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The Business of Architecture

MODULE 1: BUSINESS MANAGEMENT

WORKSHOP 3 – FEE AGREEMENTS, NEGOTIATIONS & DISCOUNTS

Introduction

A written agreement should always be secured prior to the undertaking of any serious work. A good contract establishes tangible benchmarks, tangible deliverables, and tangible goals. It can also be used to force disclosure; does your potential client own the property? Is he authorized to proceed with development of it? Does he have the funds available to undertake the development?

Types of Agreement

The Old SAIA Standard Client / Architect agreement

I try to imagine if my dentist or my lawyer made me sign an agreement of such complexity and ambiguity every time I undertook business with them. In that light, potential Clients seem to have the following issues with this contract:

- Provides no cost security and clarity for the client.
- There is no clear cost for services - fees appear to be variable and adjustable.
- The contract appears to give the Architect license to freely charge as he goes along. The client, like any other contracting party, needs to know before signing the contract what the cost is going to be so that he can make provision accordingly.
- Clauses like Clause 3.3. provide for sweeping limitations to the Architects responsibility, and while not unreasonable, make the contract appear one-sided.
- The Client's obligations list places a large number of duties on the Client.
- Provides one fee solution – percentage contract sum. There is no provision for alternatives such as square meter rates or fixed fees, it does not allow for tailoring to Clients financial or operational needs and costing methodology.
- Does not make provision for delayed payments based on project criteria, ie, working for the government, bond payment delays caused by banks, and developer cash flow cycles.
- It omits important portions of our service like HOA submissions and approvals.

The standard contract does however provide good protection for important eventualities. It makes a good reference document to which we can refer in our own, simpler agreements.

The New SAIA Standard Client / Architect agreement and SACAP agreement:

In essence, a lot of the criticisms of the old contract are carried through to the much awaited new SAIA client / architect agreement, and similarly, the new SACAP agreement;

Improvements:

- Text size, look and feel, and navigation of the new document.
- A lot of the clauses bring the service up to date.
- The 'protection' clauses re payment and dispute are good.
- Architect's obligations are usefully defined and clarified.
- Client's obligations are usefully defined.
- Obligations as a result of budget over-runs are well-covered.

Still not helpful:

- Architect's service is still prescribed in fixed terms and makes no provision for other kinds of service.
- Partial service options still do not deal with the complexities and varieties of actual practice.
- Insists on the client preparing the brief – possibly the least qualified person to do so, a notion that is long overdue for a re-think.
- Payment requirements are inflexible and do not reflect requirements of actual practice.
- A lot of our service is captured in 'time-charge', a highly undesirable option for clients, since so many of these types of service are typical to practice, they should be covered in the normal workstages.
- The client to be responsible for the financial viability (feasibility study) of the project, again, the least qualified person to do so.
- The client to assess the contractors, once again, a person who may never have done any work with them is not the best person to make the call.
- Workstage 5 & 6 at 30 % of total fee – this shows a flagrant lack of understanding of our profession.
- Only one method of how fees should be charged, and based entirely on the existing tariff, despite several surveys proving beyond doubt that this method is not applicable..

The PROCSA Agreement: (Slide 202 – Procsa agreement)

The Procsa agreement is a schedule and list of conditions that forms part of a professional services 'Transactional Technology' suite. It is a standardized document that forms part of a larger range of agreements pertaining to the project.

