

ments as consistent with the project budget—based on confirmation from an outside cost consultant—there can be little or no liability to the designer if subsequent bids come in higher.

Design professionals should incorporate provisions into their agreements which reflect their commitment to work with the owner to adopt realistic project costs, while including protective language to minimize their own exposure. Designers should explain to clients that as the result of fluctuating labor costs and the variable prices of materials and equipment, they cannot be reasonably expected to take on the risk of guaranteeing project cost estimates, within certain parameters. Such a provision can take the following form:

Any evaluations by the Designer of the Owner's project budget or statements of probable construction cost, represent the Designer's best judgment as a design professional familiar with the construction industry. It is recognized, however, that neither the Designer nor the Owner has control over the cost of labor, materials or equipment, over the Contractor's methods of determining bid prices, or over competitive bidding, market or negotiating conditions. Accordingly, the Designer cannot and does not warrant or represent that bids or negotiated prices will not vary from the project budget proposed, established, or approved by the Owner, if any, or from any statement of probable construction cost or other cost estimate or evaluation prepared by the Designer.

In order to avoid exposure for excessive cost claims, the designer should explain the cost-estimating process to the client. Before finalizing a contract for the project, designers can explain how project costs are developed and how many variable cost factors affect price predictions. During design and construction, designers should inform clients about how project scope or other significant changes may affect previous cost estimates; in addition, increases in fees may eventuate from design changes at late stages of design development. Designers should be particularly cautious when an owner emphasizes that project costs must be guaranteed. This is a red-flag for design exposure in what may be an unfair and even frivolous legal action.

OWNERSHIP OF DOCUMENTS

Who owns, and has the right

Who owns, and has the right to future use of, the written design documents created by a design professional? Do clients who pay for the production of drawings and specifications own the documents? Are design professionals merely selling their ideas to clients, whereby they retain exclusive use to and ownership of their documents? If another designer subsequently completes the project, can the original designer be liable for errors or omissions contained in the design documents?

Absent an agreement assigning their rights, designers generally have ownership rights to the plans and specifications they create. However, contract terms, such as those contained in standardized AIA or ASID agreements, customarily grant the owner a license or permission to copy the designer's documents and use them for particular purposes. Additionally, when a contract does not contain any terms about whether the client can reuse drawings and documents, the client generally has a right to use the documents prepared by the design professional.

Agreements with Clients

Design professionals can protect themselves from exposure should the owner reuse design documents, and from the possibility that the owner might unlawfully use or copy them, if their agreements contain language that states that the design professional is the author and owner of the design work and retains possession to and ownership in the work. Such a provision can be worded as follows:

The drawings, specifications, and other documents (including but not limited to all documents related to interior construction, custom furniture, lighting, fabrics, and carpet [add additional items here]) prepared by the Designer for this Project are instruments of service and shall remain the property of the Designer whether the Project for which they are made is executed or not. As the author of these documents, the Designer shall retain all statutory and other reserved rights, including but not limited to copyright and patent rights. The Owner shall advise its agents, employees, contractors, vendors, and