

Working for the Architect

by Quenda Behler Story

On your next project, the architect wants to contract directly with you instead of having you contract with the property owner. Consequently, you would actually be functioning as a subcontractor, while the architect performs the functions of a general contractor. Can this be a good deal?

It certainly is for the architect/GC, who no longer needs to race around looking for trade subs. That remains a part of your job. Nor does the architect have to worry about workers compensation or job-site liability problems, which also remain part of your job. If you read the contract you're offered, you'll find that even though technically you're a subcontractor on this job, the architect will not be assuming one little bit of your liability for accidents, injuries, or negligence. So don't lose those insurance agency phone numbers.

And there's the compensation issue: The architect gets an extra "construction fee" for his role as GC, usually about 5%, and it usually comes out of *your* overhead costs.

Pros and Cons

Are there any advantages for you, the general contractor? Well, sure. For one, you don't have to go out and hunt for the job because the architect brings it directly to you. The architect's 5% fee is in exchange for your sales and estimating costs, helping to keep your overhead down. It's ready-made work, and it's especially helpful if you're a natural carpenter, not a natural salesman. But there are always some pitfalls for you as well.

Third party beneficiary. Let's imagine a worst case scenario: The architect goes belly up and can't pay you. Does this let you off the contractual hook? Probably not, since most of these agreements name the property owner as a third party beneficiary to the con-

tract. "Third party beneficiary" is a legal term for somebody who has the right to enforce a contract to which they are not a party. (Most likely, the property owner has that right anyway, even if the contract did not specifically use the phrase.)

So you have to finish the job without the architect, not a problem. Unless the architect went belly up *after* the property owner paid him but *before* he paid you.

In some states, when the property owner pays the GC and the general contractor doesn't pay the subs, that payment to the architect/GC discharges the property owner's obligation to pay. This may mean that you might have to finish the job without being able to force the property owner to pay you. It depends on your state law about the rights of subcontractors, which is what you are in this situation. You can still chase the architect for the money, but you can't chase the property owner for it. Good luck, and don't forget that the architect may have a bond to go after. However, in some other states, your lien rights may protect you.

Keeping your lien rights. In some states there are specific procedures you can follow to preserve your right to a construction lien against the property, even if the property owner did pay the disappearing architect. If you are working as a sub, you should call your attorney and find out what those procedures are and exactly when you need to do those things. Timing in these cases is very important.

Ordinarily, I would suggest just going to the government agency responsible for recording property deeds and asking what the construction lien procedures are. But if you're working with an architect, you're probably working with the AIA standard contract form. If that's the

case, you should call your lawyer to wade through the maze.

Other risks for the unwary. That AIA contract will transfer other risks to you. The architect's contract typically puts the responsibility for all construction risks on you even if you're not the GC in this situation. If a flood washes the project away, or if the framing collapses because someone forgot to nail the support, it's your problem. That's not really unfair, because that's what would usually happen if you were the general contractor. And it's another reason why those insurance agency phone numbers are so important.

But who is responsible for design errors in this case? I'm not talking about the kind of design error only a professional architect would recognize. I'm talking about the kind of situation where the concrete mixture that the architect ordered is incorrect and the foundation will start to crumble after a few frosts. The architect's problem, right? Wrong. The contractor still has a duty to point out obvious design errors and omissions, and the contractor also has a duty to work with the architect during the design phase to minimize any problems created by these design errors.

Protecting Yourself

If you find yourself in such a situation — with the architect telling you one thing and your experience and observation telling you something else — but you don't want to walk off the job and risk breaching the contract, what do you do?

To protect yourself, put your concerns in writing and then go ahead and finish your contractual obligations. Don't worry about including magic legal words in your letter. It's okay to use your own words, but you must make your point clearly. In the con-

crete example, you would want to state that your experience has been that, to make a good foundation, you need a different mix than what's required in this contract. Make sure both the architect and the property owner get a copy of your letter, and try to get them to sign off on it. If they won't, send it by registered mail.

I'm not trying to wave you off from contracting directly with an architect. Frequently these arrangements can work out quite well, and all parties benefit from the rather unique nature of this relationship. But you can have problems on any job, and just because you are dealing with a professional does not mean that you can accept their

word on everything. Be diligent and voice your concerns when they arise, so you aren't left holding the bag. 

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