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RISK MANAGEMENT PARTNERS FOR THE DESIGN AND BUILD INDUSTRY

Specifying Materials

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

Like most design firms, you will often find it necessary or advisable to specify materials to be used to properly execute your design. In some cases, these specifications may be general in nature, recommending a particular type of material or technology. In other cases you may call for a specific brand name or product model. Regardless, each time you specify a particular material, you are accepting an additional liability. You are accepting responsibility that the specified material will perform its intended function in an acceptable manner and that it will not harm the health or welfare of those who work on or occupy the facility.

The liability related to specifying materials is long term and can jump up and bite you years after project completion. What's more, it's a liability that can put you in a precarious position even if you followed the prevailing standard of care when specifying a material.

Lessons from the Past

Some products that were widely used in the construction industry a few decades ago – lead-based paints and asbestos, for example – were eventually determined to be hazardous. Like everyone else, architects and engineers were unaware of any serious risk and commonly specified these materials for their projects. And who knows which of today's new and untested synthetic products might eventually be found to be harmful to health — or simply fail to live up to the client's expectations?

After products are ultimately deemed hazardous or ineffective, claimants and their attorneys will try to hold consultants responsible for damages or injuries caused by these materials, even though they were considered safe, effective and standards of the industry at the time they were used. Such claims are tantamount to insisting that you predict the future, and they make you think twice before specifying new products in your search for more efficient and effective materials.

A Recent Court Case

When specifying materials, you cannot simply rely upon word-of-mouth recommendations or manufacturer claims of quality and effectiveness. The prevailing standard of care calls for you to have personal experience or knowledge that a recommended material will perform its intended function successfully under prevailing conditions. A 1998 court case demonstrates how relying on second-hand information can prove expensive.

An architect was hired by a school district for a renovation project. Part of the project called for the architect to replace windows with insulation panels to help improve the school's energy efficiency. The architect specified a particular brand of insulation panel and the project was completed. Within two years, the panels began to warp, bow and deteriorate, allowing water and cold air to penetrate the building, resulting in \$300,000 in damages.

In an appellate court ruling, the architect was found liable for specifying the unproven type of insulation panel. During the trial, the plaintiff presented the testimony of a licensed engineer who stated that the panels were inappropriate because of their "dimensional instability" when exposed to the extreme weather conditions of upstate New York. The expert witness also testified that the architect deviated from the applicable standard of care by relying almost exclusively on the manufacturer's product literature.

Affirming an earlier court finding, the court of appeals found that the panels were indeed defective and the architect was held liable for failing to meet the prevailing standard of care. The court noted that the architect did not have personal experience with the product, nor had it conducted or requested laboratory tests to prove the new product's effectiveness. (*Brushston-Moira School District v. Fred H. Thomas Associates*, 692 N.Y.S. 2d 551.)

Yet Another Dilemma

Another scenario presents a difficult dilemma. Suppose your client suggests or even insists that you specify a product you feel may not be safe or reliable. Perhaps it's a product that while allowable

under current building codes, has yet to undergo the test of time for this specific application. If you agree to specify a client-recommended product that later proves to be flawed or dangerous, you can be liable for damages.

Avoiding Liabilities

Fortunately, there are measures you can take to help avoid specification-related claims. First, make it standard practice to specify products and technologies that are time-tested and proven in a particular application. Ask yourself: What would other reasonable design professionals do in these circumstances? That sets the basis for the "standard of care." You might also ask yourself: In a deposition or on the witness stand, how would I justify my decision to specify this particular product or material?

If you decide to specify a new or unproven material, or if your client asks you to specify a product with which you are unfamiliar, do your research. Your goal is to be able to demonstrate that you made a reasonable, professional effort to explore the suitability and reliability of the product. For instance:

- Collect brochures, product specification sheets, test results, warranties and guarantees from the manufacturer and keep them for your records.
- Read all directions and label warnings carefully.
- Look for collaborating evidence to support the manufacturer's claims, such as test results of an independent laboratory.
- Document your conversations with the suppliers and your client regarding the product and its application in the specific circumstances, including any reservations you might have.
- Require the manufacturers, suppliers and installers to give assurances that the product is suitable for the intended application.
- Consider having your own controlled tests conducted, or ask the manufacturer to demonstrate the product's suitability for your application.

