



# Ask Vic!

**Q:** Although we have managed to weather the recession successfully, preserving cash flow has been a challenge for our small surveying firm. Fortunately, we have been able to access credit lines to meet our payroll obligations. We want to implement some changes to improve our cash flow in the future. What can we do?

**A:** Surveying firms need to set appropriate fees for their services and collect those fees to stay profitable. Regular billing and follow-up will open communication about a client's concerns that could lead to a fee dispute. Implementing billing controls can minimize the risks that come with trying to collect on an unpaid invoice.

## ENFORCING RIGHTS BY SUSPENDING SERVICES

If the client fails to make timely payments for services, firms should have the right to suspend performance or pursue legal termination of the contract. Termination is a drastic step which has important legal consequences and potential liability associated with it and should be pursued only after careful consideration and dis-

cussion with legal counsel. Suspending performance for nonpayment is a less drastic option.

Professional services contracts should clearly deal with a firm's rights to suspend or terminate the contract. Distinct from termination, a suspension of services merely stops the performance of services while the non-payment or other default that caused the suspension continues. As with termination, suspension should be preceded by at least the contractually-mandated advance written notice to allow the client an opportunity to cure the default.

## RECOVERING AN UNPAID FEE

Filing suit to collect an unpaid fee may seem logical. Doing so, however, invites a countersuit for negligence. Even if the counter-claim is merely retaliatory, it still takes time and money to defend. Worse yet, it may be a legitimate claim which would not have been pursued but for the fee action. Firms seeking an unpaid fee must perform a cost-benefit analysis: are the risks of taking legal action to recover a fee justified compared with the potential benefits? Considerations include whether the client can actually pay, the costs of legal fees, and internal costs such as lost staff time during litigation, the likelihood of success, and what percentage of the amount due is an acceptable expense.

## THE RIGHT TO WITHHOLD A FEE

Clients often demand the right to determine whether payment for services is justified; they try to protect themselves by having the option of withholding payment. Firms must realize that while professional liability insurance is triggered by a demand for money or services alleging negligence, the client's withholding of a fee based on a contractual provision is not a claim. For a professional liability policy to respond, a claim must be filed and a settlement,

award or judgment must be rendered. Allowing a client to refuse to pay is problematic in good times; in a recession it is a shortcut to bankruptcy.

## AGREEING TO PAY A CLIENT'S LEGAL FEES

Firms which have successfully sued a client to recover unpaid fees often feel that the legal expense of doing so should also be reimbursed. Clients have the same feeling, and this shared attitude often results in a "prevailing party" contractual agreement. This provision can create a significant risk.

Any provision on the recovery of legal fees by the prevailing party is a contractual condition a firm is free to assume. Professional liability insurance, however, does not cover the risk of the firm paying prevailing party costs related to a successful claim of negligence against the firm; this contractual obligation is the firm's sole responsibility. There is no common law entitlement to recover attorneys' fees, and few statutes award such fees. Therefore, there is no coverage for the payment of another party's costs based on a contractual fee-shifting provision.

In addition, prevailing party provisions often result in the coercion of the weaker party—often the surveying firm—by the financially stronger client. While it is not a certainty that a client will use a prevailing party provision to coerce a settlement, such a provision increases the likelihood of prolonged litigation, the exposure of the surveying firm's assets, and the cost of any covered claim.

Business lines of credit, cash reserve funds, and carefully scrutinized expenses can assist a firm in surviving difficult times. The most important risk management practice to preserve cash flow is to include and enforce appropriate contract terms and fee collection procedures.

Do you have a question regarding an insurance or practice management issue? E-mail your question to AskVic@Schinnerer.com and look for your answer in a future issue of ACSM's Bulletin. Victor O. Schinnerer & Company, Inc., is the underwriting manager for the CNA professional liability program. Schinnerer and CNA have been the commended program of the American Congress on Surveying and Mapping since 1965.