

Consultant Compensation

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SUMMARY

To avoid unwelcome surprises, contracts should outline whether a consultant will receive compensation if the prime contractor is not paid.

AVOIDING THE RISKS OF NONPAYMENT

In most contracts, when the architect is not paid by the client, the consultant faces the risk of not being paid even when services are rendered. The consultant's protection against that risk rests in questioning the architect about the client's solvency and business practices before the project begins. If the answers are not satisfactory, the consultant can reject the commission. Later, should payments not materialize, the consultant's protection rests in the architect's making reasonable efforts to collect the money owed.

Therefore, when architects develop agreements with consultants, it is important to address this question: Will the consultant be paid if the architect is not paid by the owner? If nonpayment is caused by something that is the consultant's responsibility, the consultant understands when payment is not forthcoming. When this is not the case, however, the consultant may not be so understanding. It is a business risk that the parties should address in their contract.

Assuming the architect-consultant agreement is silent on what happens if the architect is not paid; the architect will have to explain that it is customary in the design profession and construction industry for the consultant's compensation to be contingent on payment being made to the party holding the prime agreement with the owner. This would be so even if the consultant was the prime contractor with the owner and the architect was the subcontracting consultant. The reasons for this custom are compelling:

- The prime contractor absorbs the costs—and risks—associated with project acquisition.

- The prime contractor will have to absorb the costs of collecting the fee should payment be tardy or otherwise not forthcoming.
- In the time between marketing and closeout, the prime contractor is directly responsible to the owner for the vagaries and tensions of the design process.

Architects need to understand that in most jurisdictions, if the agreement is silent on when the consultant is to be paid for satisfactory performance of services, then the law requires payment within a reasonable period. The fact that the client has not paid the architect would be no defense unless the architect's agreement with the consultant states that receipt of payment from the client is a condition precedent to the consultant's receipt of payment from the architect.

RESOURCES

More Best Practices

The following AIA Best Practices provide additional information related to this topic:

- 17.01.04 Legal Elements of Contracts
- 17.02.02 Client-Selected Consultants
- 18.02.02 Owner-Architect Agreements for Small Projects

For More Information on This Topic

See also "Project Team Agreements," by Timothy R. Twomey, Esq., AIA, *The Architect's Handbook of Professional Practice*, 13th edition, Chapter 11, page 289. See also 14th edition of the *Handbook*, which can be ordered from the AIA Bookstore by calling 800-242-3837 (option 4) or by email at bookstore@aia.org.



Keywords:

- Practice
- Project administration
- Project agreements
- Consultant agreements