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Who's that Kid Holding the Wrench? *How to Resolve Defective Work*

by Kevin O'Beirne, PE

One day at the office—that of a sizable engineering firm—about ten years ago, the phone rang. Our client was on the other end and after the usual pleasantries asked, almost curtly, “*Who was the kid at the site spotted today holding a wrench?*”

“Um...” I tried to think quickly. “I honestly don’t know. It couldn’t have been our guy.”

“Yeah, well, if it was, he’d better not do it again!” snapped the client.

When the very-bright young engineer we had assigned to serve as the onsite construction observer returned to our office later that day, I asked, “Did you tighten some bolts or something today at the plant? If so, you were spotted with a wrench in your hand and the client called me about it.”

“Yeah,” he said, visibly annoyed. “I’m guilty as charged. I tried to help on that issue where the contractor dug in his heels about fixing few simple loose nuts and the client’s people refused to do it as well. You know—the one that’s keeping us from starting up the whole new pumping system. All I did was tighten up a half-dozen nuts so we could start up the thing and finish this job!”



He was earnest and understandably a bit irritated at being blown in so fast. All he was trying to do was resolve an impasse that had delayed startup for a couple of weeks. What was the right thing to do in this situation?

The Incorrect Response...and Why

This is a great example of “**No Good Deed Goes Unpunished**”. The correct response is—bizarrely—to not “help out” at all. On the surface, this seems to fly in the face of logic: A young or otherwise inexperienced person representing the design professional or owner at the construction site may be self-conscious about appearing reluctant to “get their hands dirty”, or may be eager to move events to a desired resolution. Normally these are positive personality traits, but in this case they can spell trouble for both the design professional and the project owner.

Presented below are several good reasons why the design professional’s or owner’s representative at the construction site should not get directly involved with (even the slightest) construction activity:

1. **Means and Methods of Construction:** Arguably the most important reason why no one other than the contractor or their subcontractors and suppliers should perform any of the construction work is because the construction contract documents properly confer on the contractor full responsibility for the means, methods, procedures, techniques, and sequences of construction (see: AIA® A201™, *Standard General Conditions of the Contract for Construction* (2007), Section 3.3.1; EJCDC® C-700, *Standard General Conditions of the Construction Contract* (2013), Paragraph 7.01.A; DBIA 535, *Standard Form of General Conditions of Contract between Owner and Design-Builder* (2010), Section 2.7.2). Interfering with this cardinal obligation, no matter how well-



intentioned, blurs the lines of contractual responsibility and could contribute to making resolution of future issues less-clear and more-prone to disagreements between the parties. Interfering in this important contractor's responsibility has the potential for the contractor to allege "tortious interference"¹ in a claim or dispute, which is an allegation that no owner or design professional really wants to have to defend against.

2. **Where does it Stop?** If someone other than the contractor performs some part of the contractor's responsibilities, the contractor may potentially start to rely upon such actions, thus conferring on the "interfering entity", to a certain extent, some obligation to perform for the contractor's benefit. Some courts and arbitration boards have so ruled, under certain circumstances. Now that's blurring the lines of contractual responsibility!
3. **Possible Effect on Warranties:** Warranties are an important source of assurance for the owner that the contractually-required quality of construction will be provided by the contractor. Such warranties include the contract's correction period, the contractor's general warranty and guarantee, general warranties and special warranties of suppliers of materials and equipment, and other types of warranties required by the contract or by laws and regulations. However, when an entity other than the contractor performs any work on the construction, the potential exists for such work, whether performed properly or not, to have an adverse effect on one or more of the applicable warranties. The ultimate consequence can be voiding of one or more warranties that the owner purchased and relied upon. (For a more-detailed discussion of issues related to warranties, see the June 2015 issue of this newsletter.)

¹ Tortious interference is a common law tort allowing a claim for damages against a defendant who wrongfully interferes with the plaintiff's contractual or business relationships.

4. **Health and Safety:** Chances are that the design professional's onsite person and perhaps the owner's personnel are not properly trained in the types of construction required or the use of the necessary tools. When other than the contractor's personnel perform any of the construction, there is significant potential for injury to the person(s) involved and others, particularly when the work is performed improperly. The last thing anyone wants is for someone to be hurt during, or as a result of, the project. Even using the most-ordinary of hand tools, such as a wrench or screwdriver, has associated hazards and can result in injury.