Don't hesitate to ask manufacturers' field representatives to be present during installation to

ensure that the product is installed properly and according to manufacturers' specifications. If feasible, ask the field rep to test the product under appropriate conditions.

If your client insists that you specify a product with which you have a question of suitability, quality, durability or ease of maintenance, put your objections in writing. If the client overrules you, protect yourself by having this confirmed in writing. Ask for an indemnity.

If the item in question involves health or safety issues, however, that is another matter altogether. If you cannot convince your client to change the specifications because of the risks, you must look to the termination provisions of your contract rather than endanger anyone's life or health.

Seek Contractual Protection

Address specification issues in your contract agreement with a provision that spells out and limits your responsibility. Here's a sample clause, courtesy of insurer DPIC Companies:

Specification of Materials

The Client understands and agrees that products or building materials that are permissible under current building codes and ordinances may, at some future date, be banned or limited in use in the construction industry because of presently unknown hazardous and/or defective characteristics. The Client agrees that if any such product or material specified for this Project by the Consultant shall, at any future date be suspected or discovered to be defective or a health or safety hazard, then the Client shall waive all claims as a result thereof against the Consultant.

The Client further agrees that if the client directs the Consultant to specify any product or material after the Consultant has informed the Client that such product or material may not be suitable or may embody characteristics that are suspected of causing or may cause the product or material to be considered a hazardous substance in the future, the Client waives all claims as a result thereof against the Consultant and the Client

agrees, to the fullest extent permitted by law, to indemnify and hold harmless the Consultant from any damages, liabilities or costs including reasonable attorneys' fees and defense costs, arising in any way from the specification or use of any products or materials which, at any future date, become known or suspected health and safety hazards.

While you would ideally want this clause in all of your contracts, some clients may balk at including such blanket language. In such cases, you could forego such a clause in the original contract and add it as an addendum in the event of a questionable product specification by the client or another party. Regardless, make sure you coordinate any such provisions with your Code Compliance clause, as well as any provision you have concerning toxic substances.

Substitutions for Specified Materials

You put your reputation and your finances on the line every time you specify materials. But what if a contractor, subcontractor or other party to the construction project suggests a substitution for your original recommendation?

Much has been written regarding the dangers of accepting substitutions. On the one hand, you do not want a job negatively impacted or your own costs or liabilities significantly increased accepting and processing inappropriate or numerous substitution requests. On the other hand, you do not want to discourage innovation or eliminate competition. How can your costs and exposures to claims be minimized?

Here are some tips for minimizing and, when necessary, handling requests for substitutions for your specified materials:

- Develop specifications that clearly define performance characteristics and other project requirements.
- Regularly review and update your list of standard specifications. Make sure that your specified materials are reasonably available and are indeed still being manufactured.

- Include as part of the specification a “Substitute Request Form” that must accompany any proposed substitution. This form should set forth the criteria that will be used in reviewing the acceptability of a substitution.
- Include in your contract steps that must be taken to request substitutions. Spell out the approval process. Also specify in the contract that the design professional has the right to back charge the contractor for services related to the review of proposed substitutions.
- Be responsive to any requests received. Should a dispute arise, courts do not look kindly upon designers who fail to respond to or arbitrarily reject reasonable requests for substitutions.
- Address the issues of specifications and substitutions in a pre-construction review of the construction documents. Include all design professionals, owners, contractors and major subcontractors. This will help identify those specified materials that may cause concerns among one or more parties. Calls for substitutions can then be addressed before construction begins.
- Do not allow shop drawings to become quasi-substitution forms. Such attempted uses of shop drawings should be rejected and returned as not in compliance with the contract.

While contractual protection is a recommended safeguard for shielding yourself from liability for specifying materials that later prove ineffective or dangerous, the best protection is taking every reasonable step possible to make sure the products you specify or substitutions you accept will perform their intended function in a safe and effective manner. There is no substitute for experience, research and common sense when specifying materials.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We’re a member of the Professional Liability Agents Network (PLAN). We’re here to help.