



Stopping and Restarting Projects

Not Business as Usual

RLI[®]
DIFFERENT WORKS

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DIFFERENT WORKS

Special Thanks To

David Hatem

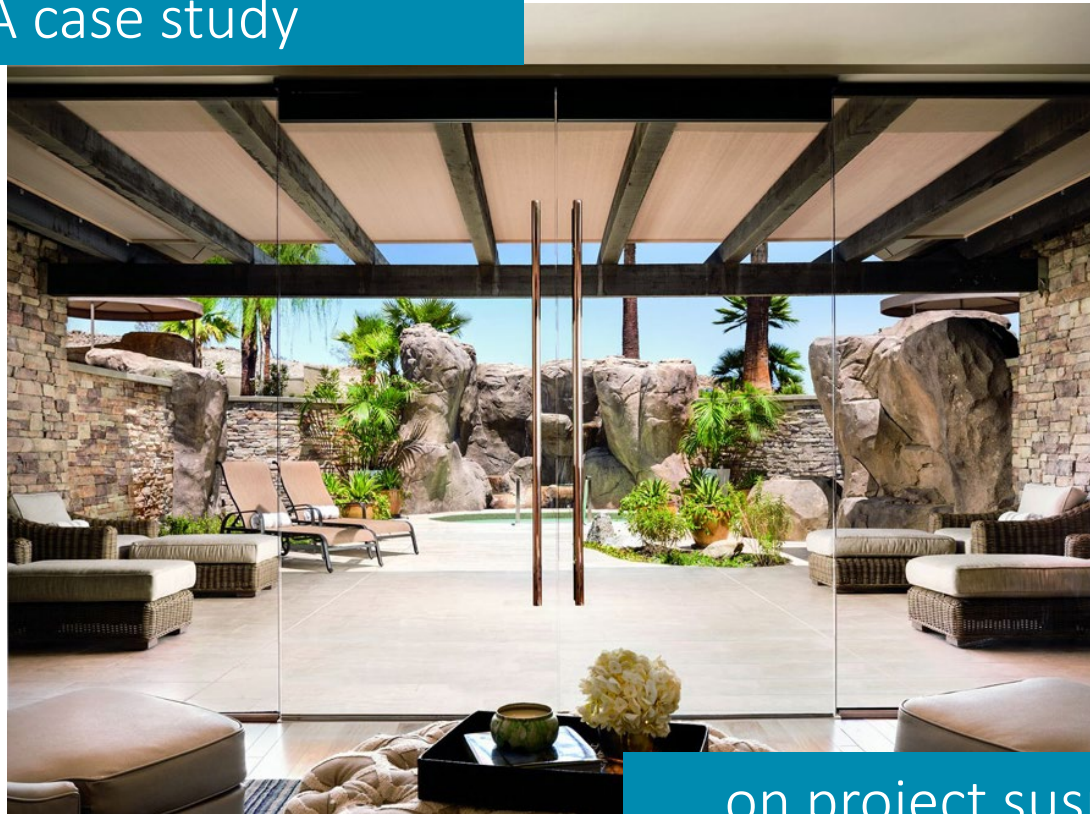
Donovan Hatem LLP

RLI[®]

DIFFERENT WORKS

The Ritz-Carlton Rancho Mirage

A case study



on project suspension

Rancho Mirage Timeline

Rancho Mirage Project Timeline



This course examines the common issues that arise for Design Professionals when a project is suspended, terminated, and/or restarted. Different scenarios will be used to illustrate the type of risks Design Professionals may face, and what they can do to manage and mitigate those risks.

Learning Objectives

Participants in this session will:

1. Identify some of the many factors that can impact a project's status;
2. Discover some of the risks associated with project suspensions and restarts;
3. Review relevant industry standard contract provisions for Design Professionals; and
4. Discuss other ways to manage a design professional's exposure when a project stops and restarts.

Reasons for Suspension



Some examples include

Force majeure event

Changed conditions

Regulatory delay

Lack of funding

Partner disputes

*Note: Many of these factors are outside of your control

General Risks

- 1 Payment
- 2 Intellectual Property
- 3 Changing Circumstances

Payment

Fees for:

Services already rendered and reimbursable expenses

Costs associated with suspension and/or resumption of services

Retainage



Payment Terms

Rights and obligation:

Spell out the rights and obligations of the parties in the event of a project suspension and resumption.

Entitled to fees

Entitled to an equitable adjustment

Entitled to a right to terminate services

Payment

AIA B101-2017 §9.2

“

If the Owner suspends the Project, the [Design Professional] shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the [Design Professional] shall be compensated for expenses incurred in the interruption and resumption of the [Design Professional's] services. The [Design Professional's] fees for the remaining services and the time schedules shall be equitably adjusted.

