

Retail contracts should be win-win

Just the mention of the word "contract" can conjure up images of pain. With the possible exception of marriage vows, people tend to view contracts as negative, complicated and unpleasant or even boring. Fortunately, we as "contractors" have to take a different approach, especially in the area of retail where a client's revenue stream depends almost completely on when the construction is finished.

A contract doesn't have to be a tug-of-war between the construction firm and the owner. The true purpose of the contract should be to execute a set of rules which both parties agree to follow, and consequently, benefit from. Contracts should be written as win-win documents in which both the contractor and the client walk away satisfied and duly compensated. It sounds easy, almost warm and fuzzy, but navigating contract language in today's litigious business climate and robust economy can be a tricky exercise at best.

First, competition for retail contracting work in this marketplace is as fierce as it's ever been. Owners today demand faster schedules and higher quality while invoking penalty clauses in contracts if the job runs late, threatening revenue. Some contractors will agree to unrealistic time frames, and penalty clauses just to secure the work; when the schedule comes crashing toward the deadline date, the only way out is to scrimp on materials, craftsmanship and project management.

The Nuts and Bolts

Construction contracts come in all types and serve broadly diversified functions. The key for the general contractor is to educate the client on the design and construction process and ensure that reachable and realistic cost parameters and construction schedules are met. He also wants to ensure he gets paid. Each of these points is carefully written into a contract in which both the contractor and the owner know what is expected of the other and what happens if those expectations are not realized. In general, the American Institute of Architects offers boilerplate language for four types of retail construction contracts:

■ **Stipulated Sum.** This contract is pretty straightforward. A contractor is bound to completing a specific set of services for a fixed sum.

■ **Cost Plus A Fee with Guaranteed Maximum Price.** The contractor stipulates that



Steve Hritz
Owner and president
Centerre Construction,
Englewood

the fee is what ever it costs him to do the job, but he puts a cap or a ceiling on the cost by defining a *not to exceed* number. This is a type of contract that may also include what is called a *split saving incentive* in which the client and the contractor evenly split the dollar amount if the job comes in under budget.

■ **Cost Plus A Fee with Guaranteed Maximum Price.** No cap or ceiling is defined. This is obviously a more speculative type of document because of its open-ended structure.

■ **Design/Build.** This contract puts control of both the design and construction in the hands of the contractor. Fees are affixed to specific services and a percentage of the profit and overhead.

The most important factor in choosing a specific contract is to make certain that its language and intent matches the type of project it's being written for. A small office tenant finish contract, for example, would not be adequate to serve the needs of a big box retail center.

Controlling the Costs

Cost overruns in construction projects are an unfortunate fact of life. Although the owner-contractor relationship can be perceived as competitive and sometimes even adversarial, it is always in the contractor's best interest to keep cost overruns down without compromising the agreed-upon schedule. This can be a painfully arduous task, especially in retail.

One restaurant client insisted on adding and extension clause to a cost-plus-fixed-fee contract, which completely negated what the main contract stipulated. In essence, his extension clause stated that nothing in the original document was valid unless he said it was. Obviously his perception, shaped by some very bad advice, was that

we, the contractor, were out to shield ourselves from any culpability. He, of course, was badly misinformed and we had to bring him back to reality.

Once again, education is an excellent tool a contractor may use to improve the communication process before a contract is signed. If an owner chooses to press for restrictive language that limits the movement of the schedule, it is the contractor who must clearly lay out the potential hazards.

Another client was intent on infusing a clause that prohibited any work from being done unless he specifically signed off on each particular and minute construction detail. As an out-of-town retail owner, he was often unavailable.

We had to forewarn him that this type inflexibility almost certainly would inflict unnecessary delays, and possibly sacrifice the money he was trying to save on the front end of the job by delaying his store opening at the back end.

Conversely, a contract may be written with flabby language heavily favoring the contractor and architect; for example, project parameters and subsequent costs are left open-ended and ill defined. Execution of a loose contract of this nature, which appears to protect the financial gain of the contractor, in the end may alienate the owner and lead to ill will, or even litigation.

Closure of the Contract

Overall quality is the most effective tool to bring a contract-and a project-to closure. Unfortunately, not all construction firms will agree on what defines true quality. The standard, we believe, should include:

1. Enforcing a formal in-house quality control program;
2. Using specified material for the job;
3. Executing the build-out with top-flight drawings, documentation and craftsmanship;
4. Employing a full-time general superintendent for on-site project oversight;
5. Following the progress of the schedule with redundant, on-site project management. ▲