What I do not like about the PROCSA Agreement:

- Paradoxically, its great length. Like early SAIA contracts, it overwhelms and intimidates our Clients – it cannot be signed without their lawyer present. It does not lend itself to a quick and reliable result. Appropriate for the private commission of a large office building, not suitable for a private house for work with a developer Client.
- The un-editable download process. It is confusing that you may not change certain details, like the client's name, after you have downloaded it. It is common for a Client to create a new company for the project, and that would necessitate populating and signing a whole new agreement.
- Furthermore, what if the Client rejects the contract or revises certain aspects of the agreement, does this require us to purchase a new contract and start from scratch?
- It 'fixes' the role and duties of the Architect before any design work has even begun.
- Clause 12.0 gives the Architect far-ranging opportunities to adjust his fees. Almost all potential Clients would like to see the Architect's fee as a fixed sum.
- This un-editable document seeks to secure the identification and appointment of the entire teams of professionals before a feasibility or sketch plans has been initiated.
- It calls for the production of a Site Development Plan for submission and approval in stage 2.
- Stage 6 clause 6.1.2. "Attend operational training and handover procedures." I will confess to having been obliged to do some odd things as an architect, sitting through somebody else's operational training lectures would be a first for me.

What I do like about the PROCSA Agreement:

- The advantage makes it the most thorough and comprehensive agreement by far, it covers in granular detail all possible permutations and outcomes of the Client / Architect relationship.
- It introduces the concept of a 'Principal Consultant', recognizing and rewarding the Architect for his services rendered in 'managing' and co-ordinating the other consultants.
- This agreement makes various provisions for the Architect to limit the duration and extent of his liability.
- It makes allowance for fee methodology and apportionment to be chosen to suite the Clients (and the Architect's) needs.

Homemade agreements:

Although there are exceedingly well written and useful standard Client / Architect Agreements available, a lot of us still use or may still want to use our own forms of contract. These contracts offer certain advantages that make them desirable:

- They offer flexibility in terms of describing and including service to be provided; dealing with HOA's, energy efficiency investigations etc, limited Workstage 5 & 6 service or specifically agreed upon service (some client's get their own plans approved).
- They offer flexibility in terms of describing unusual projects and tasks.
- They offer flexibility in terms of fee charging methodology and payment conditions.
- They are generally less onerous and intimidating and can be more concise.

As will be illustrated, they can be used as a very effective tool to manage the relationship.

DISCLAIMER ! GET LEGAL ASSISTANCE

Get a lawyer to carefully peruse all contracts and to reinforce clauses and make provisions where necessary.

The Scope of the Project

Understand in detail the full scope of the project and capture it in a written brief. Although it is the client's obligation to provide us with one, it is in our interest to do this on the client's behalf and get him to sign it. The written brief forms a binding contract between us and our client so we ensure that it is very carefully considered and clearly stated.

<u>The written brief can include the full list of accommodation and anticipated sizes:</u>

- Make allowance (about 17 %) for wall footprints and passages.
- Total sizes of the building to ensure that our 10 % overrun liability is not exceeded, or we can find ourselves redesigning the entire project at tender stage at our own cost.
- Include the total anticipated size.
- Provide an estimated budget, or make reference to the client's imposed budget, clearly stating it as such.

Recommend that a Quantity Surveyor does a feasibility on the written brief. This can save a huge amount of heartache, loss of credibility, and financial losses later. If this is not possible, my fee calculator as described in Workshop 2 provides a great opportunity to educate the client on costs and budget. It also provides a benchmark from which the original budget was extrapolated, thus bringing clarification in the event of cost or budget overruns. The original fee budget can be used as a reference for scope creep and project performance.

Common omissions from the brief that we will provide full service for:

- Boundary walls, boundary and garden lighting, gates, earthworks, retaining walls, swimming pools, landscaping, security services, driveway and pathways paving, rainwater harvesting, planters, irrigation, interior design work and so on.
- We need to make sure to capture work that may not be clearly a part of our project. If we are adding an office building in an office park – there can be work required on the existing building or infrastructure, access and roads for example, on which we will need to provide service. Changes may be required to existing structures for fire compliance, SANS 10400 compliance and disabled access.
- Client exclusions such as direct contractors. Our service will still run to site co-ordination, water connection, electrical connection, sewer connection, municipal approvals, surrounding tile and finish continuity and most probably snagging and quality control.

We will be expected to provide design work and co-ordination, technical detailing, services co-ordination, quality assurance, payment certification and snagging on all these extraneous items. If we have not made provision for this additional service in our original fee agreement, it becomes very hard to submit that account after the fact.

