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Robert M. Coon
Bond Account Manager
Scott Insurance
628 Green Valley Road
Greensboro, NC 27408

Dear Robert:

Per your request, I am providing you with my observations and comments on a manuscripted provision, Paragraph 13.9, entitled "Mold Warranty," apparently inserted in a modified version of AIA Document A201, 1997 Edition, issued recently by the City of Winston Salem, North Carolina. My comments merely are intended as comments given from a risk management perspective. They are not intended to constitute legal advice, and should not be construed as such. I encourage you to seek legal advice from a knowledgeable attorney licensed in North Carolina.

I find Paragraph 13.9 to pose a number of risk management problems for contractors. These problems, in turn, likely will cause contractors and sureties to be very reluctant to accept this provision. Following are some notable observations and concerns:

- No environment is entirely free of mold. Mold is naturally occurring, and some level of mold spores will be found in every environment. To warrant "that the Project will be free from the existence and growth of mold, fungi, or other microbial organisms" is asking for the impossible.
- Since some level of mold is inherent, how do you determine whether a particular condition poses a health threat or merits repair or remediation? What objective standards will be used to determine such a threshold? The provision completely ignores these considerations.
- The warranty is made in relation to the "Project." "Project" is defined as "the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors." Thus, the Contractor is warranting the work of others. The Contractor is making a representation not only as to its own work, but as to the work put in place by the Owner and by those separately retained by the Owner, who are not in privity of contract with and are not under the control of the Contractor.
- The provision does not recognize or address the important responsibilities of the design professional and the owner in avoiding such conditions by furnishing proper design and proper maintenance and operation of the structure—that is, the "mold" condition may result from defective design, defective specifications, or from improper maintenance and operation of the facility. Will the design professional and owner make enforceable representations concerning

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their responsibilities? Will the contractor have to bear and defend all mold claims and associated costs if and until the contractor can prove that the mold condition arose from defective design or improper maintenance and operation? Again, the contractor is being placed in an untenable position.

- The duration of the warranty is for “five (5) years after the date of Substantial Completion of the Project.” Such a lengthy warranty duration will pose considerable problems from a surety underwriting perspective. Sureties usually are comfortable in covering a construction warranty obligation of up to two years. Durations longer than two years increase the uncertainty regarding projections about the contractor’s future viability. Here, the warranty actually may be much longer than 5 years—i.e., the warranty runs from 5 years after the date of Substantial Completion of the *Project* (italics added for emphasis). The drafter of the modification again uses the term “Project” rather than “Work,” presumably to lengthen the time in which a breach of warranty claim may be made against the Contractor. In fact, as worded, the Substantial Completion of the Project could occur many years after the Contractor has finished its Work on the Project (e.g., separate contractors are still performing their work on the Project)! In any event, any warranty, much less a problematic “mold warranty,” of this duration is unrealistic.
- Has the owner considered retaining a knowledgeable third party to inspect and to certify the nonexistence of mold and other microbial conditions at key milestones as the construction progresses? Otherwise, how can the parties objectively determine liability in the event of subsequent mold conditions? In the absence of such, will the Contractor always be left “holding the bag” for all claims relating to such conditions—i.e., the Contractor will always be put in the position of having to prove that the condition do not arise from its actions or inactions?
- I have not reviewed the insurance portions of the document. What requirements, if any, are made for insurance to cover mold conditions? Who would bear the costs of such insurance? Is similar coverage expected of other Project participants, including separate contractors?

I hope you find these observations and comments of assistance as you work to educate the City of Winston Salem as to the inequities of the “Mold Warranty” provision. I also will forward for your information and review a publication, entitled “Managing the Risk of Mold in the Construction of Buildings,” developed by the Associated General Contractors of America that I believe will be helpful.

Please do not hesitate to contact me should you have questions or require further assistance.

Sincerely,



Mark H. McCallum

Encl.

