

AICP NATIONAL GUIDELINES – DIGITAL PRODUCTION

AICP Digital was formed in 2009 to address business issues, including standards and practices, affecting companies that produce content digitally, including those working in interactive media, visual effects, animation, design, motion graphics, and those combining physical production with digitally created content. AICP has added these digital guidelines, which through use and adoption will become the industry standard.

COMMERCIAL PRODUCTION BIDDING PROPOSAL AND PURCHASING SYSTEMS

The most important component in production is clear and specific communication between the production company and the contracting-client. The bid proposal and/or statement of work create a road map which outlines how the company plans to execute the job, in addition to identifying the deliverables and job specific contractual points, e.g. intellectual property ownership. The best proposals provide the most production values and are developed with precise specifications supplied by the contracting-client that allows the production company to be equally specific regarding what will be supplied. They are more than simply an allocation of dollars.

FIRM BID

Under this system, production companies submit a proposal including a summary of costs. Once details of the approach have been agreed upon and the proposal is accepted it becomes the contract price for the job, barring a major change in specifications. There are no accounting obligations to the contracting-client by the production company for actual costs after the production. It is standard industry practice that contracting-client producers have the authority to approve changes in specifications. For digital production, major changes in specifications include deviations from the statement of work such as changes in schedule, design direction, technical methodology or script in ways that impact the work flow and/or volume of work and will be billable to the contracting-client as change orders or overages to the contract price.

STATEMENT OF WORK

In addition to the summary of costs, a proposal for digital production shall include a statement of work which will include the details of the firm bid approach and shall be mutually agreed upon between the production company and contracting-client. The statement of work shall contain the final deliverables and the creative and technological expectations as outlined and agreed upon during the pitch and final award phases, which may include agency storyboards or styleframes, referential pitch materials, final approved scripts, and calendar.

APPROPRIATION OF CREATIVE CONTRIBUTION

During the course of the bidding process, production companies often provide approaches to a project that materially change its overall look or direction. Production companies may also provide new elements, designs or characters for the project. When the job is not awarded to that production company the exploitation of such creative contributions is the misappropriation of the production company's intellectual property and work product.

SEQUENTIAL LIABILITY

Sequential Liability means that the agency as agent for its disclosed principal, the advertiser, is liable for payment to the production company only if the advertiser has paid the agency; otherwise the advertiser is directly responsible for the payment.

Certain agencies have inserted a Sequential Liability clause in their contracts. Others have added a side letter to be signed by the production company. Still other agency contracts do not overtly refer to Sequential Liability as being in effect, but do refer to the agency as "acting as agent for" (the advertiser), which suggests the same thing. However, where such phrase is used it should be ascertained that the agency becomes liable to the production company if it is paid by its client.

If the agency is requesting the recognition of a "principal-agent" relationship, then the client (principal) should not be released from the obligation of payment until total payment is made to the production company. It should be clarified that even if the client pays the agency, the client remains liable if the agent defaults in fulfilling the payment obligation.

If an agency's internal policy insists upon these payment terms (sequential liability), the production company should:

1. Have a specific written provision for the advertiser to pay the production company directly;
or
2. Require the agency to acquire, and acknowledge in writing that they have received, 100% of the production costs in advance of production; or
3. Make sure the advertiser ("client") also signs the Agreement. If it is a rider, the terms of payment and the full contract price should be added to the rider. In addition the production company should:
 - a) Be provided with the advertiser billing and contact information,
 - b) Copy the advertiser on all invoices, and
 - c) Notify the advertiser of payment due as soon as terms of the contract (payment dates) are not met by the agency.

PAYMENT GUIDELINES

It is recognized that this is a labor intensive industry and accordingly prompt payment to the production company for services rendered is essential. It is recommended that if payment is not made as agreed, the production company reevaluate the ability of the contracting-client to meet its contractual obligations. Failure to make prompt payment, as set forth in the contract between the production company and the contracting-client, is a breach of contract giving the production company recourse to the cancellation provisions set forth herein. In the event the contracting-client is an agency and is in default of any payment, it is recommended that the production company notify and forward duplicate invoices to the advertiser.

The license for, or title of ownership to, the work shall not be granted or transferred until full payment is made. Each production company should consider adoption of a payment policy requiring full payment for the work prior to its use. The Association believes that such a policy is consistent with good faith business practices.

- A) For digital projects such as visual effects, animation, design, etc., which are expected to be completed within 120 days, 75% of the contract price is due and payable upon signing of the contract, but not later than 5 business days after the award of the job. (Note: The production company should not accept verbal awards. Job awards or orders should come in the form of a written or email request.)

The final installment of 25% of the contract price (including all approved and invoiced change orders) is due and payable upon delivery but not later than 30 days from the date of the final invoice or not later than the use of the work (e.g. the airing of the commercial), whichever is sooner.

- B) For interactive digital projects such as mobile and desktop websites, apps, games, etc., which are expected to be completed within 120 days, 50% of the contract price is due and payable upon signing of the contract, but not later than 5 business days after the award of the job. (Note: The production company should not accept verbal awards. Job awards or orders should come in the form of a written or email request.)

