

## ATTORNEYS CAN ADD VALUE TO A CONSTRUCTION PROJECT

By R. Carson Fisk (as seen in *Texas Construction* August 2008)

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In the construction industry, contractors often seek the advice of an attorney after a dispute has arisen because they do not see the value in retaining an attorney to assist in the review or drafting of contract documents.

Perhaps this is due to the belief that an attorney is only for dispute resolution, expense or the inability to locate a quality attorney at an earlier time. Regardless of the reason, the impact of a dispute on a project may be lessened – or disputes may be entirely avoided – by having an attorney review contract documents.

Whether a commercial contractor's work contains a common law implied warranty is debatable. Depending on the work performed, statutory implied warranties may affect the potential liability of a contractor. For example, claims related to the design, supply and installation of a power supply system have been held to be claims governed by the Uniform Commercial Code – a code typically applied only to the sale of goods and not services. A contractor was sued as a result of the alleged failure of the contractor's materials, which were used to construct the electrical system.

The Uniform Commercial Code places two warranties on goods: 1) an implied warranty of merchantability, and 2) an implied warranty of fitness for a particular purpose. Although these implied warranties may be disclaimed, such disclaimers must meet certain requirements in order to be effective. For example, such disclaimers must generally be conspicuous. To satisfy the conspicuousness requirement there must be something on the face of the contract that would attract the attention of a reasonable person. Language is conspicuous if it appears in larger type, contrasting colors or otherwise calls attention to itself. By failing to recognize the applicability of these implied warranties or to properly draft a disclaimer, a contractor is potentially subjected to increased liability.

Most contractors probably are familiar with contract provisions that waive claims for consequential damages. Through these provisions, owners often waive claims for loss of use, lost profits, diminution in value, and lost rents. Contractors often waive claims for home office overhead, lost profits, loss of bonding capacity, and loss of reputation.

Under certain circumstances, a contractor may be sued by an owner for alleged violations of the Deceptive Trade Practices – Consumer Protection Act. This act generally requires that any limitation of liability, such as limitations on the types of damages that are recoverable, must meet certain conditions if it is to be considered valid and enforceable. One of these requirements is that the party waiving its rights be represented by an independent attorney.

Perhaps one of the most forceful contractual provisions is an indemnity provision, in which a party may seek to shift the risk of its future negligence to another. The provision may seek indemnity whether such indemnity is for damages caused solely by the party or caused by the party acting concurrently with the other party. In both instances, Texas imposes fair notice requirements before enforcing such provisions. These consist of the express negligence doctrine and a conspicuousness requirement. Under the former, intent to indemnify one of the parties from the consequences of its own negligence has to be specifically stated. The conspicuousness requirement is the same as previously mentioned. If an indemnity provision fails to satisfy either of the fair notice requirements, the provision is generally unenforceable.

These are only a few examples where the an attorney might help a contractor understand the risks it is assuming and potentially avoid critical clauses rendered unenforceable. Although widely used, contractors should be wary of relying solely on standard forms. For example, the general conditions in the AIA Document A201-1997 contain indemnity provisions that have been held to be unenforceable under Texas law. While standard forms are easy to find and use, they are often not tailored to the contractor's specific needs, contain superfluous terms and may be unenforceable in certain instances. The same dangers exist by merely "cutting and pasting" terms found in the contracts of other parties or through computer generated form programs.

By reviewing or drafting contract documents, an attorney can provide advice concerning the risks it is assuming and suggestions for modifications to the contract.