

Communiqué

A Practice Management Newsletter

March 2015

In this issue:

Master Services Agreements:
Good for Business

First Person Singular: Mark Baughman

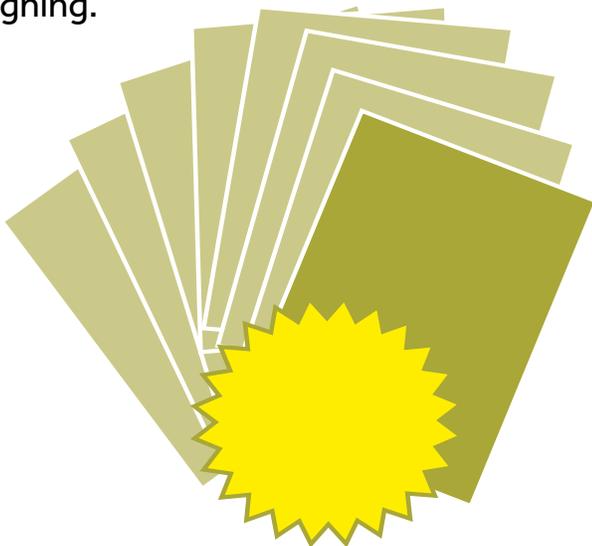
XL Group
Insurance



Design Professional

Master Services Agreements: Good for Business

Wouldn't you prefer to negotiate a good contract just once rather than over and over? Master services agreements/task order arrangements allow you to determine the scope and pricing quickly and to start designing.



Let's just agree: going through contract negotiation and formation for each and every project takes up a lot of time, expense and paperwork. It can be especially frustrating when you and your client have worked together before and just want to get on with the project.

"Many of our insureds talk about all the time it takes, all the to-ing and fro-ing with owners' lawyers to negotiate specific clauses," says Robert vanArsdall, Director, Business and Sector Analysis for XL Group's Design Professional team. He worries that rather than go through the process, some firms will begin providing services without a signed contract in place, thinking they'll get around to it eventually, or they'll resort to an inadequate letter agreement. Some firms even forgo a contract altogether if the fee is small, or if they have a long-term relationship with the client.

Master Services Agreements

If you provide services to a single client on a number of individual projects over a period of time, vanArsdall suggests you consider a master services (or *continuing service*) agreement.

A master agreement sets forth the agreed-upon business terms and conditions (and sometimes the fee schedule), for a specified period of time, perhaps a year or two. This gives you a framework for providing services without having to go through detailed contract negotiations each time. The scope, schedule and fee for each specific project can then be easily established with a short-form task order (sometimes referred to as a *service order* or *work order*).

"Think of your current one-time contracts as having two parts: the terms and conditions and the scope of services,"

vanArsdall says. “A master agreement has exactly the same structure, except that its terms and conditions extend over a longer period of time.

“The beauty of the master agreement/task order arrangement is that when a task order is issued, you don’t need to negotiate terms such as indemnification, insurance, risk allocation, dispute resolution, ownership of documents, suspension or termination, because these provisions are already set forth in the master agreement.”

Such ongoing arrangements offer greater convenience and, assuming the basic terms are properly worded, establish a better understanding of both parties’ needs and concerns.

“Using a master agreement can really streamline the contracting process,” vanArsdall says. “PSMJ estimates that most design firms get 75 percent of their jobs from repeat clients. If that’s true of your firm, think of the time you’d save having a master services agreement in place versus going through one-off negotiations every time. In terms of facilitating work and risk management, it’s a slam dunk.”

It’s good business, too, according to vanArsdall. “Having a master agreement in place makes it easier for clients to work with you,” he says, “because they perceive you as already ‘approved.’ Once a client has invested time in negotiating the master services agreement, he or she may be more willing to do additional projects with you. It functions as a subtle sales and marketing tool.”

A few clients, especially municipal, state or provincial entities, might be wary of master agreements, as they may perceive the agreements as somehow showing favoritism or “short-listing” approved designers, or as a promise to engage your firm for multiple projects. According to vanArsdall, the best counter to this objection is to remind them how many projects you have done with them in the past and point out how much time negotiating takes.