5. **Liability and Insurance Considerations:** Should injury to persons or property result from misuse of tools or improper technique, "what comes next" is often rarely considered in advance. General business liability insurance is carried by the owner, the contractor, the various subcontractors, and the design professional, but when one employee exceeds their responsibilities and authority and contributes to injury to persons or property, which entity's insurance is responsible? That may be for attorneys to resolve, which is never good or easy. Furthermore, the architect's or engineer's professional liability insurance may not cover actions and negligence when the design professional practices outside their professional practice realm—such as tightening loose screws at a construction site.

6. **Labor Relations:** Some people reading this article may want to dismiss this consideration, but it can be important, particularly when matters of trade union jurisdiction are at stake. In the real-life scenario presented at the start of this article, it was an "aggrieved" owner's union-shop employee who complained about our staff engineer holding the wrench. Trade unions—whether in partnership with the owner or contractors—can be protective of their jurisdictions and quick to file grievances. While such matters could appear to be trivial to a design professional, they can cause the owner or contractor significant time and distraction and are an unnecessary complication on a construction project. Therefore, such conflicts are best avoided altogether.



Handling it the Right Way

Instead of literally taking matters into your own hands, the preferred approach is to send to the contractor a written notice of the defect(s) in the work. Most standard-form contracts, such as those by the American Institute of Architects (AIA), Engineers Joint Contract Documents Committee (EJCDC), Design-Build Institute of America (DBIA), and others include provisions that expressly require the contractor to remedy work that is labeled as "defective" (see AIA® A201™ (2007) Sections 4.2.6 and 13.5; EJCDC® C-700 (2013) Paragraph 14.03; and DBIA 535 (2010) Sections 2.10 and 3.1.3). Such notices are to be formal and in writing and should comply with the notice-delivery requirements of the contract; see AIA®



A201™ (2007) Section 13.3, EJCDC® C-700 (2013) Paragraph 18.01, and DBAI 535 (2010) Section 13.8.

For reduced potential for misunderstanding of what constitutes a “notice of defective work”, such notices should optimally include at the top—just below the transmitting entity’s letterhead—words indicating a transmission method complying with the General Conditions’ notice provisions; for example, “TRANSMITTED VIA U.S. CERTIFIED MAIL/RETURN RECEIPT REQUESTED, AND VIA E-MAIL”, or other appropriate wording. The notice-letter’s subject line should indicate the project name and contract designation and include words such as, “Notice of Defective Work”. The body of the notice-letter should include wording such as, “This letter constitutes notice of defective Work in accordance with Section [Paragraph] [___] of the General Conditions,” or similar wording that clearly communicates the intent of the notice. The overall text of the notice-letter should be clear, succinct, and include appropriate references to the associated, specific provisions of the contract documents.

While many standard-form contracts confer on the owner the right to perform work at the site and to correct defective work, such rights usually arise only after the owner has given the contractor proper, written notice of the defective work and a reasonable cure-period (e.g., time allowed for the contractor to perform the remedy) has elapsed.



The owner’s hammer to encourage the contractor to remedy the defect(s) in the work, other than the express obligations of the contract documents, is that defective work is ineligible for payment. Even if funds for the work in question have already been disbursed in a prior progress payment, most standard-form contracts allow the owner to withhold payment for defective work even if the amount has already been previously paid. Design professionals need to understand and properly exercise their responsibilities in this regard by recommending (EJCDC) or certifying (AIA) reductions in the amounts of

progress payments due the contractor when there is work known to be defective. This is an very-important obligation of the design professional.

Conclusions

When work is defective and it appears that the contractor is dragging their feet in implementing the remedy, the owner and design professional need to keep their cool, avoid the temptation to “take matters into their own hands” in the field, and to properly and clearly exercise the owner’s and design professional’s rights and obligations in accordance with the contract. When all entities involved in the project recognize and adhere to their contractual responsibilities, resolution of matters such as defects in the work are easier and ultimately fully resolved with greater alacrity.



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