

XL Insurance @-Clips

Certify This!

As litigation involving construction continues to escalate, some clients are attempting to push the risks of such litigation on to other parties, including architects and engineers. For example, some clients are demanding that designers certify that a building or structure is “asbestos free” or “mold free.” In fact, in Texas, at least one school district has written language into its public school design contracts that requires the architect to certify that the school is “asbestos free.”

Given the fact that the risks of environmental hazard claims are well known, and considering the magnitude of some of the civil awards resulting from certain hazardous material exposure claims, it’s surprising that some designers are willing to accept these risks. Evidently, they feel it’s necessary in order to win the job.

It can’t be said often enough: *certifications of almost any sort have no place in your contract*—particularly when they involve some type of potential environmental hazard. By definition, to certify, guarantee or warrant something means to assure the *total accuracy* of a statement or to confirm *absolute* compliance with a standard. Without extremely expensive, invasive testing, no

one can guarantee the absolute absence of a material or substance. No matter how thorough you are during your site observation visits, you cannot possibly observe or test every cubic inch of a site.

By certifying something, you are assuming a level of liability well beyond the standard of care required by law; the law doesn’t require you to guarantee your work or the work of others. Remember, too, professional liability insurance isn’t intended to cover breach of contract or breach of warranty, or a promise to perform to a higher standard of care than required by law. If you certify something and a claim arises, it may not be covered by your insurance.

If your client has drafted a contract that requires you to certify, guarantee or warrant the absence of potentially hazardous materials such as asbestos, formaldehyde, silica dust or mold, your best bet is to delete the provision. Explain why you cannot and should not be expected to expand your liability and jeopardize your insurance coverage. We recommend that such certifications be issued by a professional environmental consultant hired directly by the owner.



If your client thrusts a certification form in front of you for signature, and you cannot dissuade him or her, you have the right to sufficiently modify the form to be insurable. Although less protective than completely declining the certification, in this situation, you can at least define certification in such a way that it doesn't change your standard of care. By defining *certify* as "an expression of the consultant's professional opinion," or by agreeing to certify some fact "to the best of the consultant's information, knowledge and belief," you may help render the word less absolute. To be sure, though, check with your legal counsel and insurance advisors.

Still another approach would be to add a clause to your contract that prevents your client from requiring certifications proposed by any party or prohibits any action that jeopardizes your professional liability insurance coverage. (*The XL Insurance Contract Guide for Design Professionals* includes a chapter on Certifications and includes suggested contract language. The *Contract Guide* is available to insureds of the Design Professional group of the XL Insurance companies.)

Some states, such as California, have defined *certification* by statute in terms that limit an A/E's liability. We strongly recommend that you work with your professional association or society to propose similar legislation in your state.

Remember, whether you're asked to certify a school as "mold-free" or that its roof will withstand hurricane-force winds, issues of certification should be identified and dealt with early—during contract negotiations. In addition to a thorough reading and appropriate modification of the proposed project contract, a very tight, well-crafted scope of services that explicitly describes what services you will and will not provide is one of the best ways you can avoid claims and prevent loss.

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