How to navigate the subtleties of contract warranties

The fact that [warranty clauses] sometimes distribute that risk unfairly will normally not matter

NORM STREU AND CHRISTOPHER HIRST

Buried near the end of most construction contracts are contractual warranties. These clauses rarely receive much attention or comment, but a recent court decision has highlighted the risks inherent in these common clauses.

In **Greater Vancouver Water District** vs. **North American Pipe & Steel Ltd.**, the water district (GVWD) contracted with North American to supply steel pipe for a waterworks project. The GVWD and its consultants had prepared the design and specifications for the steel pipe that was to be supplied by North American. In the contract, North American gave two relevant warranties to the GVWD with respect to the steel pipes. First, North American warranted that the steel pipes would conform to the specifications, and second, that they would be "free from all defects arising at any time from faulty design in any part of the goods." Unusual wording one would think, given that the design had not been undertaken by North American. Even more troubling was that the design was deficient and, accordingly, while North American supplied pipes that met the design, the pipes were defective.

The court found that on a plain reading of the contract, North American not only had contracted with GVWD to deliver pipes that met GVWD's design but had also "warranted and guaranteed that if it so supplied the pipe, it would be free of defects arising from faulty design." The court found that these clauses were not mutually exclusive and held that they were separate contractual obligations that reflected an agreed distribution of risk. Accordingly, in the court's view, North American was liable for any damages that resulted from the design defect and it simply did not matter whose design gave rise to the defects.

The court further found that while such a clause could be considered to distribute risk unfairly, such unfairness was a matter for the marketplace, not for the courts to adjudicate on. The court went on to comment that such a distribution of risk in a contract can be "dangerous" as contractors may refuse to bid or, if they do so, may build in costly contingencies. The court also advised that those who do not protect themselves from the potential risk posed by such a warranty "may pay dearly." In conclusion, the court stated that owners were unlikely to benefit from a transfer of risk where contractors would be faced with the prospect of potentially disastrous consequences and that the parties to construction contracts should more practically address the assumption of design risk as the failure to do so creates the potential for protracted and costly litigation.

What makes this case particularly interesting, or perhaps alarming depending on your point of view, is that North American was found liable for supplying a pipe that had been constructed in accordance with the design supplied by GVWD even though that design was defective. In essence, North American agreed, perhaps unknowingly, in the warranty provisions to assume the design risk associated with the GVWD's design.

As demonstrated in this case, warranty clauses can distribute substantial risk in a construction contract. The fact that they sometimes distribute that risk unfairly will normally not matter. Accordingly, giving careful attention to what warranties you may be providing with respect to a particular project is an effective tool in managing your risk, as is defining and limiting the remedies available under the contract for a breach of the warranty. To paraphrase the **Court of Appeal** in the North American case, those who do not spend the time to protect themselves from the potential risks posed by a contractual warranty may end up paying dearly. ■

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EDUCATION: BUILDING CAREERS IN CONSTRUCTION

Skills building on the business side of construction

HAYLEY WOODIN

Construction is just as much about building careers as it is about building buildings.

With **BuildForce Canada** forecasting close to 40,000 retirements in both B.C. residential and non-residential markets between now and 2025, plus thousands of job openings anticipated for managerial, supervisory and other senior construction positions over a similar time frame, the next decade will offer significant opportunities for those interested in career progression and willing to pursue the related training.

"The pace of change in the industry, the competitive marketplace and need to leverage best practices wherever possible, is driving the need for the industry to adopt a culture of continuing education," said **Fiona Famulak**, president of the **Vancouver Regional Construction Association** (VRCA).

The VRCA offers many options for employers and employees to embrace that culture of continuing education. The association offers courses in the areas of business development, computer skills, leadership and management, law and safety year-round. Many also give participants credits toward Gold Seal accreditation, including such courses as supervisory and management skills; communication, negotiation and conflict resolution; and construction project management.

The Construction Leadership Forum provides an opportunity for employers and employees alike to build their industry network while participating in a full roster of educational sessions and panels. For the first time this year, the forum will also offer attendees a Gold Seal credit upon successful completion of the conference.

Outside of the two-day conference, hosted at the Fairmont Chateau Whistler on May 6-7, a commitment to developing rounded, effective industry leaders is behind the rest of the VRCA's programming.

The association offers 60 in-class courses aimed at supporting blue-collar expertise with the management, leadership and white-collar skills that help further careers. New to this year's roster are several courses delivered directly in response to industry demand, including a course in change order management, and one in social networking for the construction industry, both of which are Gold Seal-accredited. In March, the **Homeowner Protection Office** (HPO) implemented an enhanced licensing system that requires residential builders looking to apply for or renew their licence to attain 40 points' worth of continuing education across seven core competency areas, including construction management and supervision, legal issues and business planning.

The VRCA's tender, contract and builders lien law and introduction to construction blueprint reading courses have already been HPO-accredited, and more accredited courses are on the way.

For more information on the VRCA's program offerings, visit *vrca.bc.ca*. ■