Check into the client's track record and finances before accepting any assignment.

DON'T accept projects without an adequate fee for your services, less than credible scope of services or that are outside of your firm's area of expertise. Also, be wary of projects without a contingency. This may place the client in a position to ask you to value-engineer the project to account for unforeseen issues that would have otherwise been taken care of by the contingency.

2. Always have a fair and balanced contract that is amended as necessary

Your contract is the document that sets forth the mutual obligations of the parties and will serve to manage expectations throughout the project. Your contract should precisely state the intent of the parties in order to prevent misunderstandings, and have terms that can be easily understood by a mediator, judge or jury.

DON'T agree to an elevated standard of care by providing guarantees and warranties. You cannot reasonably be expected to guarantee or warrant that construction—something over which you have no control and very little observation—is completed in strict conformance to the plans and specifications. Providing guarantees and warranties not only creates a potential uninsurable exposure for you, it sets an unreasonable expectation for your client.

3. Have a clear scope of services

Your scope of services should leave nothing to guess. It should clearly state what services you intend to perform, what you will do for additional compensation, and what you will NOT do. Your scope should be drafted in a way that a disinterested layperson could easily understand what you are doing.

DON'T amend your scope or contact without written confirmation. Remain disciplined and diligent when it comes to amending your services or fee on a project. These changes need to be in writing so there is no question as to the precise terms of the modified agreement.

4. Document changes in schedule and cost in writing

The client's priorities are: 1) when it will be done and 2) how much it will cost. When circumstances change these two variables, claims can result. Often, changes to schedule or cost can be due to factors well beyond your control, such as contractor delays or owner directed changes. It is important to clearly document these changes in a way that manages the expectations of your client and protects you against unnecessary liability.

DON'T fail to respond to RFI's in a timely manner. Contractors who underbid projects with the intention of "making it up on change orders" will start to build their case of hard to read plans and specifications from the onset of the project. If you delay in responding to an RFI, even one that is not important to the critical path, you may end up having that used against you in a claim situation. Have a candid discussion with your client when you sense these tactics are underway, and start to control the dialogue from the beginning that the excessive RFI's are affecting the schedule and taking essential resources away from the project effort.

5. Develop and follow a document retention protocol

It is often said that the party with the most documents will win the dispute. Documentation is a key part of risk management, but saving every document can be costly. Work with your attorneys, and insurance and tax professionals to develop a written document retention protocol that everyone in your firm will follow. By doing this, you will be able to better archive and store documents for future use, if necessary, and you will be able to discard certain categories of documents without penalty. Having such a protocol will protect you in a claim scenario and will streamline your operations.

DON'T discard documents if you are aware of a dispute that might involve your design, even if your document retention protocol says it's okay to discard them. You have a duty to preserve documents if a reasonable person would conclude that the information you possess could be relevant to the underlying dispute—regardless of whether you are a party to the dispute.

6. Manage accounts receivable

The vast majority of fee claims by A/E firms result in counterclaims by the client for negligence. Negotiating a contract with fair payment terms and making sure your receivables never get too large is a great way to avoid a suit for fees and an unhappy client. If you are not getting paid, find out why.

DON'T waive the payment terms in your contract. Often, A/E firms are reluctant to follow up on bills that are not getting paid, and savvy owners can argue that the A/E firm waived the payment terms in the contract. Don't be afraid to ask for money when it's due.

7. Have a culture that adopts a non-punitive policy towards mistakes

To err is human, and the sooner your firm understands this, the better off you will be managing the human component of a design error or omission. The best way to handle a mistake is to take proactive steps as early as possible, and get in front of the problem. If your employees are afraid to talk about possible improvements, your ability to get better over time is greatly diminished.

DON'T be afraid to pick up the phone and call your AXA XL agent. If you think you may have made a mistake, we can help you get in front of it and manage the issue. That's what we are here for.

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8. Develop post project review system

Post project reviews offer a way for firms to increase their best practices through a candid analysis of what works and what can be improved. Develop a method to discuss the successes and challenges of each project in a way that does not create a paper trail in possible future litigation. Not repeating missteps in the future can ultimately increase client satisfaction and result in repeat business.

DON'T put in writing that you mismanaged a project or made a mistake. These admissions can be used against you if there is a future claim. Instead, keep the criticism to a conversation, and focus on “challenges and future opportunities” instead of “things you did wrong.”

9. Include dispute resolution provisions in contracts and seek mediation early in a claim situation

Contracts with a clear dispute resolution provision that specifies mediation will set forth a procedure for resolving problems in the unlikely event one develops. The vast majority of claims get resolved at mediation, and an early mediation will allow each side to evaluate its case in a confidential setting before they incur significant legal expense.

DON'T close the door on mediation. Some folks consider mediation a sign of weakness. AXA XL's experienced claims staff believe mediation is an effective form of resolving most disputes.

10. Report claims and circumstances to your carrier in a timely manner

During the course of a project, there are certain signs that should alert you that a claim may be forthcoming. Recognize and react appropriately to communication breakdowns, accusations, finger pointing, overruns on the client's budget, work stoppage, and being excluded from important meetings. Delaying notifying your broker or insurance company of potential problems or claims is short-sighted.

DON'T ignore disputes between the contractor and owner as they may ultimately involve you. Paying close attention to what is happening around you is a great way to stay in front of a problem. Owners rarely have the additional funds to pay contractors who underbid projects or fail to correctly mobilize. The A/E firm's insurance can be viewed as a contingency fund if you are not aware of the warning signs of a design claim.

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