



Time-Bombs In Your Filing Cabinet, Part III

By: Mike Pappas

This Article is the last in a series of three articles regarding the “time-bombs” in your filing cabinet and will focus on the typical warranties provided by contractors through construction contract documents.

A warranty is a promise, made by the person providing the warranty, or the “warrantor”, that goods or services provided by the warrantor are of the quality represented and will be replaced or repaired if found to be faulty. In the construction industry, a warrantor can be a general contractor providing a warranty to an owner, a subcontractor providing a warranty to the general contractor, or manufacturers and vendors providing warranties to any of the above.

The warranties on a construction project typically start with the manufacturer of each of the component materials which are purchased and delivered to the site by vendors and subcontractors. These same vendors and subcontractors often supply their own warranties on the materials and services which are incorporated into the component systems within the structure being built. Finally, the general contractor often provides a warranty to the owner of the structure that encompasses the entire structure and all of its component subsystems and materials. Upon the final completion of a typical multi-story construction pro-

ject, there can be scores of separate warranties which pertain to the completed structure and all that lies within.

Manufacturer and Vendor Warranties

The least complicated warranties are those warranties provided by vendors or manufacturers on products which are supplied to the project. These warranties are often clearly limited to manufacturing defects and benefit the recipient of the warranty by assuring that any defects covered under the warranty will be repaired or replaced during the warranty period. The fact that the warranty typically is for a definite period of time protects the warrantor by limiting its contingent liability for defects to the duration of the warranty. The main pitfalls associated with these warranties arise from conflicting language which may be included in purchase orders or other contract documents. Although the warranty language in the form supplied by the warrantor appears to be cut and dry, that standard warranty language can often be modified or superseded by language included in the upper-tier contract documents which are incorporated or “flowed down” to the warrantor. It is thus incumbent upon the warrantor to know and understand the scope of the warranty that it is required to provide pursuant to the relevant contract documents prior to submitting its bid so that it can adequately evaluate the risk posed by a non-standard warranty require-

ment, assess the cost of that risk, and include that cost in its bid instead of assuming that its standard warranty will suffice. The result may be a breach of contract action against the warrantor. A breach of contract action, unlike a breach of warranty action brought under a warranty, has the potential for unlimited damages; the damages available in breach of warranty actions are typically limited by the terms of the warranty.

Subcontractor and Contractor Warranties

Warranties provided by subcontractors and contractors are usually mentioned in the contract documents and create an obligation on behalf of the warrantor to provide its items or work in accordance with the contract documents and free from defects or deficiencies. It is often believed that these warranties, especially those set forth in the most common contract documents (AIA, AGC, etc.), are limited in time to one year. However, as will be explained, that is often not the case.

The most common contract warranty language usually resembles the warranty language found in section 12.2.2.1 of AIA form contract number A201 (1997) which obligates the warrantor that:

“[i]n addition to the contractors obligations under paragraph 3.5, if within one-year after the date

Time-Bombs, Part III, Continued

of Substantial Completion of the Work ... any of the work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition.”

Section 3.5.1 of AIA A201 (1997) provides that:

“[t]he Contractor warrants to the Owner and Architect that material and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents.”

Neither of the aforementioned provisions limit the actual warranty obligations to “one-year.” Instead, section 12.2.2.1 creates a “call-back” period during which the warrantor is obligated to return and correct, repair or replace its work in the event that it is found to be non-compliant with the contract documents. Note that the obligations of section 3.5.1 are not limited in time at all. Rather, pursuant to the obligations of section 3.5.1, should any work be discovered at any time to be non-compliant with the contract documents or otherwise not in compliance with the warranty representations, the warrantor is required to bring the work into compliance.

Another common misperception is that the contract language which expressly limits the warrantor’s “call back” warranty obligations to one year applies to all warranty obligations contained in the contract. Unfortunately, courts across the country have consistently ruled that the one year “call back” warranty limitation cannot be construed to apply to all warranty obligations set forth in the contract, and that, in order for warranty obligations to be effectively time limited, each time limitation must be expressly and conspicuously set forth with respect to each warranty obligation contained in the contract.

In addition to the express warranties discussed above, implied warranties can also be problematic. An implied warranty is a warranty that is imposed against the warrantor by virtue of the warrantor’s actions or representations, or by law. Chief among the implied warranties is the implied warranty of workmanlike construction. This warranty imposes a duty upon the party rendering the work to provide work that is of good quality, free from defects, and in conformance with the contract documents. This warranty generally requires materials or work which is within the skill of a builder of average abilities. Although this implied warranty was originally applied only to residential construction projects, the courts have expanded its coverage to include condominiums, apartments, and even commercial buildings. Needless to say, aside from the statute of limitations and its specific application in each particular case, this implied warranty obligation is not limited in time.

It should be noted that the statute of limitations would, theoretically, provide some time limitation to all warranties, whether they are expressly time limited or not. However, the application of the statute of limitations and the event which triggers the running of the statute of limitations is very fact specific, and as a practical

matter, one should not rely upon the statute of limitations as providing a cut-off date for contingent warranty liability.

Conclusion

There are ways to avoid warranty problems lurking in your filing cabinets. First, all contracts should be carefully reviewed prior to execution. All warranty obligations should be identified and, if not acceptable to the parties, negotiated. Qualifying language such as “substantially” should be added to warranty provisions in order to avoid demands for strict compliance with the design documents. Next, language which warrants against broadly defined items should be avoided. The scope of the warranty and any exclusions should be clearly defined, and all warranties should be clearly time limited.

If you would prefer to receive this newsletter via email, please contact us at postmaster@harrisonlawgroup.com

Harrison Law Group is a full service law firm with a concentration in construction and surety law.

HLG Constructor Bulletin is designed to provide our clients and colleagues with informative and useful material regarding construction law developments. However, this newsletter is not intended to offer specific advice or opinions to any of our readers and any application of the matters discussed herein are dependent upon specific facts and circumstances of individual situations. If legal advice or other expert assistance is required, the services of a competent professional should be sought. If you would like to be added to our mailing list or wish to furnish comments, suggestions or address corrections, please contact us at the address below, by e-mail at postmaster@harrisonlawgroup.com, or at our web site located at www.harrisonlawgroup.com.

© 2005. All Rights Reserved. Adam C. Harrison, P.C.
/a Harrison Law Group



40 W. CHESAPEAKE AVE., STE. 600
TOWSON, MD 21204-4891
410.832.0000 410.832.9929 fax

700 TWELFTH ST., N.W., STE. 700
WASHINGTON, D.C. 20005-3945
202.783.1515 202.783.1650 fax

110 BAPTIST ST.
SALISBURY, MD 21801-4911
410.860.0040 410.860.0054 fax