The next installment of 25% of the contract price is due and payable halfway through of the production schedule of the job (the midpoint of the hours budgeted to complete the project).

The final installment of 25% of the contract price (including all approved and invoiced change orders) is due and payable upon delivery but not later than 30 days from the date of the final invoice or not later than the use of the work (e.g. launch of the website), whichever is sooner.

- C) When digital projects are expected to extend beyond 120 days, a monthly cash flow schedule should be determined proportionate to the budget spent in each month provided the production company receives a minimum of 50% of the contract price upon signing of the contract, but not later than 5 business days after the award of the job, and 75% of the budget prior to delivery. This schedule should be attached to the contract. Invoices should be generated no less than monthly, i.e. on the first day of the month and payment made by the last day of the respective month. Keep in mind when apportioning costs that payroll must be paid in most states according to labor code no less than twice per month.

If payment is not received in accordance with the payment schedule the production company shall be entitled to cease work on the project and/or withhold final deliverables until such payment is received.

LATE PAYMENTS

When payment by the contracting-client under the terms of the production contract is late, there will be an interest charge at Prime + 2%* on all payments later than 30 days from the contract due date (using the prime rate as of the 30th day).

*The production company determines the actual rate of interest. The rate inserted above is shown as an example.

CANCELLATION AND POSTPONEMENT

As with live action production, if the production company blocks out a specific period of time to produce a job, no further efforts are made to sell that time. And, if a job is canceled or postponed, it is the obligation of the production company to make all reasonable efforts to re-book the time. Although unlike live action production, digital artists are hired based on skills needed to complete the project. Since every phase of digital production is specific to the schedule it is highly unlikely that the production company would be able to use the same artists for the same time frame if the production company's time was rebooked for the same period.

- A) If notice of cancellation/postponement is given halfway through the production schedule of the job (that is between the award or start date and the final delivery date), the contracting-client will be liable to the production company for the full cost of the job as bid plus all change orders negotiated prior to the notice of cancellation/postponement.
- B) If notice of cancellation/postponement is given in the second quarter of the production schedule of the job (that is between the award or start date and the final delivery date), the contracting-client will be liable to the production company for 75% of the cost of the job as bid plus all change orders negotiated prior to the notice of cancellation/postponement.

- C) If notice of cancellation/postponement is given in the first quarter of the production schedule of the job (that is between the award or start date and the final delivery date), the contracting- client will be liable to the production company for 50% of the cost of the job as bid plus all change orders negotiated prior to the notice of cancellation/postponement.

In the event of postponement, the production company shall submit a new bid proposal and statement of work to complete the project. Prior to the commencement of production the contracting-client shall either execute a change order or new contract and the production company shall be paid for such work in accordance with the payment guidelines, including an initial payment prior to the commencement of production.

If scheduled production has been prevented from occurring due to circumstances beyond the control of the production company as in “force majeure” (meaning but not limited to, earthquake, riot, fire, flood, volcanic eruption, acts of war, strikes, labor unrests, civil authority, terrorism, power outages, and acts of God) the production company shall be paid for cancellation/postponement in accordance with the terms above.

The production company shall have the right to cancel the project without penalty in the event the contracting-client has breached the Agreement or defaulted on payment to the production company.

PRODUCTION INSURANCE

Production insurance policies may encompass the following: commercial general liability (covering bodily injury or property damage to others), worker’s compensation and employer’s liability (covering the illness or injury to employees), umbrella liability (provides excess limits over the general liability and employer’s liability policies), production media and media perils (covering loss of data), multimedia/technology errors and omissions liability (covering copyright and trademark infringement – excluding patent infringement), and for interactive production network security and privacy coverage (covering failure to maintain the security of networks or confidential information). These policies have traditionally been purchased by the production company, but may also be provided by the advertiser or the advertising agency in policies known as “wrap-up.”

When the advertising agency or advertiser is providing the production insurance the advertising agency and/or advertiser should indemnify, defend and hold harmless the production company from any and all deductibles and claims covered, or which would have been covered had the advertising agency or advertiser maintained adequate insurance under the wrap up program, and the production company should be listed as a “named insured” on the policies for that job and provided with proof of insurance.

If the contracting-client requires the production company to supply patent liability insurance for the project, the production company shall secure the coverage (provided it is available) and all costs associated with the insurance, including premiums, legal opinions/services, and deductibles, shall be the responsibility of the contracting-client.

Whether production insurance is provided by the production company or the advertising agency and/or advertiser, the production company is actively involved in the insurance process and there are costs associated with this involvement. For wrap-up, the production company must negotiate and process insurance claims should the need arise. In most cases, the production company is required by the advertiser or agency to maintain “usual and customary” insurance coverage in addition to that provided under the wrap-up insurance program. It is therefore appropriate that the production company include in its estimate a charge for wrap-up administration, purchased insurance (including coverage required by the wrap-up policy), and any costs associated with patent liability risks.

INDEMNIFICATION

When two parties enter into an agreement it is common for those parties to indemnify each other for, among other things, the contributions, contract breaches, and actions each party makes to or in connection with a project. Therefore, when the production company and contracting-client enter into a contract for a project the parties should indemnify the other with respect to the items and/or materials each supplies for the production according to the brief, job specifications and contract, and with respect to their actions and breaches of contract terms.

