

Agreeing the terms of business

Terms of business are intended to be a framework within which designers, clients and suppliers work. Terms of business need to be established between all of the parties concerned before any work begins, so that each party to the proposed transaction knows in advance the rules by which the game into which they are about to enter is to be played. This is important because the rules by which any company always plays frequently clash with the rules by which the other parties to the business always play. It is as well to get contradictions sorted out before the game starts.

Trying to establish retrospectively the terms of business under which some completed transaction was done is normally the prelude to a dispute; general terms of business are intended as the first step towards avoiding this.

Project-specific terms of business

Before a design consultancy starts to work for a client, or before a freelancer or a supplier starts to work with a design consultancy, it is also necessary to agree project specific terms of business. Whereas the general terms of business specify the general rules of the game, these specify the nitty gritty of what that game is to be:

- what is it that each participant is providing, to whom and when?
- what is it that the parties involved are expecting to receive?
- within the framework of the transaction who will be responsible for what?

It is possible to work by word of mouth, and on the backs of envelopes, but this will not provide an orderly framework within which to conduct business. A framework allows time to be used productively; word of mouth and backs of envelopes guarantee that a lot of time will be involved in disputes and litigation, to the benefit of the legal profession, but to the detriment of the design consultancy and its clients.

Drawing up general terms of business

Never try to draw up general terms and conditions of business without professional legal help. Use a solicitor who is experienced in commercial law, and, if possible, is already familiar with the design business. Working together, design consultancy and solicitor should seek to draw up general terms of business which cover:

- legal identity of the consultancy
- title (ie legal ownership) of the work
- the limits of the design consultancy's responsibilities
- the use of the work
- design credits
- payment terms
- interest on late payment
- interpretation (see below)
- copyright, moral and intellectual property rights
- governing law.

How all of these things are expressed, and exactly what should be included for any particular business, are matters arising directly from the company's circumstances and objectives, and must be dealt with accordingly. There are no 'tablets of stone' on terms of business in design consultancy, but it is in everyone's interests to operate within clear, fair and workable guidelines:

- the terms of business must make it clear who is offering to do the work; the potential client needs to know the legal status of the consultancy
- legal ownership should not be confused with physical possession; the legal owner holds the title (eg the title deeds to a house)

- establish the point at which title and property rights *to* goods and services supplied will be transferred (this applies *to* supplier-co-consultancy transactions and Consultancy-to-client transactions)
- the consultancy may want to reserve the right *to* recover all costs incurred in recovering overdue payment from the client
- (interpretation' involves clarifying the legal meaning of words and phrases used in the terms of business
- the terms of business should state which country's legislation will cover agreements made (particularly important in the light of increased overseas work).

In a number of instances, the terms and conditions which the design consultancy wishes *to* adopt for itself (eg in relationships with suppliers) will be different from those it wishes *to* apply in relationships with clients.

Establishing a project-specific agreement with the client

Outline brief

An outline brief should, ideally, be prepared by the client before discussions on the project-specific agreement begin, and this is likely to form the basis for those discussions. Subjects that ought to be covered include:

- background information on the client organization
- the subject, context, and nature of the design project
- detail on the marketing and business background
- clearly stated project objectives
- description of the target audience
- timing
- the names and roles of the people in the client organization who will have the authority to approve the work at each stage
- budget
- constraints
- environmental considerations.

Incompatibility

Incompatibility can arise between the terms and conditions of the consultancy and the client. The negotiation may start from a basis where the consultancy's general terms of business and the client's terms of business are not compatible. The client is the buyer, and the consultancy the seller, and each party will have drawn up general terms of business which protect and support their own interests.

The project agreement negotiation has to move from the general to the specific, in order to agree what terms of business will relate to the particular project.

Problems arise if consultancy and client send each other documents which, in effect, say 'the above general terms of business are set in concrete, and will govern the conduct to anything we do together unless we agree to any change, in writing, before any work commences'. If the initial documents are incompatible, and they are left as such, this can lead to what lawyers sometimes call 'The Battle of the Forms' where both sides are endeavouring to establish whose terms and conditions take precedence in the event of a dispute.

What makes a contract

For a contract to exist there needs to be:

- an offer
- an acceptance
- a consideration (ie an agreement to transfer something of value such as money, goods or services).

If the client's general terms of business include items unacceptable to the design consultancy. or vice versa, alterations that make them acceptable to both parties must be thrashed out before a contract is made. If this is not done) the resulting contract may be invalid as it is quite possible that a court would decide that all that has happened is that the consultancy has made an offer, and the client has made a counter offer. There has been no acceptance, and therefore no contract.

The parties must agree the consideration as part of the negotiation. Once the offer is accepted, a contract is made. The majority of contracts made in the design sector are verbal in the first instance, the three conditions that go to make a contract having been fulfilled a, a

meeting or over the telephone. This does not make what is now the post-contractual exchange of documents any less important.

Precedence between general terms and conditions

Once a contract exists, if there is a dispute over whose general terms of business apply, the general view is that the terms which take precedence are the last ones despatched before the conclusion of the contract. This is, a legal 'grey area' which is best avoided.

Elements of a project-specific brief

The aim of the project-specific agreement is *co* reach a well-defined and recorded arrangement with the client so that:

- there is a mutual understanding of what both parties are setting out to achieve; this is normally contained in a written brief
- the agreement which has been reached on price is set out clearly; the consultancy informs the client of what charges are *to* be passed on as rechargeables and/or disbursements) and supplies either costs or estimates for this
- there is an agreed timetable both for work and for payment
- both parties know the position on title *to* the goods and services *to* be provided
- consultancy and client are in agreement over any legal rights related to the project
- both parties are agreed on how changes to the client brief are to be handled
- an agreement is in place for procedure should work be rejected
- mutually acceptable procedures have been agreed concerning confidentiality
- agreement has been reached on the availability of file copies to the consultancy.

