akerman

Practice Update

Keep Hotel Construction Contracts As Well-Equipped As Guest Rooms

February 7, 2017

By Stacy Bercun Bohm

Hotel construction contracts can be among the most powerful tools to help developers comply with brand standards. This update will focus on the specific terms this vital document should address to achieve such a critical goal.

Overall, hotel developers can:

- include a standard of care that makes compliance with brand standards part of the contract requirements;
- include compliance with brand standards as a prerequisite to substantial completion and final completion of the construction work and the contractor's right to final payment;
- include the applicable brand representative in the punch list and equipment start up processes;
- attach specific brand requirements as an exhibit to the construction contract;
- address brand insurance and indemnity requirements in the construction contract.

Standard of Care
In general, standard form contracts do not specifically and sufficiently state any "standard of care" to be applied to contractors.

Related People

Stacy Bercun Bohm

Related Work

Construction
Real Estate

Without an express standard of care provided in the construction contract, the law will imply one which may not be what the parties intended. Hence, hotel developers should ensure their construction contracts include a standard of care that specifies the applicable laws, codes and rules that apply to the project, and confirm that certain provisions required by law to be contained in the contract are complied with and expressly included.

For instance, the hotel developer may want to include a reference to the applicable building code, applicable city, county or association codes, or minority business enterprise language, if applicable. Additionally, hotel brand standards, LEED (green building) requirements, or other project-specific requirements, should also be included as applicable.

Substantial Completion, Final Completion
Though standard form construction contracts generally do include basic requirements for substantial completion of the construction work, such as the owner's receipt of beneficial occupancy of the project, it is advisable to include additional requirements with which the contractor must comply before it is entitled to receive payment of retainage and/or final payment.

It is often the case that many owners require the contractor to provide, as a condition precedent to substantial completion:

- a final or temporary certificate of occupancy or certificate of completion from the governmental entity having jurisdiction over the project;
- as-built drawings;
- consent of its surety, if any, to final payment;
- subcontractor and manufacturer warranties and other related close-out documents.

In addition to adding these types of conditions to its construction contracts, a hotel developer should also consider making compliance with the applicable

brand standards an express condition precedent to substantial and final completion.

Some hotel flags may even want to require that brand representatives inspect the project and sign off on substantial and/or final completion.

If a hotel developer wants these conditions to be required of its contractor, then these terms must be expressly provided in the contract, or the owner may end up being required to pay retainage and/or make final payment without receiving these key close-out documents and/or brand representative approvals.

Punch List, Start up Processes
Some Lotel brands may require the brand representative be involved in and sign off on the punch list and start up processes. Even if this is not a brand requirement, it is good practice to include such a provision as the brand representative will have experience with hotel equipment and brand standards and requirements.

Uncovering issues during the punch list phase and before final payment is released will make contractor compliance easier than it otherwise would be after final payment has been made.

Real world examples illustrate how including brand approval for the punch list helps make sure the project is completed correctly.
In one instance, the contractor installed a shower head on the wall adjacent to the shower door. This was not in compliance with brand standards as the brand required the shower head be placed on the wall opposite the shower door for safety and convenience purposes.

However, the plans cited in the example were silent about the location of the shower head. Because the contract provided for a brand representative's sign off on the punch list, the developer was able to rely on the contract language to withhold final payment

until the shower heads in each room were reinstalled in the proper location.

Brand Requirements As an Exhibit
Any specific brand standards that may be included in a brand construction standards' manual should be included as an exhibit and attached to the contract. Those should take into account standards related to life safety, fire protection, mechanical, electrical and plumbing requirements. These elements will help define all brand standards that the contractor is required to perform, and for which the owner is obligated to pay.

Not including these standards as part of the contract can create ambiguities about what the parties intended and lead to change order disputes during construction and disputes with the brand post construction.

A detailed, comprehensive and specific outline of the applicable brand standards to be complied with can eliminate project delays, budget overruns and costly litigation with the contractor and the applicable brand.

Insurance, Indemnity Requirements
Make sure to check any applicable brand agreements and documents such as franchise, license and management agreements for brand insurance and indemnity requirements.

Many brand agreements have specific insurance coverage and deductible limit requirements. Additionally, brand agreements and documents may require that the hotel brand/franchisor be named as an additional insured on the project's commercial general liability and builder's risk policies.

Moreover, the additional insured status is commonly given through an additional insured endorsement. Hotel brand agreements and documents may require the hotel brand be named as an indemnified party in the hotel design and construction contracts. Thus,

the developer should make sure the construction contract complies with these requirements.

In sum, including applicable brand standards throughout the construction contract can help the hotel developer comply with brand requirements and eliminate project delays, budget overruns and costly litigation.

This update originally published in *Hotels* magazine on January 30, 2017.

This Akerman Practice Update is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.