

BUILDING BLOCKS

DESIGNPRO
INSURANCE GROUP
A Wichert Insurance Agency

BETTERMENT – WHAT IS BETTER ABOUT IT? A CONTRACT CLAUSE THAT IS FAIR TO A/ES

BY: ERIC O. PEMPUS
FAIA, ESQ., NCARB
DESIGN PRO INSURANCE GROUP

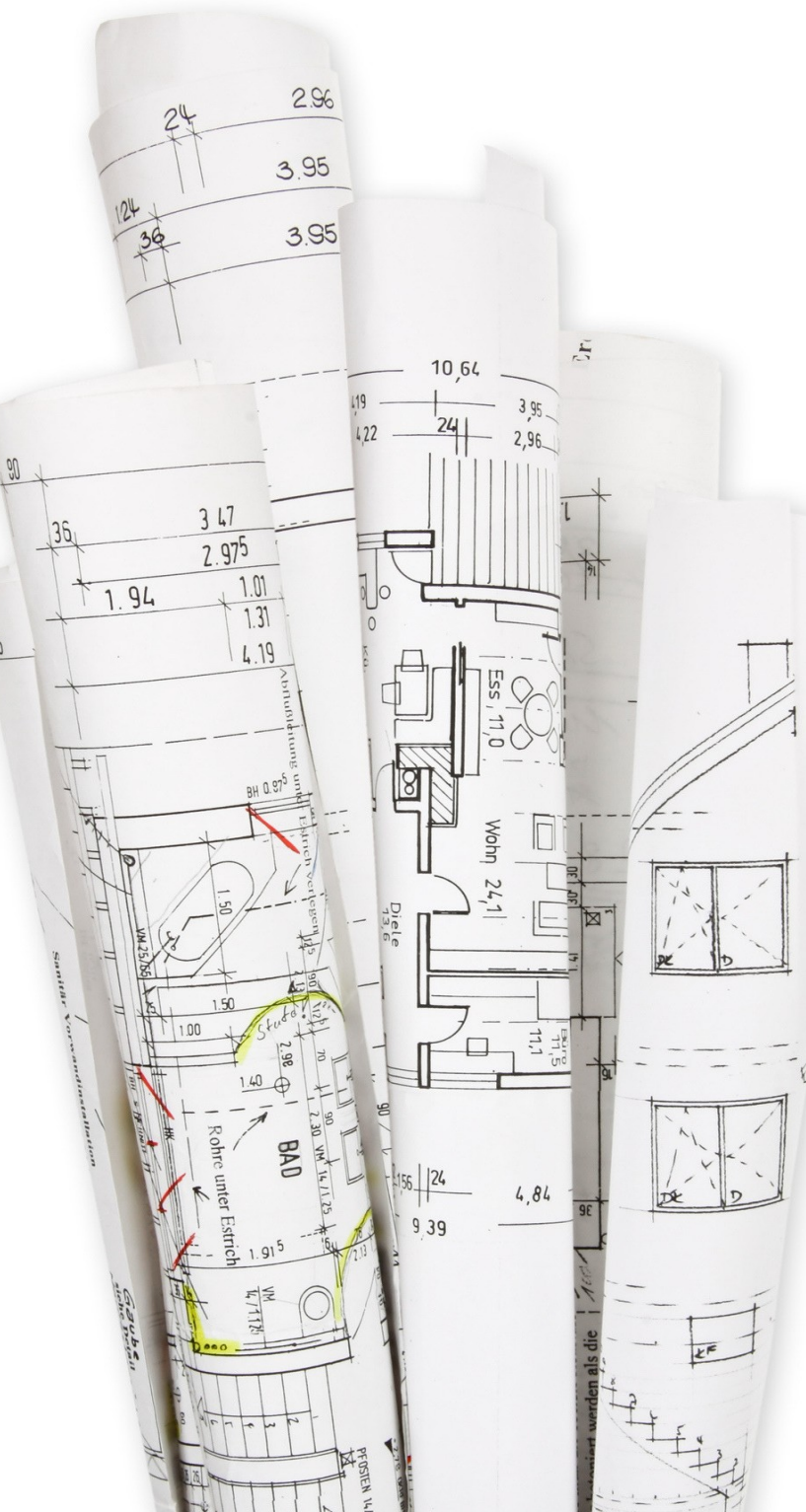
THE SCENARIO GOES SOMETHING LIKE THIS

Architect's in-house structural engineer omitted some steel in the construction drawings to support the twelve roof-top HVAC units on the roof. The need was discovered by the steel fabrication company, and a Change Order was issued by General Contractor. The project Owner has requested the A/E firm to pay for the omitted steel. After all, according to the Owner, he “bargained for a complete building.” The amount is no small sum.

