



BY NANCY A. CHILLAG

Design/Build: The Legal Risks Involved

More and more remodelers are offering design services, and the objective is quite clear: to secure the project and eliminate competitive bidding. However, the risks, such as those that follow, aren't always considered.

1. What design services are legal? Every state has laws which govern when persons per-

Offering design services can be a great way to secure clients, but to maximize the benefit, you must first address the risks

forming design services must be licensed and/or certified. For example, in California, an architectural license is required unless the design services are limited to two-story (plus basement), woodframe constructed dwellings consisting of four units or less. You may be able to hire an architect to perform design services in-house in order to comply with your state's laws.

2. Do you have proper insurance coverage? Contractors carry General Liability Insurance to protect themselves in the event the work of improvement causes personal injury or property damage. On the other hand, architects and engineers usually carry Error and Omission Insurance to provide protection in the event they make a mistake in their drawings and/or calculations which cause either construction defects, personal injury or property damage. These are separate

policies and do not automatically cover the same activities.

3. Errors are yours alone. When a dispute arises during a project, the contractor usually argues that he or she is unable to build the structure as designed, claiming that the plans are wrong, inadequate or vague. The architect usually argues that the contractor is incompetent, and the homeowner is often stuck paying for the reconciliation. Avoiding this conflict is probably the major reason a homeowner hires a design/build firm. In this case, when a deficiency comes to light, the contractor must make the changes, absorb the cost of the redesign and additional construction, if any, and also complete the project on schedule. Legally, the owner will be able to demand such.

4. Inability to change price. When homeowners approach a design/build firm they have a budget in mind, and they assume the contractor's design can be built within the budget. Contractors without much design experience can easily wind up with plans that will exceed the budget. If this occurs, you may be forced to absorb the cost of the excess. Carefully monitor costs and inform the owner when the design has exceeded, or will exceed, their budget. They may authorize an increase, but the notice must be given in advance.

5. Owner terminates you after the design phase. As stated, contractors prefer design/build arrangements because they secure the entire project from the start. But what happens when the owner likes your

design, but has found a contractor who will build the project for less? Usually the amount a contractor charges for the design is far less than the owner would have paid an architect, thus a windfall is bestowed upon the owner. Furthermore, the contractor is usually not in the design business, and if they had known the owner would not use them to build the project, they would not have taken the client in the first place. Your "design contract" must specifically state that your plans belong to you, and that the owner is not authorized to use the plans for any purposes other than to have you execute them. If the owner uses another contractor to build the plans, you'll have the right to sue the owner for unauthorized use. You may also want to sign the construction contract at the same time as the design contract, stating the price to be an estimate based on the budget of the owner, subject to adjustment for the actual design selected by the owner. This obligates the owner from the start to have you build the project.

Design/build can be a wonderful way to secure clients without competitive bidding. But to ensure the maximum benefit, you need to address the risks before you start. ♦

Next column: Improper hiring interview questions.

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