Flat Roof Liability

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When a roof leaks, the GC is often held liable. A good contract can limit his liability and help him recover damages from others.

In roofing lawsuits, liability may lie with any or all of the parties bound by the contract. With careful structuring of his contract, a general contractor who hires a roofing sub can limit his own liability or at least leave the door open for recovering damages should the roofer perform negligently or the products fail.

It's not likely that the GC will be able to protect himself entirely from being sued. In fact, even in cases where an owner sues a roofing sub directly, the owner may decide to name the GC as well, especially when the GC has "deep pockets"—the ability to pay greater damages. Therefore, neither the GC nor his roofing subcontractor is likely to stand alone in a roofing-related lawsuit. In a lawsuit based on roofing defects, any of the following factors — and others — can contribute to a GC's exposure:

- The GC's role as a "designer," even if only through suggesting changes to an architect.
- The GC's willingness to present to his sub any plans or specifications that he knows are defective.
- The GC's failure to monitor his roofer's performance or to properly document the process.
- The GC's acceptance of the roofing work as complete, without a proper inspection.
- The GC's failure to deliver materials on time, meet schedules, or supply correct materials.
- The GC's inclusion of clauses that seek to require the sub to assume the GC's liability for his own negligence.

The prospects for suits arising from roofing jobs are not to be taken lightly. In a study by the National Roofing Contractors Association, half of the 7,837 roofing projects reported in all areas of the United States from 1983 to 1988 were described as "problem jobs."

Suits may arise from defective materials or a GC's negligence or "non-workmanlike" performance. Often these result in such roof problems as blistering, splitting, ridging, slippage, or delamination in built-up roofs; or wind-related damage, lap defects, flashing defects, or puncture-tear damage in single-ply roofs. Potential sources of liability include improper storage or preparation of materials (such as overheating of asphalt), moisture entrapment during construction, inadequate application of materials, damage to the roof or building during construction, inadequate detail work, and improper use of tools or equipment.

Duties of Roofer

Unless the contract specifies otherwise, a roofing contractor's obligation ends when he successfully completes his work in accordance with the contract. References in the contract to plans or specifications will likely make them part of the contract, so the roofer should be aware of them before he signs the contract.

Roofing contractors do not normally claim to have the same design expertise as an architect or engineer. Therefore, their legal duty is merely to follow plans supplied by the general contractor, owner, architect, or engineer.

When plans or specifications are defective, several parties may be held liable. In general, however, a roofer is not liable unless he has warranted the plans and specifications to be sufficient or has acted negligently by following plans or specifications that are obviously defective. In plans and specs that are defective, liability generally lies with the architect or designer. Only when the roofer alters or proposes changes to the plans will he generally share liability.

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A GC who makes similar recommendations to an architect may likewise accept a designer's liability. To avoid creating a warranty and becoming liable for any defects in a roof system, a contractor who recommends changes should make it clear that he: (a) is not an architect or engineer; (b) is only offering recommendations based upon experience; and (c) is not guaranteeing that the proposal will provide satisfactory performance.

In practice, however, owners often find it simpler to sue the general contractor and not the roofing sub. Often, they will sue the architect as well. In cases where the owner doesn't sue the architect, the general contractor may decide to recover his share of liability. Even then, the architect may argue that his responsibility is to the owner, not the GC. The GC also may seek to recover damages from the roofing sub.

A roofer walks a legal tightrope where the plans or specs contain questionable provisions. When the plans and specs are so obviously dangerous or defective that no reasonable roofer would follow them, the roofer must bring them to the attention of the owner, general contractor, or architect to escape liability.

It may be to the GC's advantage to add to his contract that the roofer is obligated to review plans and specs, and that he point out obvious defects. But, in general, the GC cannot require a sub to assume responsibility for the GC's own negligence.

Quality of Workmanship

A GC may find it easier to pursue a claim regarding workmanship if he includes an express warranty in the roofer's contract, but such a warranty may raise the price of the job. A GC benefits if the roofer agrees to start his warranty at the completion of the entire project, rather than at the completion of the roofer's work.

Even without an express warranty, a roofing sub is subject to an implied warranty: In following the plans and specs provided, he has an obligation to perform in a "reasonably good and workmanlike manner." Even when a manufacturer of roofing materials guarantees a roofer's workmanship, at least one court has stated that the roofer is not relieved of this obligation.

When a manufacturer warrants a roofer's work, a manufacturer's representative will examine the roof and issue a warranty decision. If an owner sues the GC, the GC could in turn seek to have the roofer contribute to those losses. When there is such a warranty, the roofing sub could then seek damages from the manufacturer.

A roofing sub may also have an obligation to avoid negligence that would adversely affect the owner. This may apply when an owner contracts with a general contractor, and the GC contracts with the roofer. In such a case, if the owner were to sue the general contractor for negligence, the GC could seek contribution from the roofing sub for his share of the damages.

Completion of Contract

Often, disputes arise over whether the contract has been completed. Basically, "substantial performance" of a roofing contract occurs when the owner receives the roof he essentially contracted for. Mere imperfections or omissions of detail that do not significantly deviate from the original plans or requirements do not defeat a claim of substantial performance.

