

Practice Update

Protecting Hotel Brand Standards With Architect Agreements

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What is it that makes a person choose one hotel over another? In many cases, this decision is based on the person's familiarity with the hotel brand and the ability to predict the guest experience to be received. As such, it is essential, when designing a new hotel or even renovating an existing hotel, that the work complies with and lives up to the hotel's "brand standards."

Hotel brand standards are basically a written set of design "rules" that establish the look and feel of a specific hotel brand (regardless of location), reinforce the hotel's overall image and identity, and differentiate the hotel from its competitors. They include configuration and finishes of rooms, reception, lobby and other public spaces, lighting fixtures; climate-based air conditioning and window requirements; available amenities; and pool size and location.

Also addressed in brand standards are spas, restaurants, furniture, fixtures and equipment (FF&E), technology, hardware and software. Due to the uncompromising application of such requirements, a hotel's brand standards must be considered at the initial stages of the design of a new project, and incorporated into the architect's and

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other design professional's ultimate design plans and monitoring responsibilities.

This update will focus on the specific terms that hotel developers can include in any architect or other design agreement for a hotel project in order to achieve this critical goal.

Overall, hotel developers can:

- include a standard of care that makes compliance with brand standards part of the design requirements;
- include the review of the contractor's compliance with brand standards as part of the design professional's construction administrative obligations;
- include a requirement that the brand's technical services department approve plans and specifications and material modifications/change orders;
- include a requirement that the design professional include the applicable brand representative in the punch list and equipment start up processes;
- attach specific brand requirements as an exhibit to the design agreements; and
- address brand insurance and indemnity requirements in the design agreements.

Standard Care

In general, standard form design agreements do not specifically state any "standard of care" to be applied to the design professional. Without an expressly stated standard of care in the design agreement, the law will imply one which may not take into account compliance with brand standards. Hence, hotel developers should ensure that their design agreements include obligations and a standard of care that not only requires that the design of the project comply with all applicable laws, codes, statutes and rules governing the project, but also that

the design complies with all applicable standards for that particular hotel brand.

In addition, the hotel developer may want to include in the standard of care a reference to any applicable city, county or association codes, minority business enterprise requirements, LEED (green building) requirements, and any other project-specific requirements to which the ultimate drawings, specifications and other design plans must comply.

Construction Administration Services

In the event that the design professional (typically, the architect of record) is performing “construction administration” services for the hotel developer in which the design professional is required to perform site inspections, review submittals, sign off on contractor’s applications for payment, and determine substantial and final completion of the work, it is critical to require the design professional to account for and advise owner of any failure by the contractor to comply with hotel brand standards. This process should include evidence of approval of changes in the plans and specifications by the brand’s technical services group.

For example, in the event that the design professional has specified a certain type of tile in compliance with the hotel’s brand standards and the contractor requests a substitution that, if accepted by owner would violate the brand standards, it should be the design professional’s obligation, per the contract, to identify the potential violation, notify owner of same and reject the attempted substitution. Moreover, the design professional should be required to, before approving any application for payment or issuing certificates of completion, inspect the project to ensure that the contractor’s work complies with the hotel brand standards reflected in the drawings, specifications and plans for the project that have been approved by the brand.

Some hotel flags may require that brand representatives inspect the project and even where

not required, the owner is benefited from the brand signing off on the improvements at various stages in the construction cycle. The involvement of a brand technical services representative may estop the brand from withholding its approval of aspects of the improvements that should have been evident during a prior inspection and may be beneficial with respect to a variety of technical issues such as life safety, technology and FF&E, which may or may not fall under separate and contracts.

Uncovering brand standard compliance issues during the periodic inspections and the punch list phase and before final payment to the contractor is authorized by the design professional will make contractor compliance easier than it otherwise would be after final payment has been made. Completion of construction work and release of retainage should also be coordinated, to the extent possible, with brand conditions to the opening of the hotel. It is important to note that these owner protections must be expressly provided in the relevant design and construction agreements.

Real world examples help illustrate how including brand approval for the punch list helps make sure the project is completed correctly.

In one instance, the hotel's brand standards required shower heads to be placed on the wall opposite the shower door for safety and convenience purposes. The design professional's plans were silent about the location of the shower heads. The contractor installed the shower heads on the wall adjacent to the shower doors. The hotel developer withheld final payment because the hotel brand's representative had attended the punch list inspection and objected to the shower head placement. Because the contract with the contractor required the brand representative's sign off on the punch list, the design professional and the hotel developer were able to rely on the contract language to withhold final payment to the contractor until the shower heads in each room were reinstalled in the proper location.

Brand Requirements As Exhibit

Any specific hotel brand standards that may be included in a brand's construction standards manual should also be included as an exhibit and attached to the design agreement (or clearly cross-referenced and incorporated therein). The design agreement should specifically state that, in the event that the requirements of applicable law conflict with the hotel's brand standards, the design professional will have an affirmative obligation to notify the owner in writing of the conflict so that same may be addressed and clarified with the hotel brand before the final design drawings, specifications and plans are issued for construction.

Not including these standards and processes as part of the design agreements can create ambiguities about what the parties intended, lead to change order disputes during construction, result in disputes between the hotel developer and the hotel brand post construction and significantly delay opening of the hotel. A detailed, comprehensive and specific outline of the applicable brand standards to be complied with as well as brand requirements concerning the hotel opening in the design and construction documents and the work approval and funding process, can substantially reduce these risks.

Insurance, Indemnity Requirements

In many cases, the hotel brand will have specific insurance and indemnity requirements for the design professionals designing the project. For example, many brand agreements and documents require that the hotel brand be named as an additional insured on the design professional's commercial general liability policy, or require that the designer's deductible not exceed a certain dollar limit.

Moreover, the hotel brand may require that the additional insured status be provided on a specific additional insured endorsement form, and may also

require that the brand be named as an indemnified party in any indemnity agreement given by the design professional. As such, it is essential that the hotel developer review any applicable brand agreements and documents such as franchise, license and management agreements for such brand insurance and indemnity requirements, and to include such requirements in its design professional agreements.

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

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