

# STRUCTURAL BUILDING COMPONENTS MAGAZINE

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## Risk Management & Insurance Part 1: Component Manufacturing Responsibilities by Kent Pagel (Based on his BCMC 2002 presentation)

At BCMC 2002 in Columbus, OH, I presented two sessions on Risk Management and Insurance to an audience of primarily component manufacturers (CMs), architects and engineers. In my first session, "Component Manufacturer Responsibilities," I focused on the fine details that CMs tend to overlook when negotiating contracts, consenting to insurance requests and other business decisions that precede the design and production work. There is an inherent danger when we skip over these fine points and ignore what many believe is unimportant language. In this session, I attempted to help CMs to take the guesswork out of legalese and confusing insurance terms.

### TEST YOUR SKILLS

I opened the session with a set of questions designed to test the risk management awareness of those in attendance. I used these questions as a basis for the session's content. Knowing the appropriate response to these questions and having a keen sense for certain contract language may help you hold up the "red flag" when necessary.

### UNDERSTAND THE DIRECT & INDIRECT COSTS OF LITIGATION

Here are a few things to keep in mind with regard to the effects of pending litigation: The lawsuit may be covered by your insurance, but you may still incur legal fees and losses in productivity. If the lawsuit is not covered by insurance, the out-of-pocket costs for defending a claim can be astronomical. Lastly, your insurance company often requires a report of your company's claim history! Sloppiness today could mean a significant impact on your insurability in the future. Considering the impact these issues could have on your company is tremendous incentive to take contracts very seriously.

### DO YOU KNOW HOW TO ANSWER THE FOLLOWING QUESTIONS?

Test yourself:

- 1. When my customer tells me he accepts my bid, I should:
  - a. proceed with design work
  - b. proceed with design and fabrication
  - c. proceed with design, fabrication and delivery
  - d. proceed with contract negotiations
- 2. What is likely to have the highest priority in the event that there is a dispute?
  - a. unexecuted bid form
  - b. customer contract form
  - c. strikethroughs in customer contract form
  - d. an addendum prepared by the Truss Manufacturer and signed by the customer.
- 3. True or False: Specifications that are referenced in the customer contract form are not binding unless provided.
- 4. A proposed customer contract form contains the following insurance and indemnity requirements—with what can I comply?
  - a. liability limits of \$2.0 million
  - b. waiver of subrogation
  - c. additional insured endorsement: 20-10-11-85
  - d. broad-form indemnity
  - e. E & O Insurance
  - f. performance & payment bonds

## **SUCCESSFULLY NEGOTIATE A CUSTOMER CONTRACT**

**Question #1: Answer: d, proceed with contract negotiations.**

Here's why it is important to have a written customer contract before proceeding with design, fabrication and delivery of a job. The contract will be the only point of reference for the legal team in the event of a lawsuit or claim against you. Without it, your legal relationship is undefined or loosely defined and is fertile soil for misunderstandings. Another potential disaster that you'll avoid by insisting on an agreed upon customer contract is the "acceptance by performance" provision. "Acceptance by performance," if that clause exists in the builder's contract, is intended by the builder to serve as your acceptance of the contract once you take action on a specific job, even if your signature is not on the contract.

How can you avoid the potential for disputes and claims against you? One simple solution is to develop a bid or proposal form and use it to define your terms and conditions. Included on the form could be payment or discount terms, credit conditions, how sales and use taxes are addressed, dates through which prices and deliveries are guaranteed, and the specific products and services to be included in the job. Most importantly, this proposal form should define your company's standard sale terms and conditions, but it can also spell out the services that you aren't going to provide. Strong consideration should be given to attaching to it ANSI/TPI/WTCA 4-2002, which defines your scope of work (consider highlighting the specific component manufacturer sections).

**Question #2: Answer: d, an addendum prepared by the Truss Manufacturer and signed by the customer.**

If your builder customer will not sign your bid or proposal form, obtain a copy of the customer contract form they choose to use and review it very carefully. You should take the time to review each word and make notes about sections of the contract that you cannot agree to. When reviewing the text, keep in mind that you cannot trust your customer to treat you fairly in the event of a lawsuit. Accept the fact that you and other company representatives are the only people who will look out for the company's best interest. Take every opportunity to discuss and outline concerns or objections you find in the customer contract. Most importantly, as the builder's customer contract form will certainly contain paragraphs or provisions that you do not find acceptable, you should consider preparing an addendum setting forth more acceptable terms and conditions. In the event of a dispute, a court or arbitrator will give strong consideration to a well written addendum.

## **SCOPE OF WORK PROVISIONS**

**Question #3: Answer: False.**

As a truss manufacturer, it is absolutely your responsibility to obtain the particular specifications that are referenced in the contract. These specs could very well conflict with your scope of work. It is up to you to determine what, if any, those conflicts are. Specifications to be researched include installation, bracing, inspection, lumber grades and deflection criteria for

roof and floor trusses. Do not think for a moment that if specifications are incorporated into your customer contract that you can choose to ignore along the lines of “no one will expect me to do that!” WTCA has a number of resources at your disposal that will be helpful in creating this scope of work statement. As mentioned above, strongly consider incorporating the new ANSI/TPI/WTCA 4-2002, which clarifies the design responsibilities of a component manufacturer when using wood trusses, to your proposal form. At the very least, thoroughly review and understand it and why it was written in the way that it was.

## DEAL KILLERS

Most people do not welcome “deal killers,” but the name says it all: you need to decide whether any of the following—indemnity and insurance requirements, pay-if-paid provisions, inspection requirements, waiver of liens, and mold guarantees—will prevent you from accepting a particular customer contract. If you are not willing to comply with one of these requirements and if you cannot negotiate these terms, you need to decide whether or not to kill the deal.

## INDEMNITY & INSURANCE PROVISIONS

**Question #4: Answer: When it comes to insurance and indemnity requirements listed in your contract, you should be prepared to respond to the items that you can and will truly comply with and carefully consider the requirements that you cannot or should not comply with.**

Indemnity provisions are the builders' way of passing the risk of the builder and others onto truss manufacturers. Indemnity clauses can be very tricky, as it typically means that you are being asked to accept responsibility and pay claims that resulted from someone else's mistakes, errors or failure. For instance, imagine a situation in which there was a jobsite injury due to a truss fall, in which you designed, manufactured and delivered the trusses. The injury resulted in suing the builder. If you had signed an indemnity clause, you could be held accountable for the accident, even though the collapse did not result from a design or manufacture failure. When an indemnity provision is included in a contract, my suggestion is to identify it, delete it if at all possible or tweak the language with the assistance of your lawyer or insurance agent.

Some builders may request that you provide broad additional insured endorsements such as ISO No. 20-10-11-85 or 20-26-11-85. These endorsements were designed for subcontractors and not suppliers. Builders, however, continue to request such endorsements as they provide the builder with broad insurance coverage in construction defect litigation. Discuss an alternative to this additional insured endorsement with your lawyer or insurance agent.

Question #4 also introduces two issues component manufacturers need to understand when reviewing insurance requirement provisions in customer contracts. First, generally speaking, it is not appropriate for builders to require component manufacturers to provide either payment or performance bonds. Second, most component manufacturers do not carry “E & O” or errors and omissions insurance. Thus, exceptions need to be made in those contracts where either are required.

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