Scope Creep:

When undertaking privately commissioned work, we are often negotiated to a fixed fee. under these conditions we must always include a clause that will permit a certain amount of scope creep (i usually allow a 10% increase in the contract sum) after which fees are to be renegotiated. it permits us a certain amount of opportunity to absorb some of the costs.

The Scope of Service

We need to clearly understand and define the full extent of our service, including or excluding additional service such as applying for municipal connections, HOA submissions and approvals, building line relaxations, etc.

It is wise to make limited allocations of time to perform these tasks, as we cannot assume the risk ourselves.

- We need to be crystal clear on what we are prepared to do, and what we are not prepared to do, and be equally clear and resolute on what it is not possible to do. Add disclaimers in your agreement accordingly. Parking relaxations and going over bulk or height zones fall into a risk zone that are simply not worth pursuing. Try and push these kind of applications onto a Town Planner to secure prior to your employment.
- Clearly state that cost for Town Planning relaxations and Consents should they be required, is not inclusive in the fee, and itemise separately.
- If our service includes principal agency on a significant project, insist on the appointment of a Quantity Surveyor. Have this is written into your agreement as a condition of our appointment.
- The biggest risk we as architects carry when appointed under the JBCC as principal agent is the cost management of the project.
- We define the limit of our interior design input, otherwise have one appointed.

- Determine whether we will require a Rational Energy Design Study. Including this in the conditions of your appointment will make the additional costs more palatable.

Expressly exclude Workstage 5 & 6 Service from the initial fee proposal:
Insist on a separately negotiated fee agreement to be ascertained at a later date. At that point, the following information will be available to the Architect to take into consideration when negotiating a fee for his on-site service:

- All drawings, schedules and specification documentation is completed and finalized.
- Municipal approvals are probably secured, all relaxations etc. finalized.
- A Quantity Surveyors Estimate may be available.
- Negotiations may have proceeded with a likely contractor and possible sub-contractors and suppliers as well.
- The likely 'duration' of such a building contract can be estimated.
- One can determine the propensity of the Employer to 'stick to the plan'.
- The quality, reliability and capability of the construction team can be assessed.
- One becomes aware if the project is sufficiently resourced and financed by the Employer.
- All this information places the Architect in far clearer position when taking into consideration an appropriate fee methodology and billing regime to undertake that particular service.

A concise and well worded 'scope of service' goes a long way to the successful management of our client's expectations. The success of your role as an architect unerringly rests on this simple perception.

As-Built Drawings and Resubmissions:
The 'synaptic brain-storm' our client's experience on site can have far-reaching and significant consequences for us as the Architect. Despite our best efforts, our Client's behaviour tends to be inevitable. Even a change as small as relocating or resizing windows can have a dramatic effect on our workload.

With Homeowners Associations being unmoving in fidelity to our plans as approved by them, Energy Efficiency compliance being as rigorous and closely monitored as it is, and Municipalities withholding Occupation Certificates (and apparently now placing fines on Municipal Accounts), the small leeway that was at one time available to us has been snatched away. It is best that we assume that changes will be made, and that we will need to comply with all the levels of authority before our service can be deemed 'complete'. This process may extend well beyond final handover and the issue of the 'Final Completion Certificate'.

By negotiating Workstage 5 & 6 service separately it gives us as Architects a better opportunity to gauge the likely outcome of the building process and what further duties we are to be required to provide.

There are some projects where the need for resubmissions is highly unlikely and no provision need be made.

However, for almost all other circumstances, we can pursue the following options:

- Make provision in our Fee Agreement that such a service is not inclusive and will be negotiated should the need arise. It may help mitigate the exuberance of our imaginative Clients.
- Include 'As-Built Drawings & Submissions' as a "Special Service' in that section in the Fee Agreement under which all other 'Special Services' are billed under the catch-all hourly rate. This is an undesirable option for any Client and should act as a deterrent.
- Restate the original rates for new energy studies, HOA and municipal submissions to be charged again should the need for a re-submission arise. Probably the easiest and most equitable offer and can be simply referred to in the fee agreement offer. As Architects we find ourselves constantly needing to update our drawings as the work progresses, so the 'as-built drawings' part of the task is generally already accomplished.

