

CONSTRUCTION LAW

Owner-Architect Agreements: Scope of Services

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This is the first part of a two-part series of articles on architectural service agreements (ASAs). Today we will discuss the scope of the architect's services under an ASA and related compensation issues. Our next article will address other contractual issues, such as ownership and use of documents, default, indemnity and insurance.

Scope of Basic Services

For the purpose of our discussion, we will presume the owner wishes to develop an unimproved parcel of land for residential purposes. As part of its due diligence activities, the owner will need to assess the highest and best use of the property from, among other things, zoning, regulatory, market and financing standpoints. One of the earliest advisers to which the owner will turn will be an architect who is able to offer guidance on how the site can be developed.

While the early services of the architect can be divided between zoning

and concept design, we will assume sufficient preliminary review of the site has been done by the owner and architect so that the architect can offer a robust proposal consisting of all services necessary to achieve project design and construction.

Notably, the proposal itself should not be signed by the owner. Often, architect proposals contain provisions unacceptable to an owner, such as limits of the architect's liability and indemnification of the architect by the owner. The proposal (as may be modified by the owner) should, however, be used as the basis of the ASA and, where appropriate, attached as an exhibit to the ASA.

The ASA should then set forth the various services the architect will perform, from zoning and concept design through the traditional phases of schematic design, design development, construction documents, bidding and negotiation and construction administration. Particular emphasis in the ASA should be on the architect's deliverables and specific duties of the architect during the design and construction administration phases, which may include mechanical or structural

engineering services performed by consultants to the architect.

Where, however, the engineering services will be performed under separate agreements between the owner and the engineers, the architect should be responsible for the coordination and integration of the engineering designs in a complete set of plans used for bidding by contractors and review by the Department of Buildings and other relevant governmental agencies.

A common issue arising in the negotiation of ASAs is the extent to which the architect will perform redesigns relating to the scope or budget for the project. As to scope redesigns, we seek to include such redesigns as a basic service (i.e., within the basic fee) through the completion of the design development phase. Thereafter, scope redesigns would be charged as an "additional service" (discussed below).

A related issue involves the concept of designing to budget. Essentially, once a budget is established by the owner and provided to the architect, it is incumbent on the architect to maintain the cost of constructing the designs within the budget. In order

to accomplish this, the owner may enlist the services of a cost estimator (which may be under the auspices of an owner's representative or construction manager) to monitor the estimated costs of the designs as they progress through the design phases. If the costs exceed the budget, the architect should be required to provide redesigns to bring the project cost within budget at no additional cost to the owner.

In the case of high-end residential development, owners often retain both a "design" architect (generally a "starchitect") and an "executive" architect or "architect of record." Where this is done, the ASA will need to delineate the respective duties of the two architects, and a "matrix of responsibilities" serves as a helpful exhibit to confirm the distribution of particular services among the full A/E team.

Compensation

There are basically three forms of compensation under an ASA: a lump sum for all services (allocated to the various phases of the ASA); hourly rates; and fee as a percentage of construction cost. There can also be a hybrid form, combining the various forms for certain aspects of the architect's services. The most common form in our practice and (we believe) the most protective of the owner is the lump sum form. Under this form, the architect (internally) estimates the time it will take to perform its scope of services, from initial planning to construction, and converts its estimate into a lump sum, which is then allocated on a percentage basis among the various phases.

Within each phase, the owner pays the architect on a progress payment basis. In reviewing the architect's proposed fee, the owner should avoid "front loading" by the architect, whereby the vast majority of the fee is paid during the design phases, leaving only a small unearned fee for the construction phase. At a minimum, we believe between 20% and 25% should be held for construction administration.

As to hourly fees, the financial problem for the owner is the same law clients find with lawyer hourly billings: the lack of a cap on fees; however, at

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times, a limited scope project merits hourly billings. As to a fee based on the percentage of the cost of construction (which is often seen in high end single family residential construction) the problem for the owner is that the ultimate fee may not necessarily reflect the architect's true cost to deliver the services. For example, the cost to the architect for its time to design a particular element of the home may be far less than the agreed percentage for the cost of construction of that element. Of course, a percentage fee could be less than it costs the architect to design the element (in terms of the expenditure of labor), but that is not usually the case.

In addition to the fee, the architect will also seek reimbursement of its expenses. Typically, the architect will seek a markup on its expenses (e.g., 10%) to cover office overhead. We take the position that overhead is covered

in the architect's fee and that there should not be a markup on expenses.

Additional Services

The forms of compensation just discussed cover the architect's basic services. To the extent the services requested of the architect by the owner during the course of the project exceed the basic services, the architect would be entitled to compensation for additional services, usually at the architect's standard hourly rates. Such additional services might be for redesigns after the final approval of the plans, attendance at governmental meetings, increased site presence, additional value engineering etc.

Additional services fees might also be sought by the architect if the time for construction administration services exceeds the planned construction schedule. In this case, we try to negotiate a grace period before the architect becomes entitled to additional compensation and provide for an equitable adjustment of the architect's fee for the extended period, reflecting the true cost to the architect for the extended services.