Mastering the Restaurant/Retail Build-Out Process

By Bradley L. Croft, Esq.

From initial demolition to securing the final certificate of occupancy, tenant fit-out projects are among the fastest moving construction projects. Restaurant and retail proprietors are under the gun to open for business. Contractors are in a hurry to meet an often overly-aggressive schedule and keep up with industry demand. Landlords are eager to commence receipt of lease payments and to get beyond the disruption and mess that construction projects can cause.

With so much rushing, mistakes and oversights are more likely to happen; scope will be missed; schedules will get pushed; changes will be necessary; and problems will occur. Spending a little extra time on the front-end of a project can help minimize these risks for all involved.

Estimating and Bidding

The temptation for parties to agree out of the gate on a price-per-square-foot is difficult to resist, especially when they may have already done work together on a prior project. Before locking in a price, be sure to review the plans and specifications carefully and note any specialty materials or installation methods that may require a longer lead-time or higher pricing. Go to the existing space and note any unique access or utility issues. Owners should share their vision with the contractor and the contractor should share their capabilities and limitations with the owner. Set realistic expectations for what can be done, when it can be done, and for what price it can be done. Also note the landlord's requirements for union labor, clean-up, LEED issues, or working hours and, where appropriate, relay any other requirements regarding construction or improvements that may appear in the owner's lease.

Contract Negotiation

Take the time to read and understand the contract and make sure the appropriate form of contract is being used. Choose a payment delivery method that is job appropriate. If the total cost of the project is less than $1 million, then a cost plus a fee with a guaranteed maximum price may not be appropriate given the significant administrative burdens such pricing often carries. And be sure to contract with the party that has the ultimate responsibility to make payments. Often the landlord will have agreed to fund a portion of the fit-out through a negotiated tenant improvement allowance. Be sure the contract accurately and clearly reflects all such payment obligations.

Scheduling terms are especially important in tenant fit-out contracts given the common time pressures of such projects. If the new tenant is required to move out of its existing space by a date certain, then that date should be known to all parties and measures taken to ensure that the new space is ready and all necessary occupancy certificates received well in advance. Pay close attention to liquidated damages provisions. In many jurisdictions, liquidated damages cannot be imposed as a penalty and must be causally related to the anticipated damages that will likely result from a delay. A contractor who has agreed to be on the hook for liquidated damages cannot also be subject to actual damages for delay. Owners ought to consider this when deciding whether or not to impose liquidated damages and, if so, their amount.

Project Close-Out and Securing Payment

Failing to obtain municipal or governmental authority approvals, sign-offs, or certificates can threaten an otherwise timely project. Care should be taken throughout the project to coordinate inspections to make sure there are no surprises that can derail timely completion.

In addition, a general contractor is only entitled to lien the interest of the party with whom it contracted. So if the tenant signed the contract, then lien rights are limited to a lien on the tenant's leasehold interest, which is typically worth much less than a lien on the owner's fee interest. As such, it is generally preferable to contract directly with the building owner. Of course, alcohol licenses can be subject to attachment by a creditor, including a contractor, and ultimately sold in satisfaction of a debt.

These fast-in, fast-out projects present a great financial upside, but are not without increased risks which must be considered and addressed before the contract is signed.

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