There are many other considerations not directly covered in the fee calculation part of the exercise that are covered in great detail in a later workshop covering on-site service.

The Fee Offer

The offer itself needs to be stated clearly either as a percentage. fixed sum or square meter rate:

- It should indicate excluding VAT (if applicable).
- If it is a percentage sum, then the budget figure or contract sum upon which it is based needs to be clearly stated to avoid later confusion, or the square meterage upon which the rate is applied, as the case may be.
- It should indicate that it is exclusive of disbursements such as travel and printing costs.

The fee should then be broken down and tabulated as to the various workstages according to apportionment, indicating that payment is due on the conclusion of each stage, and making reference to the need for interim payments should they be necessary. Should the requirement for interim payments not be stated, it is not possible to enforce them when required.

Additional Costs

From prior experience it is clearly evident that services that are not covered by the Architect's fee need to be itemized:

- Other professionals, such as Engineers, Quantity Surveyors etc.
- Municipal Submission Fees.
- Special tests.
- Supplementary Fees with an hourly rate indicated. A catch-all clause for town planning applications, relaxations, model building, marketing brochures, surveys, operating manuals etc. It can also be used to provide a base upon which to charge for 'as-built' drawings and re-submissions.

Variations

Most private owners are not aware of the onerous requirements of municipal compliance. A variation on site can set in motion an entirely new submission including a new Energy Efficiency study. In an effort to discourage late variations, I have a clause that warns my client accordingly, and an allocated hourly rate to undertake such changes.

Building Line Relaxations & Town Planning Applications
Clearly state that the risk involved in securing town planning relaxations and consent uses is the Client's risk. Fundamentally, whether it be a building line relaxation or a special consent use, we are creating a material improvement to the value of the property, and this truth should be made clear to the client. Make it clear that should the application fail, we will charge the client for all costs pertaining to the rectification of such an application. As a result;

- Town Planning applications will be charged at an hourly rate irrespective of their success, the risk has to be that of the Client who stands to materially benefit and not for the Architect.
- Any remedial design and documentation work required should an application fail is also to the cost of the Client.
- All neighbour and HOA approvals and signatures to be secured by the Client himself, as only the Client has the ability to negotiate or leverage as required.

Homeowner and Municipal Submissions
I place a large, bold, capital lettered and framed note under both of these headings indicating unequivocally that we will not be held responsible for the performance of either of these entities. I further warn the Client against the consequences of non-compliance with our documentation.

Agreement Conditions & Protection Clauses

The following clauses are now typical to all client / architect agreements in one form or another, and their relevance and application warrant discussion. Equally, in your own contract, make sure to cover the following eventualities:

Payment
- Clause 2 **OR** 3 – strike out the one not used:
- Clause 2: Most architectural fee accounts are due on presentation, but if we are working with Developers or corporations that have accounting departments, they will generally require me to submit a monthly statement that will be due for payment on 30 days.
- Clause 3: With a private commission, the fee is due on presentation of the account. A lot of Architects are now demanding a deposit – a sensible strategy. Krynauw Nel makes the observation that the payment of a deposit validates the agreement more strongly than even a signed document.
- Clause 4: If necessary, make allowance for interim payments. Workstage 4 on a very large project may take many months and be worth millions of Rands. Our contract requires us to stipulate progressive payments, otherwise our client is only obliged to make payment on completion of the workstage.
- Clause 5: Makes clear that our client may not withhold payment or 'set off' damages against our account in the event of a dispute or claim. They must be settled independently, as is our common-law right, and he may not unilaterally 'hold us to ransom' by withholding fees.
- Clause 6: In order to enforce payment lawyers advise us that we MUST include this clause, which permits us to suspend service pending outstanding payments. Otherwise we are legally obliged to provide with service whether we have received payment or not. Should we withhold service, our client may sue us for damages arising from such delays and costs incurred by such suspension of service.
- Clause 7: Permits us to charge interest in late payments at a set rate of 2 % above our banks' prime lending rate (name the bank).

