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Our Legal Reality

Monitoring Specifications to Manage Risk by Kent J. Pagel

Kent Pagel explains why is it so important to review project specifications and how should you address existing specifications in your bid and ultimately in the customer contract.

An astute contract manager working for a component manufacturer recently asked my opinion on what he viewed as a one-sided and unfair scope of work requirement set forth in a customer's proposed purchase order. For a project being built in North Carolina, the contractor customer had specifically referenced the project specifications in the purchase order. As the specifications were not attached to the purchase order, the contract manager requested to see a copy. In his review of the specifications, he discovered the following provision:

> [Component Manufacturer] shall have an engineer verify installation of roof trusses per approved engineering plans on each building. A sealed letter from [Component Manufacturer] shall be provided prior to payment.

This requirement was very similar to a specification section I recently reviewed for a project being built in Georgia:

> Upon notification by Contractor, truss manufacturer shall inspect completed installation with all permanent bracing installed and issue a letter of approval by an engineer addressed to Contractor noting approval and/or deficiencies observed.

In both instances, the builder/general contractor customer was intending in his contract with the truss manufacturer for the specifications, including this requirement to verify installation and bracing, to be fully incorporated into the truss manufacturer's contract and thus the truss manufacturer's scope of work. To accomplish this goal, the customers simply incorporated the specifications as a contract document to the purchase order. If either purchase order had been accepted without exception, the component manufacturer would have been expected to essentially certify the installation and bracing, the failing of which would certainly mean no payment and may even lead to a breach of contract claim asserted by the customer. This is even the case had the component manufacturer clearly spelled out his scope of work in his bid, but proceeded to sign the customer's purchase order form.

A request that the truss manufacturer or truss designer inspect truss installation and bracing clearly is outside the scope of work requirements set forth in Chapter 2 of ANSI/TPI 1-2002 (the national truss design standard) and ANSI/TPI/WTCA 4-2002 (the National Standard and

Recommended Guidelines on Responsibilities for Construction Using Metal Plate Connected Wood Trusses). With respect to ANSI/TPI/WTCA 4-2002, the standard specifically states:

> The Truss Manufacturer and Truss Designer shall not be responsible to review or inspect Trusses delivered or to review and inspect Trusses after erection for any problems, including dislodged/missing connectors, cracked, dislodged or broken members, or any other damage that may impair the structural integrity of the Truss.

REVIEWING & ADDRESSING PROJECT SPECIFICATIONS

Why is it so important to review project specifications and how should you address existing specifications in your bid and ultimately in the customer contract?

Manage Customer Expectations. Forget for a moment how awkward it would be for you to point out to a valuable customer the great many mistakes with respect to installation and/or bracing, and imagine on a typical project how thorough your inspection would need to be to make sure you abided by the expectations of your customer.

Can You Hire an Engineer or Architect to Perform the Inspection? If you had agreed to either of the provisions above, you would not be able to perform the inspection yourself, unless of course you have an engineer on staff. This would mean you need to hire an independent engineer to undertake this work. You should not expect that your plate company engineer will agree to undertake this work. Do not be surprised at how much this may cost you. Furthermore, you have liability to your customer for the work of such engineer in the event the service was provided inadequately.

Liability for Inspection Far Exceeds the Liability of an Improper Design and Manufacturing. Through experience and data we know that the majority of accidents involving trusses occur because of mistakes made with regard to installation and bracing, such as the following:

- Inadequate and/or improperly located temporary bracing.
- Inadequate and/or improperly installed bracing connections.
- Inadequate and/or improper connection of trusses to the supporting structure.
- Overloading before permanent bracing and/or sheathing have been installed or after installation is completed.
- Improper field alterations.
- Installation of damaged trusses.
- Improper truss alignment before bracing.

If one agrees to inspect installation and bracing and a failure occurs for any of these reasons, the component manufacturer will most certainly be implicated in some manner. Otherwise, the component manufacturer should most likely be able to extricate itself from litigation involving such a failure assuming customary risk management practices were followed.

Are You Insured for the Risk? If you review the terms of your commercial general liability

policy, and after you ask what all this means, you will be left with a general understanding that you only have coverage for negligence or product defects (design or manufacturing related) that leads to either property damage or bodily injury. On first review, this would suggest that any mistake or negligence relating to an inspection you had undertaken would not be covered. To make this very clear, however, some component manufacturer commercial general liability policies include a specific endorsement making it clear that any claim for injury or damages arising out of a rendering of services, including supervisory or inspection services, are not covered.

Deal Killer? Based on the comments above, many would submit that an inspection requirement as set forth above is a company "deal killer." Our astute contract manager indicated, "We flatly refuse to do it."

Keep an Eye out for Those Specifications! A purchase order, subcontract or material supplier agreement (whatever form is used by your customer) may specify that the trusses and components are to meet standards set in the contract documents that the buyer (your customer) has with either the owner or another contractor. In fact, the purchase order, subcontract or material supplier agreement may specifically or by incorporation by reference, refer to the project specifications. By identifying the project specifications as part of the contract, the buyer is informing the component manufacturer that such specifications must be adhered to. Many areas may be addressed in the specifications that go well beyond the truss manufacturer's standard scope of work including requirements with respect to:

- Installation, bracing and inspection (as I have discussed)
- Lumber grade
- Quality control
- Truss design
- Definition of shop drawings
- Sealed placement plans
- Fasteners, hangers and connectors
- Repair drawings

When faced with a purchase order or customer contract form that incorporates or refers to the specifications, the best option for the component manufacturer is to delete this from the contract. This absolutely should be the case if the component manufacturer has not seen the specifications. Additionally, the component manufacturer should clearly state his complete scope of work on the purchase order or customer contract form even if this is inconsistent with the specifications. As the scope of work should be spelled out clearly in the bid, either the bid can be incorporated by reference or the scope of work language from the bid can be added to the customer contract form before it is agreed to and signed.

It is dangerous for the component manufacturer to sign a contract containing a reference to the specifications without following the suggestions I have set forth. While this may be time-consuming and one is always worried how the customer will react when taking issue with the customer contract or purchase order form, to not do this is careless, risky and ill-advised.

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