”

Right to Terminate

AIA B101-2017 §9.3

“

If the Owner suspends the Project for more than 90 cumulative days for reasons other than the fault of the [Design Professionals], the [Design Professional] may terminate this Agreement by giving not less than seven days' written notice.

”

Lien Rights

Preserve your lien rights

Lien rights can be a powerful tool to help motivate a client to pay you for your services. Do not waive your lien rights. If you must sign a lien waiver, condition your waiver upon receipt of payment.

Lien Rights by State

Lien rights for design professionals differ by state.

No Lien Rights

No lien rights entirely.

Modified Lien Rights

Lien rights subject to regulations specific to design professionals.

Same Lien Rights

Same lien rights as those available to contractors.

Quiz #1

“

Design Professional hereby agrees and acknowledges that its rights to file a construction lien are hereby waived and released.

”

Answer #1

“

Design Professional hereby agrees and acknowledges that its rights to file a construction lien are hereby waived and released.

”

Sample Conditional Wavier

“

Design professional hereby agrees and acknowledges that its rights to file a construction lien...are hereby waived and released in consideration for, upon receipt of, and to the extent of all payments received by Design Professional hereunder.

”

Intellectual Property (IP) Rights

Ownership

In general, you own the IP rights to your work, unless your written Agreement with the client states otherwise.

The right to use

The right to distribute

The right to enforce

Granting IP Rights

License v. Ownership

The rights you grant your client define your ownership or lack thereof in your designs.

You have full rights

You have no rights



Granting a nonexclusive license to the Client helps you maintain your IP rights.

Granting an exclusive license to the Client places limitations on your rights.

Granting ownership to the Client is a relinquishment of your rights.

Case Law #1

Kipp Flores Architects, LLC (KFA)
Design Professional



Hallmark Design Homes, LP
Client

Design professional files a suit against client for copyright infringement, alleging Client exceeded the limited license they were granted under the Contract.

License to Use

Contract terms

Design professional gave Client limited license to build a single house from plans. Additional licenses available for purchase according to the following schedule:

Non-reproducible media- single unit construction only included

Reproducible media (provides license to construct 10 unites) 1,000.00

License for construction of additional units may be purchased:

Each repeat construction (separately purchased) \$200.00

3 additional licenses (advance purchase) 500.00

5 additional licenses (advance purchase) 600.00

10 additional licenses (advance purchase) 1,000.00

All plans copyright protected.

Ruling for Case Law #1

Design professional awarded
\$3.2 million
for copyright infringement

Ownership of Documents

Risks include:



Use without payment

Owner/Client may use your designs without paying you in full.

Misuse

Your designs are used on other projects or for other purposes.

Use without your involvement

Use without your involvement increases the likelihood of error.

Infringement

Your use of the designs may be considered infringement.

Ownership Terms

Mitigate risk by clarifying the following:

License to use is granted only when paid in full

Documents are project-specific; not for reuse

Reuse without your involvement at Client's sole risk

Indemnification

Ownership

AIA B101-2017 §7.2



The [Design Professional] and the [Design Professional's] consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect's consultants.



Non-Exclusive License

AIA B101-2017 §7.3



The [Design Professional] grants to the Owner a nonexclusive license to use the [Design Professional’s] Instruments of Services solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations under this Agreement, including prompt payment of all sums due pursuant to Article 9 and Article 11...If the [Design Professional] rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.



Indemnification

AIA B101-2017 §7.3.1



In the event the Owner uses the Instruments of Service without retaining the authors of the Instruments of Service, the Owner releases the [Design Professional] and the [Design Professional's] consultant(s) from all claims and causes of action arising from such uses. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the [Design Professional] and its consultant(s) from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner's use of the Instruments of Service under this Section 7.3.1...



Case Law # 2

Strutt Group Incorporated
Project Owner



Nelson-Salabes, Incorporated (NSI)
Design Professional

Project Suspended

Morningside Development, LLC
New Project Owner



EDG Architects
New Design Firm

Design firm awarded over \$700k in damages when a new project owner terminates their services but continues to use their designs.

Ownership Clause



The Architect’s Drawings, Specifications or other documents shall not be used by the Owner or others on other projects, for additions to this Project, or for completion of this Project by others unless the Architect is adjudged to be in default under this Agreement, except by agreement in writing and with appropriate compensation to the Architect.



Ruling for Case Law #2

Design professional awarded
\$736,000
for copyright infringement

Quiz #2



Client shall be the owner of all designs, drawings, documents, plans, specifications, maps, calculations, computer files, programs or models...whether draft or final, hard copy or digitalized, and whether maintained in electronic format or otherwise, made, conceived, developed, or prepared by or for the benefit of Design Professional in connection with the performance of its services under the Agreement.



