



GUEST ESSAYS

Shopping for Liability

Eric L. Singer

Wildman, Harrold, Allen & Dixon

2300 Cabot Drive, Suite 455

Lisle, Illinois 60532

(630) 955-0555 (main) | (630) 955-5826 (direct) | (630) 955-0662 (fax)

singer@wildmanharrold.com

Owners and contractors never seem to understand the role of the design professional in the shop drawing and submittal process. Owners want no responsibility for review, and contractors want A/e's to bless the submittals and absolve them from compliance with the plans and specifications. Even when the AIA was negotiating changes to the A201 for 1997, there was a dramatic disagreement over the proper allocation of responsibility for shop drawings.

Contractors have taken to forwarding their subcontractors' shop drawings without stamping them and architects have added burdensome language to their shop drawing stamps. Does any of this really limit liability? The short answer is "no," but careful contracting and diligent review will minimize more common sources of shop drawing--related liability.

Shopping For Contract Language: The A201 and B 141 work together to allocate responsibility among the GC, trades and the A/e. The contract and the general conditions make clear that the A/e role is limited to review for general conformance with the design concept (A201 1997, ¶ 4.2.7). A/e's are reviewing, not "approving" or blessing a shop drawing or submittal or its components, means, methods or techniques. (The EJCDC documents contain very similar provisions, see for example ¶ 6.26 of the 1990 Owner/Engineer Agreement).

Ultimate compliance with the Contract Documents is left to the contractor, and the shop drawings do not become part of the Contract Documents (A201 1997, ¶¶ 3.12.4, 3.12.8)(see also EJCDC General Conditions ¶¶ 6.1, 6.25). Not being Contract Documents, changes made in a Shop Drawing or submittal do not modify the requirements reflected by the Drawings and Specifications without a Change Order.

There are provisions in the 1997 A201 which state that the A/e review does not relieve the contractor of its obligation to comply with the plans and specs. The A/e needs to understand, however, that the provisions reserving the obligations of the contractor do not necessarily relieve the A/e; both may remain responsible. (A201 1997, ¶ 4.2.7).

Shopping For A Paddle: If both the contractor and the A/e remain responsible for their respective roles in the process, it is more than fair to demand that the GC stamp its subcontractors' submittals. If you receive an unstamped set of submittals, send them back. If time does not allow for game--playing, stamp them with a note that your review is subject to the GC's review and stamp.

It also seems obvious to require your consultants to stamp submittals within their scope, but this is a common omission. Mechanical submittals should be reviewed and stamped by your M/E/P consultant and your agreements with your consultants should always say so. If you review submittals within a consultant's scope, you are undertaking responsibility for that submittal:

A floor drain submittal arrives, containing catalog--cuts from the manufacturer with all of the project's plumbing and drains. The architect assumes that these are sufficiently generic to skip review by the M/E/P consultant. The architect stamps the drawing. The floor drain depicted was PVC rather than cast iron as required by code, and the wrong drain was installed. When the PVC melted and warped, destroying surrounding floor tile, the Owner looked to the architect and GC. The GC, of course, claimed that the submittal was effectively a Change Order (wrong. The architect looked to the M/E/P consultant, but the consultant never saw the shop drawing. The buck started and stopped with the GC and the architect.

Shopping For A Stamp: There is a wide variety of opinion and practice on the shop drawing stamp text. Some firms have repeated the AIA language from A201, ¶ 4.2.7. This makes the stamp a bit cumbersome. If your contract is clear, you should not need to restate the A201 language. Your shop drawing stamp should reflect your limited role ("reviewed in accordance with General Conditions ¶ 4.2.7," or "revise and resubmit"). You should avoid words like "approved" or "accepted" (not to mention "blessed" or "guaranteed").

Shopping For Liability: A bad installation may implicate a bad shop drawing, and may implicate the design professionals who reviewed it. No matter what your contract or shop drawing stamps say, you are likely to be a party to the dispute. The contractor will say that you "approved" the shop drawing, and the owner will say that you should have discovered the bad installation during your site observations. Claims can range from a required product replacement to full blown disaster. The 1981 Kansas City Hyatt skywalk collapse and the deaths of more than 100 people were blamed on an engineer's failure to properly review shop drawings depicting certain steel connections.

Shopping For Loss Prevention: The best way to avoid shop drawing claims is to carefully review the drawings and submittals. Do not assume that manufacturer data submittals actually conform to your plans unless you have reviewed them. You should also create a logging system to make certain that required submittals and drawings are obtained and timely reviewed ("date in" and "date out" records also help with claims that you delayed an installation).

Return any errant shop drawings that arrive but were never requested or required by the specifications. Your shop drawing log should tell you if you have received a non--required submittal. Keeping it or stamping it makes you responsible for its review and will give the GC an excuse if the submittal contains some issue of nonconformance to plans. Send it back without stamping it.

Do not accept the contractor's "rubber stamp" approval of nonconforming submittals, or submittals without a general contractor's stamp. Send them back and insist that the contractor follow its contract obligations.

Be wary of contract provisions that try to expand A/e liability arising out of the shop drawing review process. Your contracts should not contain provisions by which the A/e is to "assure" or "ensure" compliance with the Contract Documents.

Finally and perhaps most obviously, include sufficient compensation in your agreements to cover proper shop drawing review services. The shop drawing and submittal process is one of the areas of construction contracts where all disciplines converge. Cutting corners in shop drawing reviews can lead to claims and force you to shop for lawyers.



GUEST ESSAYS

About the Author: Eric L. Singer is with Wildman, Harrold, Allen & Dixon, Lisle, Illinois. His practice concentrates in construction law and in the representation of design professionals in all aspects of construction claims and dispute resolution.

NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.