

# ProNetwork News

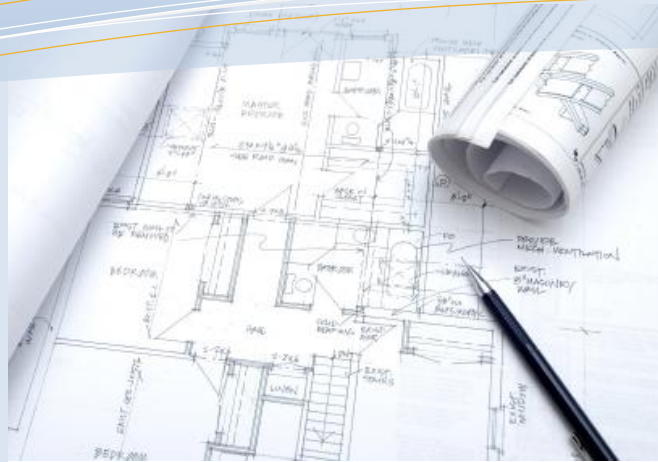
## Risk Management Tools for the Design Professional

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### Internal Risk Management – Part 1 of 2

*Excerpted from an article by Drew Seaman and Tom Waggoner of Straub, Seaman & Allen, P.C., St. Joseph and Grandville, Michigan*

Design professionals are facing intense competition for profitable projects, while the already high claims-to-revenue ratio is rising even more in a weakened economy. In this atmosphere, it is particularly important for design professionals to actively engage in internal risk management to increase productivity and reduce errors, thereby increasing profits. Here are some tips for developing your own program, which should be tailored to your firm's culture.

We suggest you address the following issues:

- Client/Project Selection
- Contracts
- Communications
- Contract Documents
- Surveys
- Construction Administration

*(We will deal with the first two of these topics in this article, and the last four in an upcoming newsletter.)*

#### Client/Project Selection

Develop a checklist with the following items to help determine if the both the client and the project are appropriate for your firm.

1. Suitability of client.
  - Prior experience with client, or nature of initial contact
  - Is client difficult and litigious, or businesslike and realistic?
2. Suitability v. riskiness of project, for example,
  - Condominium developments
  - Fast-track projects



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### Internal Risk Management – Part 1 of 2 *Continued*

#### 3. Suitability of firm's resources

- Anything unique about design or construction?
- Do we have the expertise *and* the time for this?

#### 4. Financing

- Is there adequate financing that is consistent with expectations?
- Is there a contingency fund, and does the client understand its purpose?
- Is the client an L.L.C., and, if so, who is backing the project?

#### 5. Materials/techniques

- Are new or unique materials or techniques involved? Have they been properly evaluated?
- Does the owner understand the risks?
- Are assurances of sustainability or cost savings required?

*“Develop a risk management program that is tailored to the culture of your firm.”*

### Contracts

A fair, well-drafted contract can minimize risk, so establish a consistent review practice. Appoint one or more knowledgeable people to negotiate, review and execute contracts, and pay close attention to these potential pitfalls. Given the types of excesses we have seen in owner drafted contracts you may need to retain an attorney knowledgeable in construction matters to assist you in your review and negotiation with the owner.

1. Terms that alter the customary relationship and responsibilities of the parties. For example, replace an *"inspection and approval"* obligation of the contractor's work with a carefully limited *observation* obligation.
2. To avoid paying for certain losses out of pocket, any agreement to indemnify and hold harmless the owner or any other party must parallel the coverage provided in the firm's professional liability policy. The duty to indemnify should be limited to "the extent caused by the professional negligence of the design professional."
3. Never provide a warranty or guarantee: typical professional liability policies do not cover them. The law does not normally impose such an obligation on the provider of a service.
4. Limitation of Liability clauses must be properly drafted and protect both sides to the agreement. For example, you cannot allow a consultant to escape liability through a limitation of liability clause while you remain liable to the owner for those services. Further, it's unfair to allow an owner to limit its liability for any claims brought *by* you, but to deny the same limitation to you.

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## Risk Management Tools for the Design Professional

### Internal Risk Management – Part 1 of 2 *Continued*

5. Waiver of Subrogation/Insurance clauses, if properly drafted and incorporated into the Contract Documents, can allocate the risk of certain losses to a project under construction and will be covered by an insurance policy purchased by the owner or contractor. Although one way to manage risk, this will be of little value unless the correct policy is obtained. Discuss all insurance clauses and certificates of insurance with your insurance agent or broker.

6. Develop a standard Scope of Services clause and tailor it to each project. Every person involved in a project must understand the firm's Scope of Services well enough to know if they are being asked to provide services beyond the terms of the contract. Don't provide extra services without amending the contract or there could be misunderstandings, litigation and at a minimum, a loss of fees.

7. Make sure fees are sufficient to allow the firm to provide quality service. Negotiate compensation in combination with the Scope of Services so the owner has a menu of options, and knows what he or she is to receive.

8. Strike clauses requiring the design firm to comply with all laws, statutes, codes, rules, regulations and ordinances. This is the contractor's responsibility.

9. Standard Form Documents are acceptable to ensure that the contract is fair to both parties, if tailored to each project and coordinated with the Contract Documents. Your risk management program should include regular review and revision of the contracts and other documents the firm typically uses.

10. Do not alter the standard of care applicable to design professionals by agreeing to the "highest standard of care."

11. Dispute Resolution clauses. Binding arbitration may severely impair your rights, but non-binding mediation is acceptable.

12. Never guarantee opinions, construction cost, or future energy savings.

Next time, we will address communications, contract documents and surveys, and touch upon construction administration as part of your overall risk management plan. It's our goal to help you to avoid preventable errors that threaten your firm's bottom line.

Broker's Note: