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Construction Defects: What Often Goes Wrong And How the Contractor Can Avoid Defects Litigation

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Construction Defects

Webster's Dictionary defines the word defect, as: 1. lack of something necessary for completeness; shortcoming 2. an imperfection; fault; blemish.

To some Plaintiff Attorneys, and their Experts, the word defect has an entirely different meaning. It could mean that the work was performed with less than absolute perfection, with the "Standard" being "Absolute Perfection".

As long as buildings are constructed by human beings, "Absolute Perfection" can not be obtained. Therefore, it is crucial that all of the work be performed in strict accordance with the requirements of the Plans, Specifications, Building Codes, Building Code Standards, Local Ordinances, and the highest degree of Industry Standards possible.

When relative to construction claims, the word defect also equates to financial disaster when it reaches litigation. Litigation is a lengthy process, it is highly costly, and therefore, should be a major consideration during construction, and be avoided if at all possible!

The Statute of Limitations has been extended for filing defects claims, in the State of California. Effective January 1, 1995, anyone whose home has been improved or repaired will have more time after the completion of the project to file a complaint.

Contractors can be held liable for patent defects (defined as defects that are plainly visible or that can be discovered by an inspection made with ordinary care and prudence) for up to four years after completion of the project.

For latent defects, the statute of limitations is now ten years. (A latent defect is one an owner does not know about and would not be expected to discover through the exercise of reasonable care). During 1994, under the former Contractors Licensing Law, the statute of limitations for both patent and latent defects was three years.

Construction defects claims can be minimized, or even eliminated from your life's experiences, by performing due diligence when you are engaged in the process of construction.

Due Diligence

Due Diligence, or Reasonable Diligence is giving attention to the matter at hand. It is the diligence which is required by the circumstances, and the rendering of that which prevents liability for negligence. The term "due diligence" equates to another term, which we all have heard of, and yet many find illusive, and that is the term: "Quality Control".

Quality Control, also known as "Construction Quality Control", or "C.Q.C.", is the process in which the quality of the many products used, and the methods for their use, which comprise the total building project, are scrutinized under a conservative control process, or program.

The process that it takes to construct any building project is an extremely complex process. It is replete with architects, engineers, professional societies and associations, manufacturers and suppliers, building officials, general contractors, specialty contractors, and a virtual army of labor which lends itself to numerous volumes, many years of education, and specialized training.

As with most businesses, construction is an extremely competitive industry. Often referred to as a "dog-eat-dog" way to make a living. The low bidder gets the contract. With the competitive bidding process, the only way for a contractor to be awarded the contract is that he or she must first be designated the low bidder.

In order to be designated the low bidder, it can either mean that the successful bidder has a substantial following of subcontractors and material suppliers that are highly cost effective and are capable of furnishing low quotations for their collective work. Or, it could mean that one or more of them omitted one or more items in their cost breakdown that could equate to a lot of money ... missed. When a low bid is received by a general contractor from their subs and suppliers, it is often wondered by the recipient just what and how much the low bidder left out of his or her bid and whether or not to take the chance of using that low bid. The dilemma is always raised ... "Well, if they bid this number to us, then they surely must have bid it to our competition". And, to make things worse, most of the sub bids are received by telephone only moments before the prime contract bid is to be submitted, and, therefore, the general contractor has precious little or no time available to scrutinize this temptation, otherwise known as the "last minute low bid".

The pursuit of lower costs can become a powerful driving factor, which all too often leads to construction defects, especially during a recession such as the current recession that the construction industry has faced throughout the past five years. These highly competitive elements are forcing contractors into resorting to the widespread practice of using semiskilled, and, most often, unskilled labor to perform skilled labor tasks. These skilled labor tasks in the past have always required extensive training, certification, and years of experience.

In addition to this widespread and growing practice of the utilization of questionably skilled labor, supervision is also waning. All too often, semiskilled and even unskilled crews are left to their own devices to perform their work on the job site without proper supervision or even without any supervision at all.

Before building materials can be used in any building, they are first run through a highly complex, and extensive engineering, testing, and review process. This review process is usually conducted by a vast number of independent testing laboratories and the results are reviewed by many professional committees, such as the American Society for Testing and Materials, (A.S.T.M.) and the International Conference of Building Officials, (I.C.B.O.).

Reports of the testing results and the Professional Societies' findings are published and updated regularly. These reports, often referred to as A.S.T.M. Standards, I.C.B.O. Reports, and Uniform Building Code Standards, state the minimum recommended standards for the use of the materials.