Client brief

In order to arrive at this point in their discussions, consultancy and client will almost certainly now have refined the document scanning out the aims, objectives extent and nature of the work to be carried out, together with any other relevant supporting information. This is now the client brief.

It does not matter whether the brief is drawn up by the client or by the consultancy, but it is very important that it is done, and that both sides are agreed on the content. The brief will form part of the design consultancy's proposal document, and the proposal is the most usual method of drawing together all the elements of the project-specific agreement.

Once the final project agreement has been reached and committed to writing, make certain that it can be alerted only with the mutual consent of authorized people representing the parties involved; their names should be included in the agreement.

Design stages

The established stages of a design project are normally regarded as being:

- research, strategy or feasibility
- design concepts
- design development
- implementation with the first two stages often being rolled together into one.

There is, however, an increasing trend for clients to commission a separate pre-concept stage to establish the feasibility, cost, or direction of a design project. This should be regarded by the design consultancy in the same way as is any other stage, with fees and a programme of work being agreed before the work is started.

The next section of this chapter deals with the various types of work which the design consultancy will have to carry out before it is 'able to present the detailed proposal document; this will include:

- considering how the work will be handled, and who will work on it
- refining all elements of the project specific agreement

- project costing and preparing a detailed quotation.

Confusion can arise between the proposal which is presented at the pitch stage, which will include only general indications of how the consultancy would tackle the work if appointed, and the detailed proposal which is required to regulate things once a consultancy has been appointed.

Changes to the client brief

Probably the most disputatious part of agreements between design consultancies and their clients concerns changes to the client brief. To minimize the possibility of dispute, the consultancy should insist on all changes being requested in writing. If the proposed changes will cause alteration to other things which have previously been agreed (eg the delivery date, or the price), the consultancy should inform the client of this in writing, for example explaining what the new delivery date and price will be, and insist on acceptance of the new arrangements before proceeding. Even if there is no knock-on effect from the requested change, the consultancy should confirm (in writing) receipt, and acceptance, of the request to avoid any further confusion.

Changes to the client brief may be requested at a point where the project is time critical. No matter how urgent the changes, or how rapidly they must be implemented never omit the written agreement stage; fax machines may help here.

Termination of contract

The design consultancy or its client must have the ability to bring the contract to an end if the other is in serious default or becomes insolvent. Serious default may include non-payment of fees by the client, or failure by the client to give proper instructions, or failure by the consultancy to execute the work to a reasonable standard within a reasonable time. Standard terms will normally specify that written notice of termination is required.

Termination by this method is possible even where there is no default, for example for commercial reasons; in which case a reasonable period of notice (two or three months) must be given. This type of termination requires the paying party to pay anything which is outstanding up to and including the period of notice, as well as outside costs incurred on the project. Provision should be made for what happens to work done up to the point of termination.

Project costs and project prices

Before a consultancy is in a position to finalize any project agreement with a client, it is necessary for the project to be costed and priced. Once broken down into its component parts this daunting prospect becomes digestible. Developing the costs and calculating the price includes the following:

- how much work will be done in-house using own staff
- staff hours by 'designer weight or by function for each part of the work
- how the project will be managed
- how any necessary subcontractors and suppliers will be selected
- what basis for payment is to be proposed to the client
- whether print costs, and any similar items, will be bought in and sold on to the client, or whether the consultancy will act as agent for the client
- the method of charging for disbursements.

Using an approved supplier list

Buying in work and services can be a weakness in the design sector; a relatively small expenditure of management time and effort in this area can be cost-effective.

It is normally good practice for a design consultancy to keep an approved list of suppliers for goods and services which are required regularly. The development of a close working relationship between the consultancy and its approved suppliers will normally lead to a higher level of service than ad hoc ordering, as well as giving the consultancy tighter control over both quality and cost.

To be fully effective, an approved supplier list must be kept alive. Companies which wish to be considered for inclusion should be allowed to pitch for the business, and companies which under-perform should be removed. If this is not done the competitive edge achieved through the use of an approved list is lost, as the longer-term supplier companies may become complacent and lose their edge on pricing.

Agreeing prices with suppliers

The two methods most commonly used for agreeing prices with suppliers are specification and tender, and negotiation.

The method selected depends on what is being bought, its value, and the number of competing sources from which the producer or service can be obtained. If few options are available, the consultancy will probably have to negotiate. With a wider choice, (eg with a large and technically unsophisticated production run that is not time critical,) specification and tender is likely to be the most cost-effective route.

Such a tender is likely to be by invitation, and, in many cases, the consultancy will be able to agree the keenest price of all by following the route of specify-render-negotiate, but, if this is the intention, it should be made clear to the competing suppliers when they are invited to tender.

During negotiation, the consultancy should also give attention to agreeing the stage at which title and any other rights (such as copyright) will be transferred. A hard bargainer may ask for these to be transferred on delivery, although suppliers can insist on retaining title and property rights until payment has been received. The consultancy must ensure that it receives title and property rights before passing either or both of these on to a client.

Where a consultancy is able to make the choice, it must offset the advantages of holding a creditor's money for an agreed period of time against the level of discount which may be offered for prompt payment. A cash rich company should be able to negotiate discount terms for seven or fourteen-day payment which is substantially more beneficial than all but the most extended creditor financing.