With respect to interactive production, the contracting-client should be responsible for, and indemnify the production company against, any patent infringement claims related to the functionality of the project or the materials or specifications supplied by the advertiser or the agency.

LIMITATION OF LIABILITY

The production company may be hired to execute an advertising agency’s fully formed idea, or develop and execute an idea of its own based on the marketing needs of the contracting-client. In either event, the production company should only be responsible for its contribution to the project and the contract should clarify the extent of potential liability. In no event should the production company’s exposure exceed the total project budget, and neither party should be liable for any consequential damages such as loss of business or profits.

For interactive projects (e.g. website), the production company shall be responsible for bug fixes which are identified within 30 business days following the launch of the project. A bug is an error or flaw in the source code developed by the production company which prevents it from operating as specified. The terms for support beyond 30 days after the launch shall be

negotiated between the parties. In addition, a “pull-down” date for the interactive experience shall be agreed upon in advance at which point the production company’s responsibility for the site, if any, shall cease.

The production company will use reasonable efforts to ensure that the project is compatible with current API specifications for third party interfaces (e.g., Facebook, Twitter) which are identified in the Client's bid specifications. The production company shall not be responsible for any compatibility issues as a result of API specification revisions once the production company has submitted the bid proposal and/or statement of work. If the project does not interface properly with updated/revised API specifications, any modifications required to correct these compatibility issues shall be processed as change orders and are not considered "bug fixes".

INTELLECTUAL PROPERTY OWNERSHIP AND USAGE

In most instances the advertiser should own the rights to whatever the advertiser contributes (i.e. raw materials, images, characters, and other items supplied by the advertiser) and the production company should own the rights to the production company’s pre-existing digital tools and the underlying digital materials for the deliverables.

For digital projects such as visual effects, animation, design, etc., the advertiser should own the deliverables in finished non-reusable form (with the exception of characters developed by the production company, as addressed below). Where the production company creates new characters, the production company should retain ownership of the characters and license to the advertiser the right to use the characters in the media specified.

For interactive digital projects, such as mobile and desktop websites, apps, games, etc., the production company should retain ownership to the developed work product and grant the contracting-client a license to use the developed work product for use in the campaign in the media, region, and time frame specified in the Agreement.

In each circumstance, deviations from the above may be appropriate, but these other arrangements should be negotiated on a case by case basis and should be accompanied by additional monetary and other consideration.

CHANGE ORDER

The contract price for the job is firm barring a major change in specifications. A major change in specifications includes deviations from the statement of work such as changes in schedule, design direction, technical methodology or script in ways that impact the work flow and/or volume of work and will be billable to the contracting-client as a change order to the contract price.

The project statement of work (“SOW”) shall include a process for change order management. Elements not included as part of the statement of work, or items identified in the SOW as out of scope elements would constitute a change order. These elements shall be negotiated prior to the commencement of work.

SCHEDULE

The production schedules, including contracting-client asset delivery and direction review/approval dates, shall be agreed upon at the onset of the project. Delays in delivery of contracting-client assets or direction review/approval may result in a change order. All contracting-client approvals shall be provided by the authorized representative(s) designated in the production contract.

PERIODS OF REVISIONS

The periods of revisions for the project shall be negotiated as part of the statement of work. Additional periods of revision shall be listed as an out of scope element and justification for a change order. The contracting-client shall designate a representative who is authorized to give approvals. Further revisions requested once the contracting-client’s representative has given approval shall be subject to a change order.

PORTFOLIO RIGHTS/ PUBLICITY

In order to attract new business a production company should be properly credited for the work it has done and the production company should be able to showcase its talent and production expertise by advertising, exhibiting, and promoting its work. Therefore, the production company should have the right to advertise its involvement in work that has aired, launched, or been released publicly in any form. Production company promotion shall include, but is not limited to, exhibition of the work on production company’s website (provided that work involving actors who have not given consent for internet use is password protected to avoid potential violations of the applicable SAG contract and publicity and privacy laws) and referencing or exhibiting work in either digital or print publications or speaking engagements, and entry into awards shows and exhibitions. If the agency desires to limit the production company’s use of the work as described above, the agency shall disclose these limitations in the agency’s production specs or script during the bidding phase.

In all instances the agency, advertiser and production company should identify and give proper credit to each other in reference to the work.



GRIEVANCES

The AICP has established a Grievance Committee for the use of its members. Composed of former AICP chairmen currently affiliated with member companies, as well as the current chairman and vice chairman and two digital board representatives, the committee investigates complaints by members of violations of the National Guidelines, above, or other unfair or unethical business practices. Members may file a grievance by completing the official form and mailing it with back-up material to the Grievance Committee, c/o AICP, 3 West 18th Street, New York, NY 10011.

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AICP has prepared these Guidelines for consideration by its individual member companies as a working tool to be used at that company's option. While the Guidelines do not represent agreement among Association members to apply any particular terms, through adoption by individual producers, the Guidelines reflect, and have over time become, part of the industry's "custom and usage".