Not All Master Agreements Are Alike

Nancy Rigassio, Executive Claims Counsel and Assistant Vice President for XL Group’s Design Professional team, cautions that unlike the AIA and EJCDC® master agreements (see the sidebar, “New AIA and EJCDC Master Agreement Documents”), client-written agreements sometimes contain clauses that are one-sided and seek to transfer the client’s liability to the designer. “Client-written master agreements can be just as onerous as single-project agreements,” she says. “If the master agreement contains onerous and/or uninsurable terms, the arrangement may adversely affect multiple projects.”

Rigassio says that some client agreements—such as those developed by government entities, developers and large corporations—are often derived from construction or supplier contracts and may contain terminology inappropriate for design services contracts. You might see

New AIA and EJCDC Master Agreement Documents

In 2014, the American Institute of Architects (AIA) and the Engineers Joint Contract Documents Committee (EJCDC®) published or reissued master agreement forms.

The 2014 version of the EJCDC E-505 Agreement Between Owner and Engineer for Professional Services, Task Order Edition, is intended for use when the owner and engineer have an ongoing relationship, spanning multiple engineering tasks or projects. The 2014 update of the E-505 closely follows the content and form of EJCDC’s flagship 2014 E-500, Agreement Between Owner and Engineer for Professional Services.

The AIA’s B121™–2014, Master Agreement Between the Owner and Architect, is to be used when the architect’s scope of services will subsequently be specified in a service order (B221™–2014). The master agreement provides only the common terms and conditions that will be applicable to each service order. The B121 plus a service order creates a contract: a Service Agreement.

The AIA has also released master agreement and service/task order forms for use between the architect and its consultants, and the owner and contractor.

words such as *work*, *warrant*, *guarantee* and *supervise* to describe what you’ll do. Typically, you’ll also find language referring to you as “contractor,” or clauses that impose on you liquidated damages, a performance bond, waiver of liens from all project participants and a standard percentage retainage of your fees.

Similarly, many task or purchase orders contain terms inappropriate for professional services. “That word ‘Work,’ especially with an upper-case W, has its own coverage ramifications,” Rigassio says. “It will suggest to many finders of fact—or the personal injury attorney representing the injured worker—that the insured is engaging in construction activities. Along with that suggestion come the liabilities associated with control of the jobsite, including implementation of a safety program or jobsite safety.”

Review and Update

Just as with any contract, a master services agreement must be carefully negotiated, Rigassio says. Once in place, it should be reviewed and updated regularly to account for changes in law and current compensation schedules. Standard clauses may need to be changed, too. “One example is the method for dispute resolution,” she says. “Years ago, the backlogs in court dockets caused parties to look to arbitration as the alternative. But arbitration,

“Having a master agreement in place makes it easier for clients to work with you because they perceive you as already ‘approved.’”

especially with a three-arbitrator panel and the arbitration administration fees, has become an expensive forum and arbitration awards are often compromised or arbitrary, with no remedy for appeal.”

Task/service orders should be scrupulously reviewed, too; clients can change their wording without your knowledge. Especially in public contracts, onerous terms can sneak into a task or service order. More than one A/E has executed an agreement without noticing changes, and suffered as a result.

Each task order should reference the master agreement by date or number. Such a reference makes each task order an addendum to the master services agreement, not a separate contract without the beneficial clauses in the master services agreement (e.g., a limitation of liability or waiver of consequential damages clause). In addition, make sure you and your client address when the statute of limitation begins to run on a project.

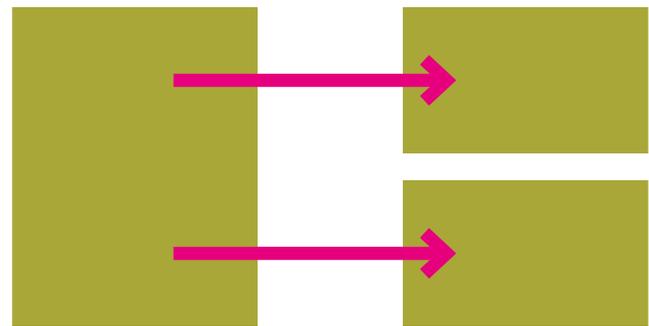
You and your attorney also need to make sure task order language and terms don’t conflict with the master agreement. According to Rigassio, master agreements typically take precedence if there is a conflict between the task order and master agreement. “I remember a claim that had the parties arguing over the limitation of liability in a purchase order and whether that LoL was invalidated by the master agreement,” she says. “In that case, the insured who generated the P.O. had standard language stating the P.O. took precedence over the master agreement. Because of this, a motion for summary judgment failed and opened up

for the jury evidentiary issues about the parties’ intentions during their contract negotiations.