Answer #2

“

Client shall be the owner of all designs, drawings, documents, plans, specifications, maps, calculations, computer files, programs or models...whether draft or final, hard copy or digitalized, and whether maintained in electronic format or otherwise, made, conceived, developed, or prepared by or for the benefit of Design Professional in connection with the performance of its services under the Agreement.

”

Right to Rely

Establish Your Right to Rely

Clarify that you have the right to rely upon information furnished by or on behalf of the Owner. Otherwise, you may be inadequately compensated for any changes that result from an unforeseen condition. This becomes especially critical if you are taking over for a terminated design firm.

Right to Rely

AIA B101-2017 §3.1.2

“

...The [Design Professional] shall be entitled to rely on and shall not be responsible for the accuracy, completeness, and timeliness of, services and information furnished by the Owner and Owner's Consultants...

”

Changes to the Project

Are you entitled to an equitable adjustment for changes to the following:

Project scope or design criteria

Resources

Parties

Expiration of permits, licenses, etc.

Laws, codes, and regulations

Terms to Address Change

Mitigate risk by including the following terms:

Entitled to equitable adjustment to schedule and fee

Force majeure provision

Disclaim responsibility for jobsite safety

Equitable Adjustment

AIA B101-2017 §9.2



If the Owner suspends the Project, the [Design Professional] shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the [Design Professional] shall be compensated for expenses incurred in the interruption and resumption of the [Design Professional's] services. The [Design Professional's] fees for the remaining services and the time schedules shall be equitably adjusted.



Force Majeure



“
superior force
”

Relieves the parties from performing certain obligations when circumstances beyond the reasonable control of the parties' arises.

Jobsite Safety

AIA B101-2017 §3.6.1.2

“

...The [Design Professional] shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work...

”

Jobsite Safety

AIA B101-2017 §3.6.4.2

“

...The [Design Professional's review [of submittal] shall not constitute approval of safety precautions or construction means, methods, techniques, sequences, or procedures...

”

Managing Your Risk

Three stages:

The three stages you can take action to manage you exposure.

Prior to Project acceptance

When negotiating the Contract

Once the Project is suspended

PRIOR TO

PROJECT ACCEPTANCE



Project Assessment – 4P's

Do the following factors make a project suspension more likely to occur?

Project

The project type and/or the services required for the project.

Place

The project location and/or project site conditions.

People

The other parties to the project – their technical qualifications, financial stability and strength, insurance coverage, and/or a prior working relationship.

Process

The procurement, contracting, and risk allocation process on this particular project – Fairness, and/or adequate compensation for your services and risk.

RLI's Project Risk Management Matrix

HOME ABOUT CAREERS INVESTORS NEWSROOM CLAIMS CONTACT PRODUCER LOGIN SEARCH



Business Insurance Personal Insurance Surety For Our Producers

Click here to access RLI's

Go No-Go Matrix



DESIGN PROFESSIONALS RESOURCES

RISK MANAGEMENT

ENROLLMENT FORM

DESIGN PROFESSIONALS LEARNING EVENTS (DPLE)

DPLE COURSES

CONTACT DESIGN PROFESSIONALS

Design Professionals Risk Management

Every A&E business faces risks, and they can never be entirely prevented. They can, however, be minimized through risk management programs. Our goal is to help you reduce the likelihood of losses resulting from most risks design professionals face.

Risk Management Programs

DPLE SERIES

Our continuing education program provides the education resources design firms need. The DPLE series offers more than 125 courses that have been approved by the AIA for continuing education learning units. Learn more about our [DPLE Series](#).

PROJECT MANAGEMENT

This program includes a dynamic [project risk management matrix](#) and to help A&E firms effectively identify, assess, manage and control the risks associated with the projects they engage in. Guidelines for using the matrix and additional risk management best practices are provided in the [project risk management matrix instruction guide](#).

Our experts are here to answer your

Visit <https://www.rlicorp.com/dp-risk-management>

by jury is a constitutional
with counsel of their choice,
ves their right to compensation
orcement of this Contract.
agree to the terms of this Contract.

WHEN NEGOTIATING A CONTRACT



Contract Terms

Rights and Obligations:

Spell out the rights and obligations of the parties in the event of a project suspension and resumption. Some contract terms to consider include:

Payment

Equitable Adjustment

Right to Terminate

Force Majeure

Lien Rights

Jobsite Safety Disclaimer

Ownership of Documents

Indemnification

Right to Rely

ONCE A PROJECT
IS SUSPENDED
AND RESUMED



Project Suspension

Steps to Take:

Steps to take when a project is suspended to protect your firm and preserve your rights.