Liability and Professional Indemnity

- Clause 8: We are contractually entitled to limit our liability to reasonable or acceptable terms. The five year time limit started from the defined period at which point our service has been finalized.
- Clause 9: Makes provision for a clause that ensures and clarifies that we are entitled to payment should the project be terminated.

Dispute

- Clause 10: Defer to the standard Client / Architect agreement. State the full name and revision of the standard agreement that we refer back to.
- Clause 11: Dispute resolution methodology must be stated expressly in the contract to avoid a default to litigation.
- Clause 12: The next stage must also be clearly stated and the rules to be used. This is essential in delaying the recourse to lawyers and helps to keep costs for resolution down.
- Clause 13: All claims are limited to the maximum cover of our insurance. Most Developers or corporate clients want a copy of our PI insurance schedule. There they can see that we will carry say R 5 million maximum cover. They appoint us knowing that.
- Clause 14: Pro rata proportion of liability proportionate to the agreed fee against the tariff.

Disclaimer

- Clause 15: Clearly states that we are not responsible for the performance of other professionals, the homeowners association, the municipality, the Contractor, his sub-contractors, the weather, the exchange rate and the bank repo rate.
- There is a note in our agreement that we will not aid and abet the client in knowingly breaking municipal or estate rules and regulations.
- Nowadays HOA's can act in a downright hostile manner. They overstep their mandate and have no qualms in sending libellous and accusatory letters directly to your client concerning your submission.
- Municipalities themselves can be in the game of simply losing submission files in their totality.
- Do not allow sub-contractors to coerce you to undertake their design and shop-drawings. Ring-fence your responsibility.

Copyright

- Clause 16: Make your copyright conditions clear. We have had the design of several buildings stolen. Doing work on risk often makes this opportunity available, and a potential tenant, who has approached several Developers to provide them with a new facility, will often choose the best design and hand it over to the Developer with the best price. These plans were copied down to the door swings! The only way to avoid this is to investigate the providence of any designs you may be given to work from and ensure that they have been paid for. We have to look after each other in this regard.
- Under copyright it is necessary to discuss the dispersal of digital files. We would not hand-over CAD files to anybody. We will make them available to other building professionals, but only through direct communication, and with the undertaking that they themselves will not distribute our original digital drawings.
- Failure to stick to this rule can have strange and extremely unexpected repercussions. My office was once asked for our original drawings by a third party. On returning the call, it turned out to be a firm of lawyers. I dropped the call and phoned our client, the developer. It turns out that one of his client's was suing him. Imagine the relationship with our developer should our original digital drawings been presented as evidence against him in court. Not to mention the opportunity for a third party to corrupt information on your drawings to pursue a case against you or your client.
- In a slightly oblique way, another aspect of Copyright is your client's right to privacy – your client may insist that you not use their project for any of your marketing material to promote your practice; you may wish to publish their building on your practice's Linkedin or Facebook page.
- Your client has purchased nothing more than the once-off use of your design and therefore does not own the right to alienate you from your design. Legal issues aside, however, it may simply be prudent to agree under what circumstances you may publish photos or presentation materials of the building, whether it be anonymously (not publishing the client's name) or not at all.

