

## The Owner's Roles and Responsibilities

It is the owner's duty to decide the scope, program, and budget for a project prior to design. During design and construction, the owner monitors the project's progress and quality and makes periodic payments to design and construction practitioners.

The owner in the design / bid / build method has separate contracts with the designer and the contractor. Those two contracts are governed by two very different standards, since the designer functions as the owner's agent during construction.

When the owner issues the construction documents to the bidders, the owner implies that the plans and the specifications are reasonably sufficient for the contractor to follow and use to complete the project. This is known as the *Spearin Doctrine*, which the Iowa Supreme Court adopted in *Midwest Dredging v. McAninch*.<sup>4</sup> If the drawings and specifications contain errors that cause the contractor to incur extra cost, the owner is responsible for the extra costs. In other words, when the owner issues the construction documents to the competing contractors, the owner asks the contractors to assume the package is correct and complete and that they need not include an allowance for the possible unknown costs due to errors or omissions in the construction documents. Allowances for unknown costs would result in a higher bid based on guesses. Instead, it is in the owner's interests to agree to bear the financial risk when such problems inevitably arise.

Although the owner warrants the constructability of the plans and specifications to the contractor, it is not common for the designer to warrant to the owner that the same plans and specifications are "perfect". Rather, the designer represents to the owner that the design and documentation were prepared with a degree of care and skill exercised by the architectural <sup>4</sup> *Midwest Dredging v. McAninch*, 424 N.W. 2d 216 (Iowa 1988). OR engineering profession at large.<sup>5</sup> If the designer makes a design error that results in the owner having to pay more for the project, the designer will be liable to the owner only if the error occurred because the designer failed to perform in accordance with the standard of care and skill applicable to the profession at large.<sup>6</sup>

Thus, due to the unique nature of each design, there are likely to be design errors or omissions that occur even though the designer performed in accordance with the requisite degree of care and skill. In those instances, the owner must compensate the contractor for any additional costs that may result, usually through a change order to the contract. However, the designer will usually not be liable to the owner unless the error is due to professional negligence. As stated in one nationally-known treatise on construction law: "[Thus] it is possible for an owner to be held liable to a contractor for breach of its implied warranty of design adequacy even though the owner may have no recourse against the design professional for design negligence."<sup>7</sup>

For this reason, the design professional will usually recommend that the owner set aside a percent of the estimated construction cost as an "owner's contingency" – a reserve allowance to cover other unexpected costs such as hidden conditions and

owner's preferences. Such a contingency remains wholly under the owner's control as to when and if it is used to cover such expenses.

This does not mean, of course, that the contractor can ignore obvious design errors.

<sup>5</sup> See e.g., AIA-B141 Standard Form of Agreement Between Owner and Architect, Art. 1.2.3.2 (1997 ed.). <sup>6</sup> *Schiltz v. Cullen-Schiltz & Assocs., Inc.*, 228 N.W.2d 10, 17 (Iowa 1975). <sup>7</sup> Bruner & O'Connor on Construction Law, Sec. 9.82, p. 670-671, West Group, 2002 (Citing various cases.)

For example, the American Institute of Architects Standard General Conditions requires the contractor to report to the architect any design errors he discovers, although that same provision does not give the contractor the responsibility to discover such errors.<sup>8</sup>

In the design / bid / build method, the owner delegates the design and construction documentation to the designer and the construction to the contractor. But that does not mean that the owner has no duties. The owner's duties are especially important because of the competitive bidding process required by Iowa law to select the contractor.

During the design and documentation phase, the owner is responsible for providing its requirements to the designer and for providing timely responses to the designer's submissions. Similarly, during the construction phase, the owner's duties executed by its agent, the designer, include timely responses to the contractor's submittals, requests for information, and proposed changes and claims. In addition, the owner is ultimately responsible for interpreting the requirements of the contract, the drawings and specifications, usually relying on the expertise of the designer. But some of the owner's most important duties are in the bidding phase. Although the designer may advise the owner about the bids received, only the owner can accept a bid and select a contractor.

The bidding documents tell contractors how the owner will select the contractor. The owner will award a contract to the responsive, responsible contractor that submits the lowest lump sum price to complete the work in accordance with the construction documents. In public contracts the owner chooses the contractor by applying those criteria in order to comply with the Iowa statutes, regulations and the terms of the bidding documents. In addition to meeting the legal criteria, the owner should abide by the ethical procedures established by the industry.