“Master agreements may designate which state’s laws apply to a dispute, even if the task order or purchase order pertains to a project in a different state.”

Rigassio also suggests that you take special care when developing your scope of services for the task or service order. It should leave no ambiguity or question as to whether or not some duty or deliverable item is included within your basic fee.

Finally, vanArsdall recommends you make sure that appropriate staff in your firm are familiar with the terms of your agreements. “As with any contract, master agreements/task order arrangements are terrific when parties actually follow the terms and conditions set forth in the master agreement,” he says. “They’re less successful when the parties’ conduct departs from the original contract.”



Once a master agreement is established, the scope, schedule and fee for each specific project can be easily established with a short-form task order.

This is another in an occasional series of articles in which the CEOs of design firms give Communiqué readers their quick thoughts on a range of practice management and industry issues.

First Person Singular: Mark Baughman



Mark Baughman is President and Design Partner of SKB Architecture and Design, a 30-person firm headquartered in Washington, D.C. The firm provides architecture and corporate interior

architecture for major law firms, corporations and institutional clients across the country.

Communiqué: What does a successful project look like to you?

Mark Baughman: When we have accomplished something meaningful with the design, stayed under budget and on time, exceeded the client's expectations and haven't killed each other getting there.

C: Describe your biggest success in the past 12 months.

MB: Beyond just staying in business, I'd have to say it's been the way we've managed to grow our practice across the country and internationally while maturing as a design practice and a business despite tremendous challenges. We have people in Silicon Valley, Chicago and the Middle East. Our design work gets better every year.

C: What's the secret to your success?

MB: First and foremost it's the incredible people we get to work with every day. We'd be nowhere without their support. I honestly feel incredibly lucky to represent these professionals. In the 33 years we've been practicing, I think we've been very good at setting our goals, looking at ourselves honestly and doing the things we need to do to

transform ourselves into the firm we want to be, and then updating that vision.

For our first few years we had a great reputation as a service firm that did really good working drawings, but not as a design firm. You don't turn into a great design firm in a day. We made a plan and slowly built ourselves into the firm we wanted to be. We listened to experts who told us we could only work this way or that way, considered their opinions and rejected them because we knew we could do better if we really worked at it. Every few years I think back at how dramatically different we are even though the management and leadership of the firm have been the same.

The theme of the firm is professional and personal growth and we're blessed with a very talented, supportive and trusting staff. I can say with confidence that everyone in the firm is a better design professional than he or she was the year before.

C: What's the biggest challenge you've recently faced?

MB: For the past 10 years or so we've fought the impact of the merger movement. Most of our leads come from real estate brokerages and most brokerages are now giant conglomerates with many departments that offer their clients a broad range of services before the architect is brought into the process.

Having sold their own services as one-stop-shopping with massive resources, it's naturally difficult for some to then recommend a firm that might be described as "boutique." On top of that, some advisors often operate from that old mentality, "Nobody ever got fired for recommending IBM," meaning you can't go wrong recommending the biggest firm. As a result, we're sometimes excluded from projects that we used to be called for all the time. In our view, the client—unless it's a national company with a major project—is often the loser because there's now a bureaucracy working on the project instead of a professional design practice.

For our corporate interiors practice, another significant challenge is the way the industry has matured. Some days it seems that there is so much interrelationship among the different parties—project managers, contractors, engineers, landlords—across multiple projects that the client is a temporary participant in a bigger "project." I think that makes it more challenging to be a good professional and advocate without breaking a lot of china.

C: How have you responded to the challenge presented by huge brokerages routinely recommending huge firms?

MB: Actually some of our biggest supporters work in these large companies. These are professionals who left mainstream practice to work on this different platform. They

do understand what we're doing and the value it provides our clients. So we try to stay engaged with them.

