

Be reasonable: reroofing contracts worth review

Have you heard of the middle man? The third man? The last angry man?

Let's talk about the reasonable man. This is the legal standard by which negligence is measured in construction work. In addition to satisfying contractual agreements, a roofing contractor may be held to the "reasonable man" standard—did he conduct himself as a reasonable roofing contractor would have under similar circumstances, exercising a degree of care and skill common to others in his field?

Some contractors mistakenly believe that the intricate legalities of new construction work, including the reasonable man standard, are cast aside when reroofing is performed. Not so, says Steve Phillips, attorney with Hendrick, Spanos and Phillips in Atlanta and NRCA legal counsel.

"The basic construction law principles that apply to new construction work apply to reroofing work," he states.

The importance of the naked eye

"Examine and document the interior conditions for signs of damage before beginning any work," Phillips says. "A pre-bid reroofing job conference that includes an interior and exterior tour conducted by the owner's representative is a good idea. Check for particularly sensitive or expensive equipment, merchandise or furniture; make note of it and take special precautions to minimize possible damage. And advise the owner of the risks so that the owner can take precautionary measures."

Unforeseen and unexpected conditions are more common in reroofing than new construction. This becomes a critical point in reviewing contracts in preparation for submitting a bid; many contain provisions that state that the contractor has examined the jobsite and "the submission of a proposal will be construed as evidence that such an examination has been made, and later claims for labor, equipment or material required or for difficulties encountered, will not be recognized by the owner."

The contractor should make sure that these provisions pertain only to those conditions that can be detected with the naked eye, Phillips warns.

Another clause to be wary of addresses the bidder's responsibility in acquainting himself with the project. Often, the clause will be worded like this: "The failure or omission of any bidder to receive or examine any form, instrument or document, or to visit the site and acquaint himself with the conditions there existing, shall in no way relieve any bidder from any obligation . . ." Phillips advises contractors to ask the owner's rep to enumerate those forms, instruments or documents.

Another provision "in essence, asks the contractor to approve and guarantee the sufficiency of the architect's plans and specifications," Phillips asserts. This provision states that, in submitting a bid, the bidder agrees that the work is "do-able" given the specifications. The contract may state that, "Wherever a result is required, the successful bidder shall furnish any and all extras and make any changes needed to produce, to the satisfaction of the owner, the required result."

"Strike it in its entirety," Phillips says flatly.

Read the fine print

Even short and seemingly simple provisions could come back to bite the unsuspecting reroofing contractor, Phillips cautions.

An example of one of these would be: "Check roof area B for leaks and make repairs." According to Phillips, a similar provision was the basis of a recent law suit brought by an owner when roof leaks occurred shortly after repairs were made. "The contractor needs to educate the owner that repairing certain areas of leakage or suspected leakage today doesn't mean that there will not be other sources of leaks tomorrow," Phillips says.

If you're bidding on reroofing a public project, Phillips reminds you to check the prevailing wage act statutes, which are in effect in several states.

Access to the jobsite is also very important. Reach a clear understanding with the

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owner of how the work will be performed—"when, and under what circumstances," Phillips says. At the pre-job roofing conference, go over where and how materials will be unloaded and stored.

Minimize the risk of property damage and personal injury. Reroofing may require a change in the building occupants' normal operations. Parking may have to be restricted, and certain entrances and exits closed. "Don't overlook the possibility that the owner has particular requirements and restrictions as to when and how the work is to be performed," Phillips advises.

Deck conditions are a major source of disputes and problems in reroofing where the contractor is to remove all materials down to the deck. "Be sure there is a provision in the contract dealing with unexpected conditions," Phillips says. Statements such as, "Surfaces damaged as the result of the removal of existing materials shall be repaired at the expense of the contractor," are, at least, preferable to: "Deck shall be clean, smooth and free of moisture before any roofing is applied."

Liability by design

The reroofing contractor who designs the reroofing project and decides what materials to use and how to install them may be held liable if his design or the materials he selects do not perform as he expects. "The general legal obligation of a contractor is to furnish the specified materials and install those materials in a good and workmanlike manner in accordance with the contract documents," Phillips states. "When called upon by an owner to advise or prepare a specification for reroofing, the role, responsibility and potential liability of the contractor is enlarged.

"Unless there is a specific exclusion in the contractor's liability insurance policy, liability for design is generally encompassed in general comprehensive liability insurance policies available to contractors," Phillips says. "But check with your insurance advisor to ascertain that your coverage includes allegations and damages arising out of design factors." General comprehensive liability policies have a "work-product" exclusion, he adds, meaning that there is no coverage for your work product (for instance, the cost of roofing). Coverage is only for consequential damages arising out of your work.

Architects and engineers typically have a professional liability policy that's quite different. It does not contain the same work product exclusion, but is generally an

"errors-and-omissions" policy, subject to a deductible.

"If the contractor has a large firm extensively involved in preparing reroofing specifications, and particularly if the contractor has an in-house design professional, he should consider purchasing an errors-and-omissions type of insurance policy," Phillips says.

Covering your assets

Phillips offers several suggestions on controlling design liability:

- Recognize your limitations.
- Do a thorough and careful study of the project. Learn the history of the previous roof system. Find out why the existing roof system is to be replaced, how long it has performed, and where and what type of problems have been experienced.
- Work with the suppliers and manufacturers whose products and systems you are using. Find out if the manufacturer believes that its system and product is suitable for the job under consideration and let the manufacturer know that you are relying on his expertise and experience.
- Be wary of using systems, products or designs you're unfamiliar with, inexperienced in handling and whose reliability in similar circumstances has not been proved.
- Establish internal quality control procedures so that design decisions do not reflect the thoughts of one person within your company.
- Advise the owner that you are a roofing contractor, that you can offer recommendations based on your experience and expertise, but that you are not an architect or engineer.

"If there is any question of the structure's ability to accommodate the reroofing system, make sure the owner is advised to retain a professional engineer," Phillips suggests. "Particularly with elasto/plastic roofing systems, there is a need to determine that the structure of the building is capable of withstanding the weight of the ballasted roof system. Several manufacturers of elasto/plastic systems include a provision in their standard licensed applicator agreements requiring the roofing contractor to certify the ballast load, or to obtain a statement from another party approving it." A qualified design professional should be retained and compensated to make the necessary structural analysis and issue the certification, Phillips says.