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Be Aware of the Risks Associated with the Shop Drawing & Submittal Process

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Shop drawing and submittal review is a frequent source of disputes on construction projects. The purpose of shop drawings and submittals is to enable the design professional to obtain a representation from the contractor as to how it plans to execute the aspects of the design for which submittals are required. Contractors often believe and assert that approval of a submittal or shop drawing transfers certain risks to the owner. If the contractor executes the work in accordance with the shop drawing or submittal, and the outcome proves to be unsatisfactory, the contractor often believes it is not responsible because its submittal was approved.

In an attempt to defeat this argument, many contracts, including those issued by the AIA, state that regardless of shop drawing and submittal approval, the contractor remains responsible to perform to the requirements of the plans and specifications. Also, many design firms include language in their submittal review stamps to the same effect. Section 3.12.8 of the AIA A201 contract states that the contractor is not relieved from responsibility for deviations in the contract documents by the architect's approval of submittals unless the architect has been given specific notice of the proposed deviation and gives written approval of it. It also provides that the contractor is not relieved of liability for errors or omissions in the submittals even if they are approved by the architect. There are many court decisions which have found work defective even though it was installed in accordance with approved shop drawings.

This provision creates a dilemma for contractors who often rely upon the architect's review and approval. Contractors are well-advised to conspicuously identify any aspects in which the work contained in the shop drawing or submittal differs from the requirements of the contract documents. Arguments by contractors that deviations from requirements were patent or obvious, and that the architect should have seen the proposed change, have not been very successful.

Another dilemma for contractors is that the shop drawing and submittal process can transfer design responsibilities to the contractor or subcontractor by forcing them to fill in gaps in the design. This poses risk for the design professional as well since the design professional remains responsible for the design and is effectively relying upon unlicensed consultants to prepare portions of the design. When design professionals are reviewing shop drawings that contain gap-filling design information, they are well-advised to conduct the review carefully as they may be held responsible if a problem occurs.

The contract is often unclear as to the nature of the work that is depicted through the shop drawings. Do the shop drawings contain design information, or only means and methods? The line between design and means and method is not always clear and, if there are problems, there can be significant disputes regarding liability. Shop drawings often contain elements of both design and



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means and methods. When something goes wrong, experts are often necessary to assist in the determination process.

Some contracts include nothing more than warranty provisions or code compliance obligations that have the effect of imposing performance standards on the contractor or subcontractor. Contracts and subcontracts must be reviewed carefully to determine whether design responsibilities are being imposed. If so, the contractor or subcontractor should have the design work reviewed and stamped by a licensed design professional. If something goes wrong, the contractor can look to the design professional or its insurance carrier for indemnification.

Delays in submitting, reviewing and returning shop drawings can also be a source of dispute on construction projects. Contracts are often of little help in resolving these disputes as they frequently state that shop drawings and submittals shall be reviewed in such time as to cause no delay in the work. A schedule analysis often must be performed to determine whether the project's critical path was affected by the alleged delay in submission or review of shop drawings.

The shop drawing and submittal process involves significant legal risks which must be understood and respected. Applicable contract provisions should be read and understood. Consult with legal counsel regarding language that may be added to shop drawing and submittal documentation that may provide some protection against the risks.