GOLDSTEIN LAW, PC

DO YOU REALLY HAVE A CONTRACT?

By Steven R. Goldstein, Esq.

Despite the best drafted agreements, if the very existence of the document is called into question, such an agreement may ultimately prove useless. Specifically, in many instances an owner or contractor with whom a design professional claims it had a valid, binding contract will claim that no such agreement ever existed and as such, the terms and conditions of the purported agreement cannot be enforced against them.

Contractors and owners often claim that they never received a written contract for signature or that they never signed an agreement with the design professional. Rather, they contend that while an agreement did exist between the parties it was oral, and not in writing. Not surprisingly, all of the provisions that protect the design professional including, among others, limitation of liability, waiver of consequential damages, copyright protection and indemnification are claimed not to be part of this oral agreement. Notably, while the New York Statute of Frauds provides that certain agreements must be in writing to be enforceable, including those which by their terms cannot be performed within one year, the courts have ruled under certain circumstances that where a party cannot prove the existence of a written agreement, an oral agreement may be deemed enforceable. Therefore, in order to help avoid such a dispute and protect the interests of the design professional, it is recommended that the following steps be taken to establish the existence of a written agreement between the parties:

(1) Make certain that all parties with authority sign and date the agreement;

(2) Provide written correspondence to the parties, by either a letter sent certified mail, return receipt requested, or an e-mail that denotes receipt by the recipient, enclosing a copy of the agreement and confirming that the document has been executed by all parties and copies have been provided to all parties; and

(3) When a change in scope of services to be performed by the design professional occurs at the project, obtain an amended agreement that is also signed and dated by all parties and confirm the existence of that agreement with a follow-up writing sent by certified mail, return receipt requested or e-mail denoting receipt.

Too often a claim is made that a party never entered into a written agreement, never signed a written agreement, or that a signature on the agreement was not that of the party or their authorized representative. Therefore, not only is it essential that the document be signed but there also must be objective confirmation that all parties executed the agreement and received copies of the agreement. While following these steps is not a guarantee that a party will not ultimately refute the existence of such an agreement, it certainly makes it more difficult to do so when there is written confirmation of the existence of the agreement with no follow-up opposition in writing from that party.

Although all parties, including the design professional, are often anxious to commence a project, it is essential that each party first be in receipt of a fully executed and dated agreement setting forth the specific terms and conditions of the design professional's retention as well as all other protective language. Having the agreement in place, and uncontested, often helps resolve disputes without litigation and, if litigation occurs, provides the design professional with strong defenses regarding, among other things, liability exposure and damages.

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