

BUILDING BLOCKS

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Negotiating a Project Owner/Design Professional or Construction Agreement

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Instead of listing the terms and conditions that are frequently contested in agreements, this risk management article focuses on the art of negotiating an agreement. There are numerous resources for negotiating agreements—books, podcasts, articles, websites, law school courses, etc. One thing is for sure; negotiation is a fundamental business skill. People exaggerate their strengths, conceal their weaknesses, and omit pertinent facts when they negotiate.

IN THIS ISSUE:

FEATURED ARTICLE
CONTINUING EDUCATION
SOCIAL MEDIA
MEET OUR PEOPLE

THE DIFFERENCE BETWEEN AN AGREEMENT & A CONTRACT

While both agreements and contracts are used interchangeably, they both involve mutual promises (a “meeting of the minds”), a key difference is their enforceability. An agreement is the beginning of contract formation. A contract is a legally binding document, while an agreement may be more informal and may not be legally enforceable. A contract requires specific elements (offer, acceptance, consideration) to be enforceable, while an agreement can be simpler and based on trust.

IT IS A PROCESS

Negotiating an agreement involves a process where parties discuss, debate, and compromise to reach a mutually acceptable outcome. It's a collaborative effort where both sides attempt to achieve their goals while understanding and accommodating the needs of the other party. While the art of reconciling differences is necessary in pursuit of a common result, it is especially important in finalizing building design and construction agreements.

CONSIDER THE FOLLOWING

1. Preparation is Key:

- **Define Objectives:** Clearly identify what you want to achieve and what your non-negotiable points are.
- **Research:** Understand the other party's needs, interests, and potential leverage.
- **Consider Alternatives:** Have a fallback plan (best alternative to a negotiated agreement or “BATNA”) in case negotiations fail.

2. Initiate the Dialogue:

- **Open the Discussion:** Start with a positive and collaborative attitude.
- **Clarify Goals:** Clearly state your objectives/encourage the other party the same.
- **Listen Actively:** Pay close attention to the other party's perspectives and concerns.

3. Engage in the Negotiation:

- **Present Your Terms:** Clearly outline your proposals and the rationale behind them.
- **Find Common Ground:** Identify areas where both parties have similar goals and interests.
- **Address Concerns:** Acknowledge and address the other party's concerns, offering compromises where appropriate.

4. Reach a Final Agreement:

- **Summarize Key Points:** Ensure both parties have a clear understanding of the agreed-upon terms.
- **Document the Agreement:** Put the agreement in writing, ensuring clarity and accuracy.
- **Review and Finalize:** Revise the document as needed until both parties are satisfied.

5. Seal the Deal:

- **Sign the Agreement:** Officially sign the contract, marking the completion of the negotiation process.
- **Establish Next Steps:** Clearly outline the next steps for implementation and ongoing communication with the finalized agreement.

Above list generated by Artificial Intelligence (AI)

UNEVEN BARGAINING POSITION

A problem exists when one party has an uneven bargaining position in a negotiation—if a project owner has terms and conditions that are unreasonable and onerous, and will not compromise. Then the design professional or construction contractor must determine their “risk tolerance.” Risk tolerance refers to one party’s willingness and ability to accept the possibility of loss or negative consequences associated with uncertainty or risk. In an “arm’s length transaction,” both parties are acting in their own best interests. When the project owner has taken a position of “take into or leave it,” it is best if the design professional or construction contractor can move to the next project.

When negotiating agreements the following matrix can be used to sort out your firm’s risk tolerance and decide whether the project is a “go” or “no-go.” Have an internal office policy that all members of the firm that buy into and use it. When evaluating new potential projects and clients, evaluate your firm’s appetite for the new opportunity for success. If the project looks too risky, or the client is someone or an entity that you have reason to believe will be difficult to deal with, let one of your firm’s competitors have it.

	Great Client	So-So Client	Bad Client
Great Project	Keep this Client Happy	This may a project that leads to other great opportunities	Dig deep for your QA/QC and assign your best staff on it
So-So Project	To keep your client, take even <u>if</u> projects	If your workload needs a project, take it	You are desperate for work
Bad Project	Explain that your workload is such that you could not provide quality services	Give the project to your competition	Absolutely Give to Your Competition

Matrix generated by Eric Pempus (EOP)

Negotiating agreements can be frustrating and time-consuming. Many legal teams go into negotiations without a clear vision of their objectives and priorities. A lack of focus leads to unnecessary contract cycles, miscommunication, and suboptimal outcomes.

About the Author of this Risk Management Building Block Article

As a risk manager for the last 20 years for the design profession, Eric has experience in professional liability insurance and claims, architecture, engineering, land use, law, and a unique background in the construction industry. Prior to risk management, he has 25 years of experience in the practice of architecture/engineering, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 37 years at Kent State University's College of Architecture & Environmental Design.

As a Fellow of the American Institute of Architects and AIA National Ethics Council 2021 Chair, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals since 2000 on topics of ethics, contracts, and professional practice in various venues across the United States and Canada. He is a former member and chair of his city's Board of Zoning & Building Appeals for 24 years, and is a licensed architect, attorney, and property & casualty insurance professional.

His educational background includes a JD from Southwestern University School of Law, Los Angeles; Master of Science in Architecture from University of Cincinnati; and BA in psychology/architecture from Miami University, Oxford, Ohio.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities and should not be construed to represent a determination of legal issues but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

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