The A/E's position is that the steel was required for the project, regardless whether it was included in the construction documents or not. Construction industry professionals all know that there is no perfect set of drawings and specifications. Perhaps the A/E could have discussed prior to bidding setting up a “contingency fund” for the Owner for situations like the above, and any unused funds to be applied to enhance the project at substantial completion of construction.

IN THIS ISSUE:

FEATURED ARTICLE
PROGRAM SCHEDULE
SOCIAL MEDIA
MEET OUR PEOPLE



Is it appropriate for the A/E to pay for the Owner's materials, in essence, free steel? If this was appropriate, owners would sit around their negotiation tables with their A/Es, hoping for omissions in the construction documents for free work. Although it may be appropriate for a design professionals to be financially responsible caused by their negligent acts of omissions, this logically does not extend to improving the project or the client's economic position, compared to what it would have been if so such error or omission had occurred.

CONTRACT CLAUSES

To resolve this dilemma, a contract clause in the Owner-Architecture/Engineering firm agreement may be included as follows (two versions):

V.1

If the A/E failed to include an item in the project design, the Owner should pay for what the component would have cost if it had been included in the original design.

Furthermore, if the Owner repairs or replaces a defective component, the Owner should not recover the cost of any enhancement exceeding the quality evidenced in the Contract Documents.

V.2

If a required item or component of the Project is omitted from the A/E's construction documents, the A/E shall not be responsible for paying the cost required to add such material, to the extent that it would have been required and included in the construction documents. The A/E will not be responsible for any cost or expense that provides betterment or enhances the value of the Project.

The Owner may accept one of these two versions, only if the following is added (of course this is subject to negotiation between Owner and A/E):

However, the A/E should pay the cost of any retrofitting the expense, waste, and intervening increase in the cost of the labor or materials necessary to correct the A/E's error or omission. And, if the cost of the omitted material increased from what they were at the time of bidding, then it would be appropriate for the A/E to be responsible for such additional costs, since the Owner would never have incurred the cost but for the negligent error or omission.

CONCLUSION

Utilizing a "betterment" clause requires the Owner to understand the fairness to the A/E. If the dilemma was litigated, a court of law would likely consider the Owner's position as "unjust enrichment," and an appropriate remedy would be allowed for the A/E. However, A/Es and their clients need to stay out of court, and if they cannot resolve the situation themselves, then the dilemma is ripe for the dispute resolution called mediation. And, the A/E must be careful not to agree to their client's agreement that contains a provision that the construction documents are complete.

It appears that an entrance was omitted in this building.



About the Author

Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for more than 15 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 34 years. As a Fellow of the American Institute of Architects and Chair/Hearing Officer of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

Disclaimer: *The viewpoints expressed in this article are those of the author(s) and are not necessarily approved by, reflective of or edited by other individual, group, or institution. This article is an expression by the author(s) to generate discussion and interest in this topic.*

MARK YOUR CALENDARS FOR ERIC'S UPCOMING CONTINUING EDUCATION PROGRAMS:



Speaking Engagements:



“Ohio Engineering Law & Ethics”

Virtual Presentation

7.5 CPD for Engineers – Includes 2.0 Ethics

June 21, 2021 – 8:30 am – 4:30 pm

GET TO KNOW US ON SOCIAL MEDIA



Get the latest updates from DesignPro by following us on social media!

Visit the DesignPro Website at: www.designproins.com

Visit the Wichert Website at: www.wichert.com

Follow DesignPro on Twitter at: [@DesignPro_Insurance](https://twitter.com/DesignPro_Insurance)

Follow Eric Pempus on LinkedIn at: [eric-o-pempus-esq-faia](https://www.linkedin.com/in/eric-o-pempus-esq-faia)

Follow Brad Bush on LinkedIn at: [brad-bush-a2a0136](https://www.linkedin.com/in/brad-bush-a2a0136)

Follow Wichert Insurance on Facebook at: facebook.com/wichertins

Follow Wichert Insurance on Twitter at: [@Wichert_Insurance](https://twitter.com/Wichert_Insurance)

MEET OUR PEOPLE:



Brad Bush, CPCU, AU
Principal
brad.designproins@wichert.com



Eric Pempus
FAIA, Esq., NCARB
Risk Manager
eric.designproins@wichert.com



Tracey Heise
Account Manager
tracey.designproins@wichert.com



Ken Windle
Account Executive
ken@wichert.com



Tracy Combs
Risk Manager & Loss Control Specialist
tracy@wichert.com



Roger Perry
Account Executive
roger.designproins@wichert.com