We're also heavily involved in creating a much larger virtual firm for our international market. The idea isn't appealing in the U.S., but internationally it's common to combine multiple firms for jobs. We're very much inspired by what Eero Saarinen conceived in the 1950s, but we recognize that being good at it takes a lot more than writing contracts. You have to have vision and leadership and your purpose has to have some altruistic element all of your partners can relate to. Perhaps firms like ours, which are accomplished at leading large teams, can turn the tide that's swamping us now.

C: Are you more optimistic or pessimistic about the next 12 months?

MB: As the head of the firm, I don't have a choice—I have to be optimistic. We try to understand all of our challenges, as well as our strengths and weaknesses, and strategize how we're going to move forward.

But as the person who has to look at the world with clear eyes, I am very pessimistic about the long run. There is very little happening in the profession of architecture that is good for the profession.

C: What makes you say that?

MB: I think architects have to understand that in the U.S. most people are suspicious of them and do not think they have the client's interest at heart. We are less respected than the contractors or real estate brokers. Sometimes I think we deserve what we got.

“You don't turn into a great design firm in a day. We made a plan and slowly built ourselves into the firm we wanted to be.”

C: How can you combat that perception?

MB: Architects have always failed at defining their value. Maybe it's just endemic. I think the professional societies need to focus on how they can help architects become an indispensable part of the construction process. Most municipal agencies are staffed by engineers who in turn come up with endless regulations forcing clients to hire engineers to do specific studies and filings. Ironically, architects are less often required to stamp and sign documents, and LEED certification is more important than architectural registration for building regulations.

AIA erred by ceding sustainable design to the USGBC, an organization that answers to no one and did not exist until recently, yet holds enormous power in the building development process. Maybe AIA can take back that initiative and get architectural certification on a professional par with LEED.

C: What's the biggest risk design firms will face in the next 5 years?

MB: I'd say it's the continuing loss of control over a project while retaining the liability.

C: How is your firm addressing new technologies and collaborative design models such as BIM and IPD?

MB: We view these with a very critical eye because in many ways Revit is intended to get rid of most of the architects. It's a way for a client to get a builder to click in some parameters and get a building. We used to call that “designing by Sweets catalogues.” But now it's much more insidious. There are many exciting things about Revit, as was the case with ArchiCAD before it, but we just have to stay focused on what we think is important and not get pushed into doing things “the Revit way” just because that's what's in the box.

C: What do you think the design firm of 2025 will look like?

MB: I don't think architecture firms like ours will exist in any real number. Either we'll all work for a few large firms or we'll work for boutiques that only take on jobs the big firms won't touch.

C: What have you found to be the most important factors in retaining employees?

MB: For younger employees, it's teaching, involving and helping them grow at their own pace. The challenge is that young employees often come to us without a clear understanding of why one firm is a better place to work than another and they have the wrong expectations. For example, some firms I know have a studio culture that emphasizes the social aspects of the design profession. As a result, their architects tend to design projects that look like furniture showrooms. They'll never design anything better than it's ever been designed before.

Doing good design, coming up with meaningful ideas, is hard. We teach young people how to push beyond the first inertia of design school, to design things they never thought they could. When they make that breakthrough, it's as exciting for us to see as it is for them.

C: What skills and traits, beyond design skills, should new employees ideally have?

MB: They should be eager to learn, relentlessly curious, and critical thinkers.

C: What advice would you give a young architect or engineer just entering the profession?

MB: The profession isn't what you think it is. Make sure you know what you value. I am very lucky—I get to work with the best people I know every day and I can honestly say there is not a thing about the architectural profession that I don't truly love, but none of it was what I expected.

“I can say with confidence that everyone in the firm is a better design professional than he or she was the year before.”



Design Professional

<p>The information contained herein is intended for informational purposes only and does not constitute legal advice. For legal advice, seek the services of a competent attorney. Any descriptions of insurance provisions are general overviews only. XL Group is the global brand used by XL Group plc's insurance companies. In the US, coverages are underwritten by the following XL Group plc companies: Greenwich Insurance Company, Indian Harbor Insurance Company and XL Specialty Insurance Company. Coverages not available in all jurisdictions. Information accurate as of March 2015.</p>	<p>Published by the Design Professional unit of XL Group 30 Ragsdale Drive, Suite 201, Monterey, CA 93940 800 227 8533 • xldp.communique@xlgroup.com</p> <p>Learn More. xlgroup.com/dp</p>
--	---