Even when a roofing subcontractor does not perform his entire contract, in some cases he may be entitled to payment for work performed. For example, if the owner orders the general contractor to stop construction, the roofing subcontractor may be entitled to recover a prorated amount from the GC. This would also apply where a building is destroyed before completion.

Acceptance May Waive Claims on Defects

Courts in several states have agreed that a GC who accepts work that he knows has not been done according to the contract, or where such knowledge can be assumed, has waived his right to seek damages later. A GC may seek damages, however, for "latent" defects —those that cannot be discovered by observation or inspection made with ordinary care. For instance, a GC may see that asphalt is applied correctly, but he may not be able to tell that the chemical makeup is defective. Such a defect is latent.

As for owners, most courts agree that mere payment for, or occupancy of, a building does not prevent a claim of defects. Rather, a GC or roofer must prove an express, written waiver or some other indication that the owner knowingly waived the right to make claims for defects. During repairs or alterations, the owner's continued use of a building is even less likely to indicate acceptance of work or a waiver of claims.

Occasionally, the GC and roofing sub agree to be bound by a designated inspector's decision on completion. Unless the inspector acts fraudulently or makes a substantial mistake in judgment, the parties cannot dispute the decision. This arrangement still allows later claims for latent defects, however.

Assuming Liability for Others

General contractors tend to pattern their subcontracts after "standard" forms, such as the Associated General Contractors (AGC) Form 600 and the American Institute of Architects (AIA) Form A-401. These contain a clause requiring the subcontractor to indemnify the owner, the architect, and the contractor against any loss or damage caused "in whole or in part" by the subcontractor's negligence. A roofer who signs such a subcontract risks becoming completely responsible for even those losses caused primarily by the general contractor or another party to the contract, as long as the roofer's negligence contributed at least a small amount to the damages.

The AGC 600 form also requires roofing subcontractors to pay the GC's and architect's legal costs to defend against any suit that names them and the roofing sub. Roofing subcontractors often attempt to remove or alter such clauses.

Limitation or Avoidance of Liability

Perhaps the first defense against a lawsuit should be to determine whether the time period for the lawsuit (the "statute of limitations") has expired. Each state has its own statute of limitations for various types of legal actions. (The statute of limitations indicates the time beyond which a party cannot be sued.) Typically, the time limit for oral contracts is shorter than for written ones.

In many states, the statute of limitations period does not begin until the party bringing the lawsuit knows or should know of a potential claim. Thus, the statute of limitations may not begin running for several years after completion of a roofing project. In response to concerns about such extended liability, a number of states have passed laws preventing a construction lawsuit from being brought after a certain number of years following construction.

Another factor that may protect a roofing contractor from liability is the materials manufacturer's responsibilities. Some courts have decided that unless the contractor has expressly assumed responsibility for latent defects in the materials, or has knowledge of defects, he is not liable—even if he selected the materials—as long as he acted with reasonable care and skill. Manufacturers also often provide express warranties of roofing systems and materials. These total system warranties, however, generally cover only repairs due to leaks. Courts have held that the manufacturer, rather than the roofer, is liable for improper application or installation of its products if the manufacturer contracts to instruct and train the roofer to install its roofing systems properly.

Proper Documentation

Whether in formal reports or simple handwritten notes, good construction records are important. They can often provide the proof necessary to resolve future disputes. A GC can help prove that contract requirements were not fulfilled if he can produce plans and specifications, contracts and subcontracts, shop drawings, manufacturer's recommendations, building codes and permits, change proposals and orders, and invoices from suppliers. Purchase orders, receipts, and other payment documents can prove that delays were caused by late ordering or delivery of materials, not by the GC's negligence. Construction schedules, foremen's progress reports, daily worksheets, and photographs can indicate that work was performed according to schedule. Finally, correspondence records can resolve disputes over contract interpretations, alterations, or other important matters.

Maintaining an adequate and organized file for each project may do more than win a lawsuit; it may prevent one by providing evidence to end a dispute, or at least support a settlement.

Damages

When the roofer is negligent, he is responsible for all the costs required to place his customer in the position he deserved to be in when the building was completed. So, a roofing subcontractor may be responsible to the owner or general contractor for the complete replacement of a roof, costs of hiring others to repair the roof, amounts paid to experts to determine the causes of roof problems, and other expenses resulting from roof defects. A roofer may also have to pay interest on these costs.

The roofing sub will not have to bear all the cost, however, if the plans and specs are to blame. Although it was not a roofing case, the 1982 Oklahoma case of *Miller vs. Guy H. James Construction Co.* establishes that a general contractor implicitly warrants the sufficiency of plans and specs which he furnishes to his sub. So, if the subcontractor incurs costs resulting from defective plans and specs, he can sue the general contractor for his damages.

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The rules contained in this article may vary from state to state, according to local law. Therefore, contractors should consult an attorney in their own jurisdiction for specific legal advice. ■

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