Working With Someone Else's Plan

by Quenda Behler Story

Imagine this scenario: Your clients want you to build a two-story addition, with a family room on the first floor and a master bedroom suite with a cantilevered deck on the second floor. The clients know it is exactly what they want, because they have paid an architect big bucks to design it (or they bought a ready-made design from a book of plans). You are a little nervous about how this plan will actually tie into the existing house, but you want the job; besides, you think you can make it work. Are there any magic words you can put into the construction contract to protect you in case the client's plan is flawed?

In fact, there are two clauses you should add to your contract. First, the contract should require the customer to warrant the plan's suitability; second, the contract should exclude any warranties from you to the customer against defects in the construction caused by a flaw in the customer's plan.

Customer's Warranty

Why ask the customer to warrant the suitability of the plan? The answer is simple: If it is necessary to spend extra time and money to correct a flaw in that plan, the customer pays the extra expense, not you. The contract should clearly state that the plans being used to build the project are being supplied by the customer and that the customer warrants them to you, the builder or remodeler, as suitable for the purpose for which they are to be used.

Make sure your customers understand that the customer warranty puts responsibility for any problem with the plan squarely on their shoulders, not yours. You are a builder, not an architect, and you are relying upon their architect and their architect's opinion. (I am assuming, however, that the problem is a flaw in the plan, not that you have trouble following a blueprint.)

Direct damages. When the customer warrants the plan to you, you are entitled to be paid for both the *direct* and the *consequential* damages you suffer if the plan is not suitable. For example, suppose this plan came from a book of plans drawn by a California architect, who put the plumbing in the exterior walls. But you are building the project in, say, Michigan, where that plumbing will freeze and crack as soon as temperatures drop to their usual winter level. If you don't recognize this problem until halfway through the job — don't laugh, because that is exactly what happened to a builder in my community — you will have to tear out the pipes and install them in another location. This extra work was directly caused by a flaw in the plan, and the customer should be responsible for the cost. A customer warranty makes this responsibility clear. If your customer feels the need to sue someone, he or she can go after the architect.

Consequential damages. Warranty damages also include what the law calls "consequential" damages. This means that in addition to the usual direct damages, you may also be able to recover damages you have indirectly suffered as a result of the plan's inadequacy. That can include a delay in starting other jobs to which you are committed, extra overhead costs, or engineering expenses incurred trying to fix the plan. You may even have had to call in the services of another architect.

Warranty Exclusions

The second set of magic words are called warranty "exclusions" or "disclaimers." The contract should say that you are excluding or disclaiming all liability for any damage or defect caused by a design insufficiency in the customer's plan. These words are intended to protect you from design flaws that surface after construction is complete and that cause damage or loss to the customer.

Suppose, for example, the second-story deck outside the customer's bedroom is not correctly cantilevered. After a year or so, the deck begins to sag, and a bulge develops in the bedroom floor where the header joist has begun to move. This problem is not your fault, because you followed the architect's plan exactly. Even without a disclaimer of warranties, if you are sued, you can probably "join" the architect in the lawsuit. Depending on the facts of the case, if you are found liable to your customer, the architect may be required to pay any damages assessed against you. Your life will be simpler, however — and your legal fees significantly less — if the customer must sue the architect directly. ■

Quenda Behler Story has practiced and taught law for 23 years. She is a partner with her husband in a remodeling company in Okemos, Mich., and is a member of the National Association of Women in Construction.