Communicate

Document

Preserve lien rights

Exercise lien rights and copyright

Project Resumption

Scenario #1

Same Owner,
Same Design Firm

Scenario #2

New Owner,
Same Design Firm



Scenario #3

Same/New Owner,
Terminated Design Firm

Scenario #4

Same/New Owner,
New Design Firm

Scenario #1

Scenario #1: Same Owner, Same Design Firm

1

Secure Payment

Secure payment for services rendered prior to suspension and for any other fees you're entitled to under the law and your contract.

2

Update or Draft New Agreement

Update the original contract or draft an new agreement to reflect the current services, schedule, and fees. If you draft a new agreement, be sure to terminate the prior agreement.

Scenario #2

Scenario #2: New Owner, Same Design Firm

* Note: You may wish to complete a project assessment before choosing to resume with a new project owner.

1

Draft New Agreement

Draft a new agreement to reflect the current services, schedule, and fees. Be sure to terminate any agreements that are not continuing, such as your contract with the prior owner of the project.

2

Confirm Ownership or Permitted Use of Documents

Confirm your ownership of the designs with the prior owner. If you do not own your designs, confirm that the new owner has permission to use the documents to complete the project.

Scenario #3

Scenario #3: Same/New Owner, Terminated Design Firm

1

Confirm Status

Confirm your status and notify affected parties of your departure (ie: Contractors, reviewing agencies, licensing bodies, etc).

2

Secure Payment

Secure payment for services rendered prior to suspension and for any other fees you're entitled to under the law and your contract.

3

Obtain Release/Indemnification

Have the project owner release you from and indemnify you against claims, suits, or damages arising out of or resulting from the use of your designs without your involvement.

Indemnification

AIA B101-2017 §7.3.1



In the event the Owner uses the Instruments of Service without retaining the authors of the Instruments of Service, the Owner releases the [Design Professional] and the [Design Professional's] consultant(s) from all claims and causes of action arising from such uses. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the [Design Professional] and its consultant(s) from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner's use of the Instruments of Service under this Section 7.3.1...



Indemnification

For use of your designs without your involvement



In consideration of the mutual covenants, conditions, and agreements herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Owner agrees to waive any and all claims against the Design Professional and to defend, indemnify and hold the Design Professional harmless from and against any and all claims, losses, liabilities and damages arising out of or resulting from the use, reuse or alteration of the Design Professional's Documents by the Owner or any other entity or individual. The Owner will remove markings on the Documents that would be sufficient to identify the Design Professional as the author of the documents.



Warranty Disclaimer

For documents used without your involvement

“

The Parties agree that at this time, the Design Professional does not represent that the Documents are complete, or that they are consistent with the current conditions that may affect the Project, and makes no representations or warranties about the fitness of the Documents for any particular purpose.

”

Scenario #4

Scenario #4: Same/New Owner, New Design Firm

1

Confirm Ownership or Permitted Use of Documents

Confirm that you are permitted to use the documents prepared by the previous design firm.

2

Obtain Release/Indemnification

Ensure that you are not responsible for the services completed prior to your retention and secure an indemnification for claims arising out of the services performed by the previous design firm.

Indemnification

For documents prepared by or services rendered by other design firm(s).



In consideration of the mutual covenants, and agreements herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the **Owner agrees to waive** any and all claims against the Design Professional and to **defend, indemnify, and hold the Design Professional harmless from and against any and all claims, liabilities and damages arising out of or resulting from the services performed by the [prior Design Professional].**



“

An ounce of prevention is worth
a pound of cure

”

- Benjamin Franklin

Overview of Project Assessment Phase

Do the following factors make a project suspension more likely to occur?

Project

The project type and/or the services required for the project.

Place

The project location and/or project site conditions.

People

The other parties to the project – their technical qualifications, financial stability and strength, insurance coverage, and/or a prior working relationship.

Process

The procurement, contracting, and risk allocation process on this particular project – Fairness, and/or adequate compensation for your services and risk.

Overview of Contracting Phase

Rights and Obligations:

Spell out the rights and obligations of the parties in the event of a project suspension and resumption. Some contract terms to consider include:

Payment

Equitable Adjustment

Right to Terminate

Force Majeure

Lien Rights

Jobsite Safety Disclaimer

Ownership of Documents

Indemnification

Right to Rely

Overview of Project Suspension Phase

Steps to Take:

Steps to take when a project is suspended to protect your firm and preserve your rights.

Communicate

Document

Preserve lien rights

Exercise lien rights and copyright

Overview of Project Resumption Phase

Steps to Take:

Steps to take when a project is resumed to get your project back on track

Modify existing contracts or draft new contracts

Review project objectives, scope, and budget

Verify compliance with any new laws, codes, or regulations

Update any designs or models, if necessary

Revise costs and schedules accordingly

Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects
Continuing Education Systems Program

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