Architects and engineers refer to these "Standards" and specify them in their plans and specifications. Once these specifications are made part of the construction documents for a building project, it is incumbent upon the general contractor, all of the specialty contractors, and all of the materials suppliers to comply with the specifications.

Here's where the problems begin. Assuming that the specified materials are currently available, the contractor may figure that he or she can save money by substituting either materials or manufacturer, thereby creating the possibility of using materials that may be inferior to that which were originally specified, and approved for that project.

Often, there is little or no review process of the materials actually used in the project by the architect or engineer who specified them in the first place.

Another common cause of defects is when materials or products used in the project, the user does not follow the installation instructions or read and understand the I.C.B.O. Report which states the approved method for installation and use of the material.

The most common cause of defects, is the lack of quality control during the pre-construction and construction phases of the work.

In almost all contract formats the term "Per Plans and Specifications" is used extensively. Architects and their Consulting Engineers will almost always go to some length to specify the products they expect to be used, and the methods to be incorporated for their use either on the drawings or in a separate book of specifications.

Often, the specifications will require that the Contractor furnish "Submittals" and "Shop Drawings" to the Architect for his or her review and acceptance.

This is an area of quality control, that very often goes amiss, and may directly lead to defective construction. All too often the Contractor and his or her Subcontractors do not place enough importance in this process, and the submittal is either lacking important information needed or is not complete. Often, the items being submitted on are substitutions of that which was originally specified, on the pretext that the product(s) either are no longer available, or the Subcontractor may not be a "Certified Applicator", or they can simply purchase this substituted product cheaper than the product specified.

The Submittal and Shop Drawing Review Process, whether required by the contract, or not remains an extremely vital function to controlling quality, and avoiding claims. Whether required or not, it is crucial that the Contractor "Get It All On The Record".

It is the duty of the contractor to complete the work covered by his or her contract, in accordance with the approved plans and specifications. The contractor must carefully study the approved plans and specifications and should plan their schedule of operations well ahead of time. If at any time it is discovered that the work which is being done is not in accordance with the approved plans and specifications, the contractor should immediately correct the work.

In order to assure that the work being done is in accordance with the approved plans and specifications, the contractor must provide for and furnish adequate, experienced, competent supervision, and coordination of all of the work he or she is contracted to perform.

Inspection is a crucial function that does not start with the Building Inspector, or the Special Inspector. Inspection must begin with the Superintendent. It is critically important that the Superintendent be thoroughly knowledgeable of each and every trade that he is supervising. This doesn't necessarily mean that he has to be an expert in all trades, but it does mean that the superintendent must be aware of the resources available to him to gather sufficient information to assure that the work is being performed in accordance with the approved plans and specifications, and the manufacturer's recommendations for the use and installation of the material products being used, and that the work is in conformance with the requirements of the Codes.

If you're thinking "Good Grief ... that's a lot of responsibility!" You're right. The job of a construction superintendent is a hell of a lot of responsibility, and must not be taken lightly!

In order for the Contractor to avoid Defects Litigation, he or she must at all times be vigilant with a well focused eye on, and maintain the following:

1. Always exercise Due Diligence.
2. Always maintain constant and high levels of "Quality Control" Systems.
3. Always check the contents of all sub bids to comply with not only quantities, but for the compliance with the requirements of the Approved Plans and Specifications, during Competitive Bidding.
4. Always consider the "pitfalls" of using semiskilled or unskilled labor when considering your Cost vs. Profit. Skilled Labor can get the work done right the first time!
5. Always use Building Materials that are as Specified, and in the Manufacturer's Approved manor.
6. Always follow the "Approved" "Plans and Specifications", or obtain "Approval" for each change to the Plans and Specifications.

For the Remodeling Contractor, often he or she is furnishing the "Plans and Specifications. When you are furnishing the Plans and Specifications, either directly or through your Architect, or Designer it is imperative that the Drawings and the Specifications be as complete and concise as is possible. It is crucial that there exists a clear understanding between you and the "Client" of exactly what you are going to furnish and also what is not being furnished by you. Therefore, the single-most important document that you could have to avoid defects litigation, may very well be a good set of Working Drawings.

7. Always follow in great detail, the Submittal Review Process. If there is no official review process in force by the Architect, then incorporate one into your procedures.
8. Always provide constant experienced and knowledgeable Supervision for each project.
9. Always provide constant, and thorough Inspection of the Work. Do not wait for the City Building Inspector to inspect the work, do it first, do it while the work is in progress. The General Contractor is responsible to ensure that all work is performed in accordance with all of the requirements of the Approved Plans, Specifications, Contract(s), Codes, Ordinances, Building Code Standards, and minimum Industry Standards.

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