Employer's Responsibility

- Clause 17: Information provided by the Client is to be deemed to be accurate. This clause is taken from the Architect's handbook as issued by the Institute of Architects.
- It can represent an expensive and bitter lesson in relying upon information as supplied by the client.
- If the client gives you inaccurate or incomplete information pertaining to the conditions of their site, or its ownership, or any other information pertinent to the project, it is their fault, not yours. You shall be entitled to DEEM the information as given as correct, and claim costs for all remedial action that may be necessary to rectify such errors or omissions.
- Try and verify all information passed on to you with an alternate source. Make sure it carries the necessary stamps, signatures or approvals.
- Ask the client to employ a Land Surveyor to investigate servitudes, site boundaries, or any other regulatory conditions pertaining to the site.
- Clause 18: Standard disclaimer to prevent your client from turning your goodwill and indulgence against you.

Negotiation and Discounts

Negotiation skills are vital, and must be considered and prepared beforehand. Never, ever be negotiated for fees over the phone, or be hijacked in a meeting with the negotiation of fees. Only negotiate with all your facts and calculations in front of you.

Remember, you are in an extremely competitive cost environment. An unwillingness to negotiate with Developers will see you excluded from that market. Assuming the acceptance of your fee proposal is held-up by your proposed fee, enter negotiations using some of the following strategies.

Be scientific, know your costs and final positions.

A badly negotiated fee can continue to impoverish you for a number of years. Know the full value of the service you are offering.

In the previous section of this course, I discussed the importance of the 'cost of sales'. Understanding its purpose and value is crucial when negotiating fees and allows you to negotiate with a clear overview of your fall back positions, and at which point it becomes crucial to reduce the service.

- Use the 'tariff of fees' to know full well what the real worth of your service is.
- Use your 'cost of sales' to know full well what you need to remain profitable.
- Investigate whether your new client has built before and is realistically conversant with building costs and professional fee standards.
- Never assume you know what the client is prepared to pay for your service.
- Knowing your costs, make a reasonable offer. If he is unprepared to settle on that then all deals thereafter can be treated as 'unreasonable'.
- Architects fees typically comprise anywhere between 0.5 to 5 cents in the Rand on some projects. A 20 % cut in your fee, that could make the project ruinous for you, can represent a saving to your client of less than half a cent in each Rand.
- Never move beyond your final position. There really is a point at which the fee is not worth the costs and the risks involved.

Look for opportunities to reduce costs and trade service for fees

First option is to counter with a reduced service offer. Giving up workstage 5 & 6, where traditionally we make substantial losses, significantly reduces workload. It also eliminates several areas of conflict with the developer / employer – adjudications of V.O's, EOT's and defects. Repeat business with a large Developer client often has a repetitive nature, there is a lot of scope to safely offer discounts:

- Educate repeat clients to manage the relationship to make for more efficient use of your service.
- Managing your work on risk.
- Minimize exposure to the developer's client's or tenant's.
- Standardize construction practice and use of products and materials.
- Manage flow and dispersion of information.
- Avoid workstage 5 & 6 appointment whenever possible.

These are all easy ways in which to minimise your workload and to pass the saving on to the developer accordingly. Be sure to consciously exploit that symbiosis and sell it to your client.

Leverage: Consider all positions beforehand

Is there the possibility of on-going work to be had from this client? Is it worth being highly negotiable to secure this work, or does this set a bad precedent for future work for which you can expect to be underpaid?

- 'Marketing' costs and the promise of future work must be cashable and bankable.
- If a promise is made, insist on getting that promised project on the table and hold them to it. Clients will lie about their capacity as long-term employers in order to manipulate you to cut your fee.
- On the rare occasion when a follow-up project did materialize, we found ourselves being offered sub-standard fees again! We had set a bad precedent for ourselves.
- Investigate their history of how many Architects they have used in the past.
- The 'requirement to prove oneself' where the client will you give you the project at a heavily reduced fee because he needs to see that you are capable of undertaking the task.

Disbursement Costs

We have in the past offered a discount by waiving our travel and printing costs. I once did a long-term study on this and came to a reliable assessment that your (local) travel and printing costs will be about 9 % of the total fee (depending on your practice specifics, of course). When the market got tight, and a 10 % profit margin became a goal to aim for, I stopped doing this.